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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Use of Guidelines in Discretionary Decisions: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61

FACTS: K, a Tamil from northern Sri Lanka, had been detained and questioned by the Sri Lankan army and police. In April 2010, K came to Canada to live with his uncle out of fear for his safety. Upon arrival in Canada, K applied for humanitarian and compassionate ("H&C") relief under s 25(1) of the *Immigration and Refugee Protection Act* ("IRPA") seeking to apply for permanent resident status from within Canada.

To assist in determining H&C applications, the Minister produced Guidelines providing applicants must demonstrate either "unusual or undeserved" or "disproportionate" hardship to merit relief under s 25(1).

An immigration officer rejected the application as she was not satisfied that K would suffer unusual and undeserved or disproportionate hardship if he were returned to Sri Lankan. On judicial review, the Federal Court held the decision was reasonable. The Federal Court of Appeal agreed.

DECISION: The majority (per Abella J) allowed the appeal, finding the officer's decision unreasonable. In dissent, Moldaver J (Wagner J concurring) would have dismissed the appeal, finding the decision reasonable.

The majority reviewed the statutory context of s 25(1), as well as the meaning of phrase "humanitarian and compassionate considerations" in that provision. Under s 25(1), the Minister (or her delegate) has discretion to grant H&C exemptions from any criteria or obligations set out in the IRPA, including from the general rule that foreign nationals must apply for permanent residence from abroad. The majority held the Minister's informal Guidelines must not fetter the H&C discretion granted by s 25(1), and should not be treated by immigration officers as if they were mandatory requirements. The standards of "unusual or undeserved" or "disproportionate" should be seen as instructive, not determinative.

With respect to the standard of review, the majority applied a reasonableness standard, overturning the Federal Court of Appeal on this point. Notably, the appeal from the Federal Court's decision on judicial review arose as a result of that Court certifying "a serious question of general importance" concerning the nature of the

risk, if any, to be assessed in determining H&C applications. Following its own jurisprudence, the Federal Court of Appeal had determined that certified questions on issues of statutory interpretation must be decided on a correctness standard. Rejecting that approach, the majority at the SCC held the appropriate standard of review is reasonableness.

The majority concluded that the officer's decision was unreasonable. The officer failed to consider K's circumstances as a whole; assessed K's status as a child in isolation, rather than turning her mind to how it affected the evaluation of the other evidence; took an unduly narrow approach to assessing the circumstances raised in the application; and gave insufficiently serious consideration to his youth, mental state, and the evidence that he would suffer discrimination if returned to Sri Lanka. Instead, she assessed each factor separately to determine whether it represented "unusual and undeserved or disproportionate" hardship, discounting each in her final conclusion that return to Sri Lanka would not result in "unusual and undeserved or disproportionate" hardship to K. Her literal obedience to these three adjectives in the Guidelines had the effect of improperly restricting her discretion and rendering the decision unreasonable. The officer ought to have analyzed whether, in light of the humanitarian purpose of s.25(1), the evidence as a whole justified relief.

COMMENTARY: While broadening the scope of the H&C exemption, this is, in many respects, a troubling decision from an administrative law perspective.

Although the Court clarified that reasonableness is the appropriate standard of review on certified questions requiring the interpretation of a statute, its reasoning is problematic. For example, the majority found a Supreme Court decision favouring correctness review was "not particularly helpful" to its assessment on the standard of review, in part because the decision pre-dated *Dunsmuir v New Brunswick*.[1] Yet the majority then relied on *Baker v Canada*[2] – another pre-*Dunsmuir* case – in deciding that the applicable standard of review is reasonableness.

Further, the standard of review discussion came only *after* the majority had already interpreted s 25(1) *de novo*, without any reference to the administrative decision under review. In effect, the Court seems to have ignored its own conclusion on standard of review and conducted correctness review on the interpretation of s 25(1).

While not without their own flaws, the dissenting judges point out that the majority's approach to reasonableness itself fails to heed the admonition in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*[3] "that reviewing courts must be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fatal." Examples of this include the majority's admonishments of the officer for discounting K's health problems and failing to infer K would face discrimination if returned to Sri Lanka.

Concerns with the court's analysis aside, an important takeaway from this case is that administrative decision-makers should not treat as binding internal guidelines purporting to advise them on how to exercise their statutory discretion. Such guidelines can be instructive, but are not determinative. Rather, decision-makers are well-advised to exercise discretion in light of the statutory provision pursuant to which it is granted, including the purposes underlying that provision.

The Right be Heard when New Issues Arise: *Netflix Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289

FACTS: This was an application for judicial review of a decision of the Copyright Board to certify a

[1] [2008] 1 SCR 190

[2] [1999] 2 SCR 817

[3] [2011] 3 SCR 708

tariff imposing royalties for free trials of subscription audiovisual streaming services.

The Board sets tariffs to be paid by users of copyrighted material to copyright holders through copyright collectives, such as the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"). Starting in 2007, SOCAN applied to the Board to set a tariff for the use of copyrighted musical works in the streaming of audiovisual content over the internet. The proposed tariffs provided for royalties calculated as a percentage of expenses or revenues, without reference to subscription services or free trials of such services. A number of companies offering "on demand" streaming services, including Bell and Rogers, objected to these tariffs. Netflix took no steps to participate in the proceedings at the time.

In 2012, SOCAN entered into a settlement agreement with the objectors with respect to the proposed tariffs. The terms of the tariffs set out in the settlement agreement were materially different from the tariffs as originally proposed; in particular, they provided for a tariff of between 6.8 and 7.5 cents/month for free trials of subscription services. The Board held a hearing to decide whether to certify the agreed tariff. Netflix made written submissions arguing that the proposed tariff on free trials was impermissible because the free trials were fair dealing and the tariff violated the principle of technological neutrality. The Board refused to allow Netflix to introduce new evidence on these issues, in part because Netflix had not participated in the proceedings from the outset and allowing new evidence would cause delay.

The Board approved the settlement agreement and certified the proposed tariff. Netflix brought an application for judicial review on a number of grounds, including that it was denied a right to be heard by the Board.

DECISION: Application for judicial review allowed. Decision of the Board with respect to free trials quashed.

The Court (*per* Nadon JA) held that the standard of review on matters of procedural fairness was correctness and that the Board had failed to afford procedural fairness to Netflix.

The Board denied Netflix a right to be heard by denying it the right to introduce new evidence and to make submissions. While Netflix had not participated in the certification proceedings from the outset, the nature of those proceedings changed materially when the proposed tariff was amended to include free trial subscriptions within its scope. The right to object to a tariff set out in s 67.1 of the *Copyright Act* could not be circumvented by amending a proposed tariff in a way that introduces a fundamentally new tariff. This would deprive affected industry participants of the benefit of requiring that proposed tariffs be published in the *Canada Gazette*.

The Court also considered the criteria for the approval of a settlement agreement by the Board as set out in *Re: Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012*.[4] In considering whether to approve a tariff set by agreement, the Board should consider whether the parties before it represent all prospective users and whether arguments by non-parties have been addressed. Neither factor was met in this case, as the "on demand" service providers could not represent streaming services such as Netflix and the Board had failed to consider the submissions of Netflix, an important non-party.

COMMENTARY: This case is an important reminder about the importance of procedural fairness in the conclusion of settlement agreements that bind the public at large. Although the Court preferred to approach this case through procedural fairness principles, the same result would seem to follow from an analysis of the Board's jurisdiction. The Board's power to certify a tariff under s. 68 of the *Copyright Act* is contingent on notice of that tariff being given in the *Canada Gazette*. While the Board has the power under s 68(3) to make alterations to and impose terms and conditions on a proposed tariff, there is a point at which these alterations amount to a new tariff for which separate notice is required.

[4] May 25, 2012 (Copyright Board)

Perhaps the most interesting feature of this decision is the short passage in which Nadon JA writes that he "need not say much" with respect to the standard of review on questions of procedural fairness. He holds, on the authority of *Re:Sound v Fitness Industry Council of Canada*,[5] that a correctness standard applied (a point apparently conceded by counsel). This holding contradicts the reasoning of Stratas J.A. in *Forest Ethics Advocates Association v National Energy Board*,[6] who held that the deference owed to administrative decision-makers in setting their own procedure is irreconcilable with a correctness standard. The *Netflix* decision is a forceful reassertion of orthodoxy, in that the balance of authority supports Nadon JA's view.[7] However, Nadon JA also observes that "administrative decision makers enjoy great latitude in setting their own procedure, including aspects that fall within the scope of procedural fairness". The proponents of the correctness standard have yet to cogently explain how an administrative decision-maker can have the power to make discretionary determinations about procedure without the benefit of reasonableness review.

No Extrinsic Evidence – and Significant Deference – in the Review of Regulatory Bylaws: *Sobeys West Inc v College of Pharmacists of British Columbia*, 2016 BCCA 41

FACTS: The College of Pharmacists passed bylaws prohibiting pharmacists from using customer incentive programs to induce the purchase of pharmacy services, drugs or devices.

The College's governing legislation provides that it must "exercise its powers and discharge its responsibilities under all enactments in the public interest." Those powers include making bylaws the College "considers necessary or advisable".

The applicants sought to have the bylaws quashed by way of judicial review, arguing that they were overbroad and not based on any empirical evidence of actual harm. In fact, the applicants argued that the public interest favoured customer incentive programs, as these programs contributed to reducing the cost of pharmacy services and prescriptions. The applicants tendered affidavit evidence in the judicial review application, outlining the purported impact of the bylaws.

The chambers judge accepted the applicants' arguments, found the bylaws to be unreasonable, and struck them down. The College appealed.

DECISION: Appeal granted and order striking down bylaws set aside.

In response to the College's suggestion (though not a formal ground of appeal) that the applicants' affidavit material should not be considered, the Court expressed the view that extrinsic evidence that could or should have been before an administrative decision-maker, but was not in fact before it, should generally not be admitted on judicial review – regardless of whether the decision at issue is adjudicative or legislative in nature. If the College had attempted to immunize its decisions from scrutiny by limiting the material it considered, then a more flexible approach might be appropriate.

Turning to the substantive appeal, the Court found that the chambers judge erred in finding the bylaws to be outside the range of reasonableness. While acknowledging that the "evidence supporting the need for the bylaws was thin" and mainly or even entirely "anecdotal", there was enough to support the College's concerns. Moreover, the Court held that the College did not have to select the "least intrusive path" to address those concerns, nor did it have to wait for empirical evidence demonstrating the harm of customer incentive programs. The College was free to take preventative measures before actual harm occurs. In substance, those measures are

[5] 2014 FCA 48
[6] 2014 FCA 245
[7] See in particular *Mission Institute v Khela*, 2014 SCC 24 at para 79

policy questions lying within the particular expertise of pharmacists, and not the courts.

Finally, in the non-adjudicative context, the decision to issue bylaws may be reasonable even where there is no record of proceedings (apart from minutes of meetings), no evidence, no findings of fact or law, and no reasons in the formal sense.

COMMENTARY: As far as the editors are aware, this is one of the first appellate decisions to consider whether the general rule excluding extrinsic evidence on judicial review should apply with equal force to *legislative or policy-laden* decisions. (Indeed, the other cases cited in the Court's reasons all involved an adjudicative-type hearing.) The Court not only finds that the general rule should apply, but also hints at a new exception to that rule where regulators try to artificially narrow the record at the decision-making stage to insulate themselves from later review. Although the Court's discussion on these points is *obiter*, it is nevertheless likely to carry some weight in Ontario, particularly considering the dearth of case law dealing with the issue of extrinsic evidence in the context of legislative decisions.

The extent of the Court's deference to professional regulators in the making of bylaws is significant, though perhaps not surprising. It seems that as long as a regulator is acting *bona fide,* can provide *some* basis (even "anecdotal") to ground its concerns, and passes bylaws that address those concerns, the substance of those bylaws will almost certainly fall within the range of reasonableness and survive judicial review. In other words, the Court's decision all but forecloses overbreadth as a basis for unreasonableness.

One question not addressed by the Court is the extent to which regulatory bylaws are vulnerable on judicial review if an applicant can establish there is no rational connection between those bylaws and the harm they are meant to address. Given the tone of deference permeating the Court's decision, however, it stands to reason that only a clear absence of any logical or rational connection between regulatory bylaws and their objectives could give rise to a finding of unreasonableness.

Awarding Costs to Members in Discipline Hearings: *Truman v Association of Professional Engineers of Ontario*, 2016 ONSC 472 (Div Ct)

FACTS: This was an appeal from a decision of the Discipline Committee of the Association of Professional Engineers of Ontario ("APEO") by a professional engineer and his professional corporation.

The Complaints Committee of the APEO received a complaint against the appellants from the neighbour of one of their clients, who was dissatisfied with the appellants' proposal that the two properties should share common eaves. The Complaints Committee investigated the complaint and referred it to the Discipline Committee for further action. The Statement of Allegations included a recital of the facts, along with the assertion that the appellants "are guilty of professional misconduct as defined in section 28(2) of the *Professional Engineers Act*" – but nothing to indicate how or why the actions of the appellants constituted professional misconduct.

The Discipline Committee held that the referral by the Complaints Committee was not properly made, and stayed the proceeding on the basis that "there are no clearly defined allegations of actions, or lack of actions, in the Statement of Allegations to which the Member can respond or mount a proper defence".

The appellants sought costs of the proceeding. The Discipline Committee denied the application, ruling that "there was evidence before the Complainants Committee which, if proved, would have allowed a finding of professional misconduct to be made against the Member". The appellants argued that this conclusion was unreasonable in light of the Discipline Committee's decision to stay the proceeding.

DECISION: Appeal allowed. The appellants were awarded costs of the proceeding.

The Divisional Court concluded that the reasoning in the Discipline Committee's stay decision demonstrated the proceedings had been unwarranted. Referral to the Discipline Committee is warranted if any one element of the allegations, if proved, would have been sufficient for the panel to find that the member had engaged in one of the acts of professional misconduct alleged. At no point in the proceedings before the Discipline Committee were the appellants informed of any allegations that would ground a finding of misconduct.

The Court noted that a decision to stay proceedings is not necessarily inconsistent with a decision not to award costs. A stay may simply mean the proceeding should not proceed because the engineer has not been given fair notice of the case to meet, and not that there is no case to meet at all. But this case fell into the latter category. The Discipline Committee's reasons on the costs motion were flawed in the same way as the referral of the Complaints Committee: they drew a conclusion without providing any justification for the conclusion reached.

The Court found that it had jurisdiction to award costs of the discipline proceedings pursuant to the relevant appeal provision, which allowed the Court to "exercise all powers of the committee" and "substitute its opinion for that of the committee". Accordingly, the Court awarded the appellants $21,000 in costs for the discipline proceeding, in addition to costs of the appeal.

COMMENTARY: Respondents who successfully resist professional discipline proceedings face a high hurdle in claiming costs. This decision is best seen as an exceptional case that meets the standard of unwarranted proceedings rather than a lowering of that standard. The appellants were at no time given notice of any impugned actions that would constitute misconduct. The Complaints Committee failed to state any particular allegations, even when given a second opportunity to do so after the initial stay decision. The only conclusion to draw from this silence is that there was no case against the appellants and the proceedings should never have been instituted.

This decision is also a useful reminder to regulators to ensure that the step of referring complaints to discipline is not treated as a rubber stamping exercise – otherwise, there may be cost consequences.

The Duty to Cooperate in the Regulatory Process: *Round v Institute of Chartered Accountants of Ontario*, 2015 ONSC 7099 (Div Ct)

FACTS: The Institute of Chartered Accountants of Ontario (operating as the Chartered Professional Accountants of Ontario, or "CPAO") received information that one of its members, R, may be providing accounting services to the public through a company that was not registered with the CPAO, contrary to the CPAO's Bylaws, Rules and Regulations. Specifically, a CPAO employee developed concerns after seeing the company's website while reviewing an unrelated matter. The CPAO's Professional Conduct Committee wished to commence a review of the situation and sought certain information from R to that end.

In various communications with the Committee over a 9-month period, R's counsel sought full particulars of the complaint, including the specific identity of the employee who had initiated the investigation. The CPAO did not disclose the identity and R did not provide the information the Committee sought. R was then served with a notice to attend before the Committee on a particular date. The notice repeated the request for information. R failed to appear on the stipulated date and did not produce any information sought by the Committee. The CPAO then issued allegations of professional misconduct based on R's failure to cooperate with the Committee's request for information and his non-attendance before the Committee.

R sought judicial review to quash the CPAO's decisions to embark on the inquiry and to issue allegations of misconduct against him for his failure to cooperate with the regulatory process.

DECISION: Application dismissed.

The CPAO has the duty and jurisdiction to govern R and its other members in respect of their professional conduct. R has a corresponding professional responsibility to cooperate with the CPAO in its investigations.

Judicial review remedies are discretionary. The Court will rarely intervene in an administrative proceeding until the proceeding has run its course and all avenues of appeal have been exhausted. Intervention will normally be justifiable only once where there is a clear excess of jurisdiction or an egregious and irremediable breach of natural justice; even then, the Court may decline to exercise its discretion.

With respect to R's argument that the CPAO had no jurisdiction to investigate in the absence of an identified complainant, the Court held that the CPAO should be given the opportunity to interpret its home statute, Bylaws and Regulations, and determine its own powers before the Court deals with those issues.

The Court found that R was not denied natural justice. He was fully informed of the reason for the investigation and was provided with information regarding the matters being investigated pursuant to the Regulations.

R clearly had a duty to cooperate and provide the information requested. He did not. It is not for R to challenge the *bona fide* of the investigation at this stage. His duty is to cooperate.

COMMENTARY: This decision is a helpful reminder of the significant uphill battle applicants face in seeking judicial review before the administrative proceeding has run its course. The general stance against premature judicial review applications will be difficult to overcome, even where an argument is raised that the decision-maker lacks jurisdiction or that the applicant has been denied natural justice.

The decision also serves as a caution to those subject to professional regulation. Even if a duty of procedural fairness is owed in the course of an investigation, where there is a duty to cooperate with the regulatory process, the member must cooperate. Similarly, a member's concerns about the good faith foundation of an investigation is no excuse not to cooperate.

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For more information about the issues and cases covered in this edition of the newsletter, or to find out more about our firm's administrative and regulatory law practice, please contact Andrea Gonsalves, Justin Safayeni or another lawyer at the firm.

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