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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: ANDREA GONSALVES & JUSTIN SAFAYENI ISSUE 7 • OCTOBER 2016

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Standard of review on an internal appeal: *Ottawa Police Services v Diafwila*, 2016 ONCA 627

FACTS: D was an Ottawa Police Service officer with perpetual performance problems. The OPS made efforts to raise D up to an adequate standard of policing through remedial training. In doing so, however, it departed from the procedure set out in its own policies, passed pursuant to a regulation to the *Police Services Act*[1] (the "Regulation"). The OPS ultimately abandoned its efforts at remedial training, placed D on administrative leave and, following the requisite investigation, charged him with unsatisfactory work performance pursuant to the Act.

1 RSO 1990, c P.15 (the "Act")

At a discipline hearing, the Hearing Officer found D guilty of unsatisfactory work performance. He held that while the OPS may have deviated from the strict requirements of the Regulation, the OPS' *ad hoc* approach to D's performance issues was appropriate in the circumstances. There was no unfairness to D, as the OPS had followed a fair procedure for evaluation and provided him with ample opportunities to rectify his performance deficiencies.

On appeal to the Ontario Civilian Police Commission ("OCPC"), that decision was set aside. The OCPC interpreted the process set out in the OPS' work performance policies as a prerequisite to the termination of an officer and held that the OPS' failure to abide by them was fatal to the discipline process that followed.

In reasons that turned on the interpretation of the Regulation and applicable OPS policies, the Divisional Court overturned the OCPC's decision on judicial review. The panel concurred on the standard of review applicable to the OCPC (reasonableness), but Lederer J and Aitken J dissented, respectively, on the standard of review applicable to the internal appeal to the OCPC, and on the ultimate result.

DECISION: Appeal allowed.

The Court affirmed that a reviewing court should apply the reasonableness standard of review when examining the OCPC's decision in this case.

On the issue of the standard of review applicable to the internal appeal before the OCPC, the Court agreed with Ramsay and Aitken JJ: for questions of law, the standard is correctness, notwithstanding that the Regulation is the home statute of both decision-makers. The Court

justified this standard of review based on, among other things, the OCPC's independence from police, its superior expertise in applying general legal principles and its role in providing civilian oversight of police.

In dealing with Lederer J's view that the OCPC ought to apply a reasonableness, and not correctness, standard to questions of law addressed by the Hearing Officer, the Court noted that his objection was restricted to those circumstances where more than one reasonable answer is available to a question of statutory interpretation, which is not always the case. The Court also rejected the suggestion that the lack of uniformity between standards (*e.g.* between the standard applied by the OCPC and that applied by a reviewing court) is inefficient and deprives the OCPC of any impetus to determine whether the Hearing Officer was correct. The Court questioned Lederer J's assumption that decision-makers such as the OCPC can only be made accountable through the most intense level of judicial scrutiny. The Court went on to hold that in any event, the standard of review is a matter of discerning the intention of the legislation and not the efficacy of the arrangement.

On the merits, the Court endorsed the approach of Aitken J's dissenting opinion. It cautioned that a reviewing court should avoid the temptation to place itself in the position of the decision-maker at first instance and compare the decision it would have made against the one actually made at first instance. Viewing the standard of reasonableness through this lens, it concluded that the Commission's decision was not unreasonable.

COMMENTARY: Justice Lederer's dissent at the Divisional Court raises the interesting issue of incongruent standards of review on layers of appeal. He is troubled by the fact that in being held to a reasonableness standard, the OCPC's determination of correctness need only fall in a range of reasonable outcomes. Indeed, it may strike some as illogical to assess whether an administrative appeal body acted reasonably in finding that the decision of a first-instance decision-maker was correct (or incorrect).

The Court of Appeal dealt with Lederer J's dissent in part by pointing out that in circumstances where there is only one reasonable answer to questions of statutory interpretation, correctness and reasonableness are indistinguishable.

The fuller answer to Lederer's concerns, however, is found in the Court's emphatic reminder that the standard of review is derived first and foremost from the legislation in question. Policy concerns may help animate what the legislature was thinking – but they are not a stand-alone basis for overriding legislative intent. This suggests that in dealing with standard of review issues, courts (and counsel) should not be distracted by the type of logical quandaries that drove Lederer J's dissent, and instead focus on the intention of the legislature as expressed through legislation.

Religious organizations' membership decisions are subject to judicial review: *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255

FACTS: In March 2014, W received a letter directing him to appear before the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, in order to address "alleged wrongdoing involving drunkenness". The letter offered little additional information regarding the details of the allegations.

At the meeting, W admitted to two occasions of drunkenness, and to verbally abusing his wife during one of those occasions. He explained that this occurred because of stress on their relationship caused by their daughter's expulsion from the Congregation, which forced W and his wife to shun aspects of their relationship with her.

After the meeting, the Committee orally advised W that he was "disfellowshipped" – meaning that others in the Congregation would be compelled to shun him.

W appealed the decision to an Appeal Committee, which orally affirmed the decision of the Committee.

W brought an application for judicial review. He argued that he was not provided with sufficient particulars of the allegation against him or the process he would face; that he was not advised whether he could retain legal counsel; and that he did not receive written reasons for decision (among other grounds). W, who is a real estate agent, also alleged that the Committee's decision has ruined his business since most of his customers were members of the Congregation.

A bifurcated proceeding was held, with the first stage examining whether the Court of Queen's Bench had the jurisdiction to hear the application. The chambers judge concluded that the Court did have jurisdiction. The Committee appealed.

DECISION: Appeal dismissed.

Writing for the majority, Paperny and Rowbotham JJA held that a court has the jurisdiction to review the internal affairs of a religious organization when a breach of the rules of natural justice has been alleged. Accordingly, on the basis of W's allegations, the majority concluded that the Court of Queen's Bench has jurisdiction to hear the application.

In a lengthy dissent, Wakeling JA reached the opposite conclusion for two main reasons.

First, he found that the Congregation was not a "public actor" and thus was not subject to judicial review. Although the Congregation has charitable status under the *Income Tax Act,* it has no statutory foundations of any kind and makes no decisions that have consequences for members of the public. It is a private religious organization and its members must seek private law remedies, not judicial review.

Second, even if the Congregation's decision were amenable to judicial review, Wakeling JA found that the type of question raised by W's application was not justiciable. The constituent members of religious associations have a constitutional right to select their own members. For unincorporated religious associations, such as the Congregation, civil courts should decline to review such membership decisions (different considerations may arise for religious associations with legal status attributable to an enactment, or where property or civil rights is at stake, but neither category applies here). Such deference is justified by the constitutional protections afforded to freedom of religion, and by the reality that civil judges are unlikely to have a satisfactory understanding of the ecclesiastical law and values underlying a certain religious entity.

COMMENTARY: This case can be seen as an example of the old adage that hard facts make bad law.

One can certainly appreciate why the equities here favour W. He is a self-represented litigant who stands to lose his family, his business, and his entire community because of what appears to be an unfair decision made by the Committee (due to conduct that, at least according to W, stemmed from the Committee's decision to expel his young daughter). Given these devastating consequences and the circumstances giving rise to W's conduct, it is hard not to sympathize with his plight.

On strictly legal grounds, however, the majority's reasoning is suspect. At the very least, it is incomplete.

Indeed, unlike Wakeling JA, the majority completely fails to grapple with the crucial question of whether the Congregation's decision has a sufficiently "public" character. The Supreme Court has used this public/private distinction to draw the boundaries of judicial review since *Martineau v Matsqui Institution Discipline Board.*[2]

More recently, appellate courts have developed a number of factors to assist in analyzing whether a body's decision is public or private in nature. Those factors include the nature of the decision-maker, the extent to which a decision is founded in and shaped by law, the body's relationship to statutory schemes or other parts of government, the suitability of public law remedies, and the

2 [1980] 1 SCR 602

extent to which a decision-maker is an agent of government or controlled by a public entity.[3]

Based on these factors, one could argue (perhaps even persuasively) that superior courts have the jurisdiction to review the Committee's decision. But that argument appears nowhere in the majority's reasons.

Tie votes render tribunal decisions void if statute requires they "shall be by a majority": *Green v Alberta Teachers' Association*, 2016 ABCA 237

FACTS: G, a member of the Alberta Teachers' Association, was found guilty of unprofessional conduct. As a sanction, the Hearing Committee imposed a single letter of severe reprimand.

G appealed to the Professional Conduct Appeal Committee. The governing legislation provides that the Committee is to be composed of not fewer than three, and not more than five persons. It also provides that "the votes or decisions of any Committee or panel shall be by a majority of those participating in the vote or decision" (emphasis added).

For G's appeal, the Appeal Committee was composed of four members. Two members found that the Hearing Committee's decision on guilt was unreasonable; the remaining two members found the decision to be reasonable. The Appeal Committee issued reasons for decision stating that "the appeal is dismissed on equal division of the appeal committee."

G brought an application for judicial review. The reviewing justice found the Appeal Committee's disposition troubling, but held that he was bound to dismiss the application, based on the Alberta Court of Appeal's decision in *Ostrensky v Crowsnest Pass (Municipality) Development Appeal Board*.[4] In *Ostrensky*, the Alberta Court of Appeal upheld a tie vote of a tribunal as a decision not to allow an appeal, characterizing it as a "negative decision".

DECISION: Appeal allowed.

The decision in *Ostrensky* is distinguishable. In that case, the Board's by-laws did *not* address the prerequisites for decisions; they simply clarified that a majority decision was a decision of the whole Board.

In the present case, however, the statutory scheme sets out that the decision of the committee "shall be by majority of those participating in the vote or decision." Accordingly, the Appeal Committee exceeded its jurisdiction in dismissing the appeal on a tie vote. A majority decision was required. The Appeal Committee's decision is null and void.

COMMENTARY: The possibility of having an even number of tribunal members is a live one in Ontario.[5] If such a situation should result in a tie vote, then the semantic distinction relied on by the Court to distinguish the result in *Green* from that in *Ostrensky* may have important implications. For example, the Court's decision would suggest that in proceedings subject to the *Statutory Powers Procedure Act*[6], ties would be an acceptable form of "negative decision", because the *SPPA*'s language dealing with majority decisions more closely resembles the provision at issue in *Ostrensky* than *Green*.[7] The converse would be true where the language more closely resembled the relevant provision in *Green*.[8]

3 See, for example, *Setia v Appleby College*, 2013 ONCA 753 at paras. 33-34; *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para. 60.

4 1996 ABCA 18

5 See, for example, the *Regulated Health Professions Act, 1991*, SO 1991, c 18, s 38(2)

6 RSO 1990, c. S 22

7 Section 4.2(3) states: "The decision of a majority of the members of a panel, or their unanimous decision in the case of a two-member panel, is the tribunal's decision."

8 See, for example, *Education Act*, RSO 1990, c E2, s 277.39(2) (dealing with the decision of a school board to accept a recommendation to terminate a teacher's employment): "The determination of the board shall be

For regulators, *Green* also stands as an important reminder of the potential pitfalls of appointing an even number of members to a tribunal. As the Court of Appeal put it in *Ostrensky,* there is an "extreme lack of wisdom … in appointing a four-person tribunal to decide anything" (at para 7). And even though the decision in *Ostrensky* was upheld, an aggrieved professional may still have other avenues for recourse in such a case. Indeed, the Court suggested that a challenge might lie against those who exercised the appointment power to create a four person tribunal, rather than against the tribunal itself.

"Open mind" standard for bias at the investigation stage: *Shoan v Attorney General of Canada*, 2016 FC 1003

FACTS: Pursuant to an Order-in-Council, S was appointed commissioner with the Canadian Radio-television and Telecommunications Commission. An employee of the CRTC lodged a complaint against S and requested action in accordance with the Treasury Board Secretariat Policy on Harassment Prevention and Resolution (the "Policy").

An investigator was engaged to investigate the complaint. The investigator prepared a report setting out her conclusion that the complaint had merit (the "Report"). She found that S's behaviour toward the complainant constituted harassment.

The Secretary General of the CRTC agreed with the conclusions in the Report and recommended to the CRTC Chairman five measures to deal with the Report's conclusions. The Chairman accepted and immediately implemented the five measures.

S sought judicial review of the Chairman's decision. He argued that the Chairman had no jurisdiction to investigate the complaint and impose the corrective measures because S was a Governor-in-Council appointee and not a CRTC employee. S further claimed that he had been denied procedural fairness in the conduct of the investigation and the conclusions reached, due to bias on the part of the investigator and the Chairman.

DECISION: Application allowed.

As a preliminary matter, the Court rejected the Attorney General's argument that the only decision under review was that of the Chairman to impose corrective measures. Instead, the Court accepted S's position that the investigation, the Report, the decision in the Report and the measures implemented as a result all constitute one decision, subject to review.

The Court rejected S's argument that the issue of whether the Chairman could investigate the complaint was one of jurisdiction, attracting correctness review. Instead, the Court applied the presumption that the standard of review is reasonableness and found that it had not been rebutted.

On the merits, the Court held that having been appointed by the GIC, S could only be removed by the GIC, but that S is not immune from having his actions examined by the CRTC based on the CRTC's duty as an employer to prevent discrimination and harassment of its employees at the workplace.

With respect to the duty of fairness, the Court found that given the potential serious and profound reputation and career interests at stake for both S and the complainant, the duty of procedural fairness owed in the course of the investigation was at the upper end of the scale.

Regarding S's argument that the investigator was biased, the Court applied the test for investigative bodies – namely, whether there was a reasonable apprehension that did not have an open mind and had pre-determined the question. The Court agreed that the standard of open-mindedness had not been satisfied by the investigator. S filed evidence that in his experience and that of two

by majority vote of the members of the board…"; *Board of Funeral Services Act,* RSO 1990, c F36, s 11(4): "All disciplinary decisions of the Discipline Committee require the vote of a majority of the members…"

other witnesses, the investigator had made up her mind before all the evidence was in. This perception was based on comments made by the investigator during witness interviews. No affidavit was filed from the investigator and the Report did not address S's allegation. The investigator's notes were destroyed.

The Court further held that the investigator failed to critically and impartially analyse some, if not most, of the impugned email chains that formed the basis for the complaint against S. Her tainted analysis supported the finding that she was closed-minded.

The Court also found that there was a reasonable apprehension of bias on the part of the Chairman, since he participated as both a witness and the final decision-maker. During his interview, the Chairman expressed personal views on S's conduct and behaviour generally. The Report summarises a number of those personal opinions. In light of them, the Court held that it was impossible to see how the Chairman, whether consciously or unconsciously, could decide the matter fairly.

The Report went far beyond the scope of the complaint against S. The Court found that the investigator and the Chairman considered a number of emails that had nothing to do with the specific incidents alleged. This was unfair and prejudicial to S. The expansion of the investigation beyond the investigator's mandate supported the view that she had a closed-mind.

Despite the breach of procedural fairness, the Court did not refer the matter back to be decided by another decision-maker according to a fair procedure, as S's appointment had been rescinded by the GIC a few days after the application was heard (a decision currently being challenged by S).

COMMENTARY: This decision attracted some public interest at the time it was released, due to the public profile of S as the Ontario commissioner of the CRTC. Not surprisingly, the interesting administrative law dimensions of the case received little attention – but they are worth noting.

In particular, the Federal Court's decision demonstrates an interesting application of the "open-mind" test for an investigative decision.

Although the "open-mind" test was developed long before this case,[9] it has received considerably less judicial attention than its better known cousin, the "reasonable apprehension of bias" test, which applies to adjudicative decisions. The higher "open-mind" standard is appropriate for investigations and other non-dispositive decisions that can, nonetheless, have a strong influence on adjudicative decisions and serious consequences for individual rights and interests. As this case demonstrates, despite being a higher standard than reasonable apprehension of bias, it is not impossible to meet the open-mind test in appropriate circumstances.

Although the facts arise out of a workplace investigation, this case serves as a useful reminder for regulators that care must be taken in conducting all manner of investigations. Even with the benefit of the higher "open-mind" threshold, the investigator should collect all the information and evidence objectively, conduct interviews in a neutral, non-leading fashion, and be sure not to stray outside the investigative mandate. Further, the ultimate decision-maker, who will consider and potentially act on the findings of the investigation, should not be a participant in the investigation. ⚖

Procedural fairness requires giving adequate particulars of the case to meet: *Farah v Canada (Attorney General)*, 2016 FC 935

FACTS: F had received a full security clearance in relation to her employment as a Customer Service Agent with US Airways at Pearson International

9 See, for example, *Bell Canada v Communications, Energy and Paperworks Union*, [1997] FCJ no 207

Airport. She had no criminal convictions and had not been the subject of any criminal investigation.

In February 2014, Transport Canada ("TC") informed F that it had learned through a RCMP Law Enforcement Records Check that police had observed (1) F with Subject A on one occasion (A is a known gang member with a lengthy criminal record who admitted at the time to being a very close associate of F, though the current status of the association was unknown), and (2) a vehicle, of which F was the registered owner, leaving a gang member's funeral and carrying Subjects B and C, who were known to police as criminals.

When asked to respond to this information, F told TC that, among other things, she did not know anyone meeting the description of A, nor did she know any criminals; her cousin had, in the past, impersonated F when receiving speeding tickets; her father was the primary driver of the vehicle seen at the funeral; and she was not in the car with B and C. She asked TC for further information about A, including "the date, location and the name or description". In turn, TC asked the RCMP "for any further information related to the method by which this information was received by Police." The RCMP replied that "police had direct interaction" with F and A when they were both together. TC relayed this information to F and added that it had not been provided with names or details of the third parties or sources due to provisions of the *Privacy Act*.

The Advisory Body reviewing F's security clearance recommended it be cancelled "based on the police report detailing the applicant's close association" to Subjects A, B and C. The Body believed, on a balance of probabilities, that F "may be prone or induced to assist or abet any person to commit an act that may lawfully interfere with civil aviation." The Minister's delegate adopted this recommendation and cancelled F's security clearance, stating, "I find it unlikely that an individual would have no recollection of a direct interaction with police and, due to her very close association with Subject A, I believe the applicant either knew or was willfully blind to Subject A's activities." As a result, F was suspended from her employment without pay or benefits.

F sought judicial review of the decision, alleging the Minister's delegate revoked her security clearance without proper justification while relying on unverified and unreliable evidence.

DECISION: Application allowed. The Court set aside the decision to cancel F's clearance, finding that it was both unreasonable and procedurally unfair.

Although F was entitled to a lower level of procedural fairness, TC breached this by failing to provide F adequate disclosure to permit her to identify A. The Court noted "there is a minimal amount of meaningful information that must be disclosed in order to ensure natural justice occurs and a meaningful response can be made." Information that TC could have provided to assist F in understanding the alleged interaction included A's gender, approximate age, or nationality, as well as the city, time of day, or specific date on which "police had direct interaction" with F and A. Without adequate disclosure, F could not meaningfully explain the nature of a relationship that may have been formed with no knowledge of the criminal activities of A or that may not have existed at all. Instead she was forced to give a blanket denial of having any criminal associates.

The Court also admonished TC for misstating to the RCMP F's request for particulars about A and for invoking an improper blanket reliance on the *Privacy Act* in its response to F about her request. These actions frustrated F's attempt to obtain sufficient details about A to permit her to respond to the allegations put to her.

The Minister's decision was also unreasonable. By saying she found it "unlikely that an individual would have no recollection of a direct interaction with police" (an observation adopted from the Advisory Body's Record of Discussion), the Minister's delegate implied F was not telling the truth. Inherent in the conclusion is that police were in uniform at the time of the "direct interaction" with A and F. The decision makers

should have more closely scrutinized the evidence: the police might not have been in uniform. F's denials should have prompted the decision-makers to ensure the evidence upon which they relied supported the statement that she was "unlikely" to "have no recollection of a direct interaction with police." Without an analysis of the evidence that police interacted with F, the conclusion in the decision was neither transparent nor intelligible, rendering the decision unreasonable.

COMMENTARY: *Farah* reminds us that while the requirements of procedural fairness vary depending on the context, even at the lower end of the spectrum, the right to notice generally necessitates providing an individual sufficiently precise information to allow her to know the case to meet. It is therefore unsurprising that a court would find to be procedurally unfair a decision based on an alleged association with someone in circumstances where the individual was provided no discernible identifying features about that person or the nature of the alleged interaction with him or her.

What is notable in this case is that courts have generally held that a great deal of deference is owed to Ministerial decision-makers on security clearance decisions. However, in concluding that the decision here was unreasonable, the Court appears to engage in an unusually high – though seemingly appropriate – level of scrutiny of the decision-makers concerning their reliance on certain evidence. This suggests to us that in certain circumstances, courts will be willing to step in and require that, in order to meet the standard of reasonableness, administrative decision-makers actually demonstrate they have satisfied themselves about the reliability of key evidence where the veracity of that evidence is impliedly challenged during the course of administrative proceedings.⚖

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

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