NOVA SCOTIA COURT OF APPEAL

Citation: *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75

Date: 20090715
Docket: CA 302433
Registry: Halifax

Between:

Allstate Insurance Company of Canada

Appellant

v.

Nova Scotia Insurance Review Board

Respondent

Judges:	MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.
Appeal Heard:	May 12, 2009, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S., and Fichaud, J.A., concurring.
Counsel:	Robert G. Grant, Q.C., and Tanya Butler, Articled Clerk, for the Appellant Lester Jesudason for the Respondent Edward G. Gores, Q.C., for the Attorney General of Nova Scotia

Reasons for judgment:

[1] By a decision and order dated September 10, 2008, the Nova Scotia Insurance Review Board ordered Allstate Insurance Company of Canada to reduce its rates for private passenger automobile insurance by 6.2 percent overall. Allstate appeals. For the reasons which follow, I would dismiss its appeal.

Background

[2] The *Insurance Act*, R.S.N.S. 1989, c. 231 as amended (the "Act") provides for applications by insurers for approval of proposed rates and risk-classification systems. In 2004 Allstate and Pembridge Insurance Company applied for approval in regard to private passenger automobile insurance for the year 2005. Both used the same actuarial consultants to file their applications. Each of Allstate and Pembridge proposed no change from its 2004 rates.

[3] The Board can be involved twice in an application. First, an initial panel of the Board decides whether or not to approve the application. Second, if the application should be rejected, an appeal panel of the Board hears the appeal from the decision of the initial panel.

[4] By a decision dated April 22, 2005, an initial panel of the Board ordered Allstate to reduce its overall rates by 11 percent and Pembridge to reduce its rates by 11.8 percent. The insurance companies appealed unsuccessfully to an appeal panel. They then appealed to this Court. By a decision dated June 7, 2006 (the "2006 Allstate Decision"), the Court of Appeal allowed their appeal and ordered that their applications be sent back to the Board to be decided in light of the reasons given by the Court. That decision is reported as 2006 NSCA 70. Leave to appeal to the Supreme Court of Canada was denied on December 14, 2006. See [2006] S.C.C.A. 332.

[5] At the rehearing before a newly constituted initial panel, Allstate put forward the identical information and evidence that it had presented at its first hearing in 2005. Both it and Pembridge used the "projected prior loss ratio" to determine the complement of credibility for their calculations of rate adequacy. By a decision dated March 14, 2007, this initial panel of the Board ordered Allstate to

reduce its overall rates by 8 percent. Allstate and Pembridge, in regard to the orders pertaining to each of them, appealed to an appeal panel.

[6] In their Notices of Appeal, Allstate and Pembridge sought, among other things, the appeal panel's permission to introduce new evidence regarding a different method of determining the complement of credibility. The appeal panel requested and received submissions from the insurance companies and from counsel for the Board. It considered the Practice and Procedural Guidelines (the "Guidelines") enacted by the Board which addressed when new evidence may be introduced on appeal. In a preliminary decision dated December 24, 2007, it refused to allow the introduction of that new evidence.

[7] Allstate's appeal then proceeded to a hearing. By a decision dated September 4, 2008, the appeal panel of the Board held that the rates Allstate proposed for private passenger automobiles are not just and reasonable in the circumstances and ordered an overall rate reduction of 6.2 percent. Allstate appeals that decision and order of the Board to this court.

Issues

[8] Allstate grouped and restated the grounds of appeal as follows:

(a) Failure to allow its introduction of new evidence on appeal

(b) Breaches of procedural fairness and/or natural justice

(c) Failure to approve just and reasonable rates proposed by it.

The first and third of these grounds contain more than one issue, and I will address these in my decision.

Standard of Review

[9] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. No. 190, the Supreme Court of Canada set out the proper approach to judicial review of administrative decision-makers. Justice Fichaud provided a useful summary of that

decision in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74. He stated:

> [38] The Supreme Court issued *Dunsmuir v. New Brunswick*, 2008 SCC 9 after the judge's decision here. Justices Bastarache and LeBel, for five justices, stated the following principles governing the administrative SOR.
>
> [39] Correctness and reasonableness are now the only standards of review (¶ 34). The court engages in "standard of review analysis", without the "pragmatic and functional" label (¶ 63).
>
> [40] The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (¶ 49).
>
> [41] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (¶ 62, 54, 57).
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> [42] If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (¶ 55):
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> > (a) Does a privative clause give statutory direction indicating deference?
> >
> > (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (¶ 64).
> >
> > (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (¶ 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of

> general legal principles within the specific statutory context of the tribunal's statutory regime (¶ 55-56, 58-60).

[10] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, the Supreme Court of Canada clarified the principles in *Dunsmuir* and, in particular, the deference courts are to exercise in reviewing decisions of administrative tribunals. Justice Binnie, for the majority of the Court, stated:

> [4] *Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review. ...
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> ...
>
> [25] ... *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54).
>
> [26] *Dunsmuir* stands against the idea that in the absence of express statutory language or necessary implication, a reviewing court is "to apply a correctness standard as it does in the regular appellate context" ...

[11] Before addressing the standard of review for the first and third grounds of appeal, I will consider the second ground, namely whether the Board erred by breaching procedural fairness or natural justice. The standard of review analysis set out in *Dunsmuir* is typically not applied where such breaches are alleged. In

these cases, the decision of the administrative tribunal is not entitled to any deference. As explained in *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, [2005] N.S.J. No. 32:

> [24] Issues of procedural fairness do not involve any deferential standard of review ...
>
> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

[12] I then return to the determination of the standard of review for the first and third grounds of appeal, which are subject to the two-step analysis set out in *Dunsmuir*. The first step calls for the determination of whether the existing jurisprudence has satisfactorily determined the degree of deference required for a particular issue. According to Allstate, in the 2006 Allstate Decision this court decided the standard of review with respect to the Board generally, and specifically in relation to the issues raised in this appeal. I must consider whether that decision governs the standard of review for this appeal.

[13] In its 2006 Allstate Decision, the majority of this court stated:

> [26] The Board's task, in considering applications for approval of a risk classification system or rates, is one which is highly technical and complex. The guidelines governing the filing of applications require the presentation of an enormous amount of detail on matters unfamiliar, I daresay, to almost everyone except actuaries and insurers. ...
>
> [29] Given the nature of the material before the Board on applications for approval of rate classification systems or rates, I am of the view that, with respect to issues involving matters such as actuarial methodologies and calculations, the Board has much greater expertise than the court. Its determinations with regard to those issues are entitled to considerable deference.
>
> ...

> [31] The issue in this appeal pertains to the application of s. 155I (1) of the Act which provides that the Board is to consider whether any proposed risk classification system or rates are "just and reasonable in the circumstances." If it determines that they are not, the Board shall refuse approval.
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> [32] The Board submits that whether the Board erred in refusing the appellant's applications is a question of mixed fact and law, the determination of which is heavily weighted in the determination of facts. With respect, I am unable to agree. The Board's characterization does not capture the issue on this appeal. In my view, the issue raises basic questions about the role and functions of the Board in reviewing applications for rate classification systems and rates, pursuant to the Act. It is a matter of statutory interpretation, which includes aspects as to the test which is to be applied and the onus. These are questions of law, and questions for which the court has greater expertise than the Board.
>
> [33] Different issues may attract different standards of review. Having taking (sic) into account the contextual factors integral to the pragmatic and functional approach, I am of the opinion that the standard of review on this issue, namely, whether the Board erred in law in refusing to approve an application for risk classification system or rates, is that of correctness. I observe, without deciding, that had the issues concerned actuarial methodologies or calculations, the standard of review to be applied may have given the Board considerably more deference.

[14] In my respectful view, the 2006 Allstate Decision cannot be relied upon as having established the standard of review for all appeals which pertain to applications pertaining to applications for proposed insurance rates and risk-classification systems pursuant to the *Act*. I observe that that decision pre-dates *Dunsmuir* in which the Supreme Court of Canada re-examined the law of judicial review from decisions of administrative tribunals, determined that there should only be two standards of review, and set out the two-step standard of review analysis. Of course, it also predates *Khosa* which emphasized the deference to which administrative tribunals are entitled from the courts.

[15] Moreover, as stated in the 2006 Allstate Decision at ¶ 33, different issues may attract different standards of review. *Khosa* at ¶ 4 underscores the focus on the nature of the issue that was before the administrative tribunal under review. As will be seen, I do not agree that all the issues on this appeal are identical to those before the court in the 2006 Allstate Decision. Accordingly, it is necessary to conduct the standard of review analysis set out in *Dunsmuir*.

[16] The first factor to consider is whether the *Act*, the Board's enabling legislation, directs deference by way of a privative clause. Since any finding of fact by the Board on a question of fact within its jurisdiction is binding and conclusive (s. 16W), the Board is entitled to deference on questions of fact. However, the *Act* provides that an appeal may be brought to this court on any question as to the Board's jurisdiction or upon any question of law (s. 16Z).

[17] The next factor to examine is the Board's purpose according to the *Act*. As stated in the 2006 Allstate Decision at ¶ 20 - 24, the *Act* regulates matters relating to insurance in Nova Scotia and includes provisions intended to protect consumers from unfair rate increases in the future. The Board was given all necessary powers to review applications for automobile insurance risk-classification systems and rates. In accordance with the *Act*, it can approve or refuse to approve the application or may vary the proposed system or rates. It is evident that the *Act* is a public interest statute which contains a discrete administrative regime.

[18] The next factor to consider is any institutional expertise that the Board may possess. As set out in the 2006 Allstate Decision as quoted in ¶ 13 above, applications for approval of rate classification systems or rates contain specialized and detailed information pertaining to matters such as actuarial methodologies and calculations with which the Board has much greater expertise than the court. For questions pertaining to those matters, the Board is entitled to considerable deference.

[19] The final factor is the nature of the issue under review. In addressing the standard of review for the first and then the third grounds of appeal, it is helpful to here examine the issue that was considered in the 2006 Allstate Decision upon which Allstate relies.

[20] In the 2006 Allstate Decision, the issue pertained to s. 115I of the *Act* which sets out when the Board <u>shall</u> refuse approval. A majority of this court found that the Board had erred in law by preferring the actuarial reports of its own experts over those of the insurers. By doing so, it failed to meet the statutory requirements upon which a refusal must be founded and failed to make the critical determination stipulated by the legislation that the rates proposed by the insurers were not "just and reasonable in the circumstances." The appropriate standard of review for that

issue, which was determinative of the ultimate merits of the appeal, was correctness.

[21] Here the first ground of appeal is whether the Board erred by failing to allow it to introduce new evidence at the appeal of the initial panel's decision. It raises two issues, namely (a) whether the Board erred by applying the wrong legal test regarding the admission of new evidence, and (b) whether it erred by declining to permit Allstate to introduce new evidence. This ground pertains to a discretionary decision made by the Board on a preliminary and procedural matter.

[22] Evidentiary matters such as questions pertaining to the admissibility of evidence are generally considered to be matters of procedure. In MacAulay & Sprague , *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004 *Practice*), the authors state:

> "Evidence" is considered, on the whole, to be a matter of procedure. It is an aspect of how one enforces or goes about bringing into effect one's rights rather than being a substantive right itself.
>
> ... administrative decision-makers are masters of their own procedure. They do not have to do things the way a court would do them. Subject to the dictates of statute law and natural justice, an agency has the authority to determine its own procedure ... (Page 17-3)

[23] Allstate recognizes that, pursuant to s. 16 of the *Act*, the Board has the discretion to govern its procedures and is authorized to enact the Guidelines which address when new evidence may be introduced on appeal. It is undisputed that the Board's ruling on the admissibility of new evidence was a preliminary ruling, one which did not go to the merits of the appeal relating to whether the proposed rates were just and reasonable in the circumstances. In *Certain Ratepayers of Chester (District) v. Chester (District)*, 2000 NSCA 19, [2000] N.S.J. No. 29, this court stated in regard to the Utility and Review Board which decided not to order a plebiscite when it had the discretion to do so:

> **[16]** It enjoys a discretionary jurisdiction to manage its process subject to the governing statutes so as to ensure a full and fair hearing on the ultimate issue. In interlocutory matters such as this, that do not determine the outcome of the main proceeding, this court should follow the non-interventionist approach which governs in civil appeals. This was expressed by Justice Chipman in *Saulnier v.*

> *Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425 (N.S.C.A.) As follows, at p. 427:
>
> > "The principles which govern us on an appeal from a discretionary order are well-settled. We will not interfere with such an order unless wrong principles of law have been applied or a patent injustice would result. The burden of proof upon the appellant is heavy. *Exco Corporation Limited v. Nova Scotia Savings and loan et al.* (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at p. 333, and *Nova Scotia (Attorney General) v. Morgentaler* (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57."

[24] Pursuant to the Guidelines enacted by the Board, Allstate sought to admit new evidence pertaining to actuarial methodologies, material with which the Board is more familiar than the courts. The Board was required to interpret and apply its own Guidelines, and also to determine whether or not to exercise its discretion to allow the introduction of that evidence. The admissibility of evidence at one of its hearings is not a legal issue outside the Board's specialized expertise or a question of jurisdiction or *vires* which would attract a correctness standard. It is an issue of discretion or policy, or mixed question of fact and law, from which the legal issue cannot be readily extracted.

[25] A similar issue arose in *Nova Scotia (Assessment) v. Wolfson*, 2008 NSCA 120, 273 N.S.R. (2d) 152. There, this court decided that reasonableness was the appropriate standard of review in determining whether the Utility and Review Board, in a ruling preliminary to an assessment appeal, improperly exercised its discretion to direct disclosure under its rules of practice.

[26] Having considered the factors in the standard of review analysis and, in particular, the nature of the question, I conclude that the appropriate standard of review to be applied to the issue of whether the Board erred in refusing to allow the introduction of new evidence is reasonableness. In *Dunsmuir*, reasonableness was defined thus:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular 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. 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.

[27] I then consider the nature of the question in the third ground of appeal, namely, whether the Board erred by failing to approve just and reasonable rates as proposed by Allstate by not applying the correct legal test. This ground raises two issues, namely (a) whether the Board failed to apply the correct test to determine whether the proposed rates are just and reasonable in the circumstances, and (b) whether it made an unreasonable decision. The second issue is a mixed question of fact and law, where the legal issue cannot readily be separated. The appropriate standard of review is reasonableness.

[28] The first issue under this third ground of appeal pertains to the correct legal test. This is a question of law which attracts the correctness standard. In *Dunsmuir*, correctness was described as follows:

> [50] ...When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Analysis

Failure to Allow New Evidence on Appeal

[29] I begin by examining the Board's authority to accept new evidence on appeal and the sources of that authority. The *Act* states:

> 16P The Board may receive in evidence any statement, document, information or matter that, in the opinion of the Board, may assist it to deal with the matter before the Board whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in a court of law. [Emphasis added]

[30] Pursuant to s. 16I of the *Act* which authorizes it to "make rules respecting practice and procedure in relation to matters coming before it", the Board enacted the Guidelines. Their preamble states:

> These are Guidelines for practice before the Nova Scotia Insurance Review Board (the Board) and may be varied by the Board at any time if considered appropriate.

[31] The Guidelines themselves provide as follows:

> 2(1) The Board may give such directions on the procedure to govern the conduct of any proceeding as it deems fit having regard to the principles of fairness and natural justice and its statutory jurisdiction.
>
> (2) The Board may, in its absolute discretion, dispense with or vary these Guidelines when it considers it appropriate to do so, having regard to the circumstances of any proceeding.

[32] Guideline 23(2) states:

> 23(2) (a) The Appeal shall, subject to paragraph (b) below, be an appeal on the record and not a re-hearing of evidence already presented at the original application, not a hearing *de novo*.
>
> (b)(i) Where the Notice of Appeal includes grounds specified in paragraphs (ii) or (iii) of Guideline 23(1)(b), the Board shall determine as a preliminary matter whether it will hear evidence of new or previously unavailable facts. [Emphasis added]

[33] Allstate's and Pembridge's Notices of Appeal set out grounds which required a preliminary hearing. Guideline 23(1)(b) sets out when new evidence may be introduced on appeal:

> 23(1) An appeal pursuant to s.155(J) of the Insurance Act shall be effected by filing with the Board and serving upon any other party to the original application a Notice of Appeal which shall contain:
>
> ...
>
> (b) the grounds upon which the applicant considers the decision to be incorrect, including:

> (i) any error of law or of jurisdiction,
>
> (ii) changed circumstances or new facts that have arisen since the close of the original proceeding; or
>
> (iii) facts that were not placed in evidence in the original proceeding and that were then not discoverable by reasonable diligence; ...

[34] In its decision on the insurance companies' request for permission to introduce new evidence, the Board stated:

> [15] The Board has issued Practice and Procedural Guidelines for assistance to both the Board and applicants for rate approval applications. The Guidelines are just that - not inviolable rules - and specify that they may be varied by the Board at any time or dispensed with when, in the Board's opinion, the circumstances are appropriate.

[35] After setting out Guideline 23 and summarizing the submissions of Allstate and of the Board's counsel, the Board concluded that it would not be appropriate in the circumstances of the case before it to admit the evidence sought to be introduced. It reasoned:

> [28] In this Appeal, the Companies seek to tender new evidence that does not meet the requirements of the Guidelines' §23(1)(b) and (c) and §23(2).
>
> [29] The Hearing which produced the decisions appealed from was a complete re-hearing and the Companies were at liberty to submit all of the evidence that they now seek to introduce on appeal. All of it was available at the time of the re-hearing in February 2007, but the Companies chose to proceed on the record. When they did so, they had full knowledge of the precedent effect of the PAFCO appeal decision which had been rendered eight months earlier.
>
> [30] The Board is not persuaded that any changed circumstances have occurred since February 2007, nor are there any facts sought to be introduced which were not discoverable by reasonable diligence at the time of the Hearing.
>
> ...

> [34] In conclusion, this Panel is not persuaded that in the circumstances of this case it should depart from the usual requirements of the Practice and Procedural Guidelines and in particular, paragraph 23 and accordingly, it is not prepared to accept the additional evidence proposed to be submitted which accompanied the Companies' letter of August 1, 2007.

[36] Allstate does not deny that the evidence it wanted the Board to consider, and the PAFCO decision referred to in this extract, were available before the initial hearing or that there were no changed circumstances. It submits that the proposed new evidence was relevant and that the Board should have received it in order to determine whether the rates are just and reasonable.

[37] To give Allstate's submission the appropriate context, I will briefly explain what evidence was in issue. Applications for approval of a risk-classification system or rates are often accompanied by a massive amount of information, including actuarial support or justification for the system and rates sought. One of the factors in setting a rate is the complement of credibility for which there is more than one approach. At the 2007 initial hearing, where it had presented the very same information that had been put forward at its 2005 hearing, Allstate had relied upon a complement of credibility known as the "projected prior loss ratio." It sought to introduce at the appeal board hearing indicators using a different complement of credibility known as the industry standard method ("ISM"). Allstate's ultimate intention was to argue that the ISM approach was preferable to that used by the Board's actuaries.

[38] According to Allstate, the Board erred in strictly applying the Guidelines. It submits that the general power pursuant to s. 16I to make rules regarding practice and procedure is limited by the more specific power in s. 16P that allows the Board to receive in evidence anything that "may assist" the Board in dealing with the matter. In its view, the Board improperly fettered its discretion by failing to determine whether the new evidence Allstate sought to be introduced would "assist" the Board.

[39] With respect, Allstate's position is without merit. It is supported neither by the record nor by the wording of the relevant provisions of the *Act*.

[40] I begin by considering the argument that the Guidelines were used as a fetter on the Board's discretion to allow new evidence. Sara Blake, *Administrative Law*

in Canada, 4th ed. (Markham, Ont.: Lexus Nexus Canada, 2006) at p. 95 - Tab 31, explains at p. 97-98:

> Discretion, once conferred, may not be restricted or fettered in scope. Many tribunals issue guidelines indicating the considerations by which they will be guided in the exercise of their discretion or explaining how they interpret a particular statutory provision. The publication of policies and guidelines is a helpful practice. ...
>
> However, care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal may not fetter its discretion by treating the guidelines as binding rules and refusing to consider other valid and relevant criteria. "The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it". [citing *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 358]

[41] It is obvious from ¶ 15 of the Board's decision that it did not consider itself tightly constrained by the Guidelines. Rather, it expressly recognized that the Guidelines were not "inviolable rules" and that it could vary or dispense with them whenever it considered appropriate.

[42] I also reject Allstate's submission that the Board applied the wrong test. Section 16P provides that the Board may admit into evidence anything that "in the opinion of the Board, may assist it to deal with the matter" before it. According to Allstate, this is an overarching requirement and the Board erred by refusing to admit the evidence sought which Allstate says was critical to its rate application. However, the wording of s. 16P makes it clear the Board is given full discretion as to what it chooses to admit as evidence. Here, after considering the submissions of Allstate and its counsel, the Guidelines and the particular circumstance before it, the Board exercised its discretion and decided not to receive the material proposed by Allstate.

[43] In my view, the Board's preliminary ruling on the admissibility of evidence satisfies the reasonableness standard of review. Its decision-making process included justification, transparency and intelligibility and its refusal to allow the

introduction of new evidence fell within a range of possible, acceptable outcomes. I would dismiss this ground of appeal.

Procedural Fairness and/or Natural Justice

[44] Allstate submits that the Board breached the principles of procedural fairness and/or natural justice:

(a) by failing to apply the *audi alteram partem* rule, and

(b) by failing to apply its procedural rules fairly between the two parties.

Its position that it had not waived its natural justice rights was uncontested.

[45] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at ¶ 23-28, Justice L'Heureux-Dubé stated that the heart of any analysis dealing with participatory rights required by the duty of fairness is a question of "whether the parties had a meaningful opportunity to present their case fully and fairly." After reviewing the record and considering the submissions of the parties, it is my opinion that Allstate had such an opportunity.

[46] I first consider Allstate's submission that, at the hearing of its appeal, the Board failed to adhere to the *audi alteram partem* rule by refusing to hear Allstate's evidence on various factors which could affect the Board's determination as to whether its proposed rates were just and reasonable. The record shows that prior to the hearing, counsel for Allstate and for the Board exchanged correspondence regarding matters relating to submissions, and regarding the presence and questioning of Allstate's actuaries and of Mr. Ted Zubulake, an actuary with Oliver, Wyman Limited (also referenced as "Mercer"), the actuarial consultant for the Board. The Board agreed that the Allstate actuaries could present their reports and respond to questions at the hearing, and refused to permit Allstate to question the Mercer actuary in advance of the hearing.

[47] At the hearing itself, the Allstate and Mercer actuaries jointly provided written material regarding methodology for the complement of credibility. Counsel for Allstate agreed that Mr. Zubulake would speak to this and that the Allstate actuaries would do so afterwards, if necessary. After Mr. Zubulake

completed his testimony under direct examination, Allstate's counsel proposed that the Board simply stipulate that Allstate and its actuaries agreed to the contents reviewed by the Mercer actuary. He chose not to cross-examine Mr. Zubulake, and although given an opportunity to make any argument in regard to that actuary's presentation, did not accept that invitation.

[48] In view of this record, I cannot accept that the Board breached the principles of fairness and natural justice by failing to apply the *audi alteram partem* rule and refusing to hear Allstate's side. Allstate was given an opportunity to cross-examine the Mercer actuary. Although its actuaries were present at the hearing, the record does not indicate that Allstate wanted to call them to give evidence or that the Board, which had already agreed the Allstate actuaries could present their reports at the hearing, would refuse any such request. If, as Allstate submits, the agreement between the parties was limited to allowing its actuaries to respond to the exhibit which Mr. Zubulake was reviewing for the Board, this argument is circular. It simply returns to the first ground of appeal, the Board's refusal to allow the introduction of new evidence, which was dismissed.

[49] Allstate's second issue under its ground of appeal relating to procedural fairness and natural justice argues that the Board erred by failing to apply its procedural rules fairly between the parties to the proceeding. The insurer says that the Board permitted its actuary to present new evidence on appeal concerning an alternative complement of credibility while preventing Allstate's actuary from introducing new evidence. In my view, Allstate's argument is not well founded. Mercer was merely the Board's expert. It was not a party to the proceeding and it did not play an adversarial role *vis a vis* Allstate. Furthermore, as has already been described, it does not appear that the procedure for providing information to the Board limited Allstate's ability to have its own actuaries provide their reports or respond to any questions.

[50] In summary, I reject the argument that Allstate was deprived of "a meaningful opportunity to present their case fully and fairly". I would dismiss this ground of appeal.

Failure to Approve Just and Reasonable Rates

[51] Allstate's submissions on this ground of appeal argue that the Board failed to apply the correct test for determining whether rates applied for are just and reasonable and that, in refusing to allow the rate requested, it made an unreasonable decision.

[52] The correct test to be applied on applications for approval of risk-classification systems or rates is clearly set out in the *Act*. An application for approval of a risk-classification system or rates is deemed to have been approved by the Board sixty days after it is filed, unless within that period, the Board advises the application that the Board has not approved the application (s. 155G). If it considers that the application falls within any of the statutory grounds for refusal of approval contained in s. 155I(a), (b), (c) or (d), after taking into consideration financial and other information and any other matters as set out in s. 155I(2), the Board must refuse to approve an application. Section 155I(a) stipulates that it must refuse if the proposed risk-classification system or rates are not "just and reasonable in the circumstances."

[53] In the 2006 Allstate Decision, the majority of this court decided that the Board erred by failing to make the determination that the proposed rates were not just and reasonable. Allstate submits that the Board here erred in the same way, by failing to show that its refusal of the proposed rate is based on the criteria set out in s. 155I. With respect, I cannot agree.

[54] In its decision, the Board stated that it reviewed the application together with all the documents identified in its decision and which were part of the record. It identified the issue before it, namely whether the rates Allstate proposed were just and reasonable in the circumstances and complied with the *Act* and its regulations. It did not, as submitted by Allstate, rely solely on the actuarial approach recommended by the Board's actuary to reach its imposed rate. Rather the Board observed that there were different approaches in a number of matters. It provided a detailed analysis which reviewed considerations such as credibility standards and complement of credibility, rate group draft, the imprecision of rate making, business considerations and administrative cost, and allocation of rate reduction, and explained its findings. After considering these factors, the Board made the critical determination that the proposed rate change of zero put forward by Allstate was not just and reasonable in the circumstances. In my view, the Board did not

err by failing to apply the correct test in refusing to approve the insurer's rate application.

[55] Nor can I agree with Allstate's submission that the Board's decision as a whole failed to meet the reasonableness standard of review. Allstate argues that the decision failed to provide reasons, that it commented on the insurer's failure to make further representations or to present evidence on actuarial approaches when Allstate was prevented from doing so by the preliminary ruling against the introduction of new evidence, and that it failed to properly consider the imprecision in arriving at actuarial indications and the business considerations which led to Allstate's decision to seek no increase in its rates.

[56] Reasonableness is a deferential standard of review. As I have already described, the Board's decision raised the issues, reviewed the evidence, and set out its finding and the analysis upon which its findings were based. Its reasons were intelligible, and its conclusions fell within the range of possible and acceptable outcomes.

[57] The Board's decision satisfies the reasonableness standard of review. I would dismiss this ground of appeal.

Disposition

[58] I would dismiss the appeal. This being an appeal of a decision of an administrative tribunal, there will be no award of costs.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.