IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Atlantic Collection Agencies v. Service Nova Scotia
2006 NSSC 154

Date: 20060518
Docket: SH 250260
Registry: Halifax

Between:

Atlantic Collection Agency Limited

Appellant

v.

Service Nova Scotia Municipal Relations Business
Licensing & Registration Department

Respondent

DECISION

Judge: The Honourable Justice Arthur W. D. Pickup

Heard: April 11, 2006, in Halifax, Nova Scotia

Written Decision: May 18, 2006

Counsel: Steven Zatzman, for the appellant
Stephen McGrath, for the respondent

Pickup, J.:

[1] This is an appeal by Atlantic Collection Agency Limited from a decision of the Registrar of Business Licensing and Regulations, dated June 21, 2005, suspending the appellant's license and imposing several conditions for reinstatement. The appeal is taken pursuant to s.17(1) of the *Collection Agencies Act*, R.S.N.S. 1989, c.77, as amended.

[2] By Consent Order dated July 13, 2005 the suspension of the appellant's license was stayed pending a decision by this court respecting the appeal.

[3] The appellant filed a Notice of Appeal dated June 29, 2005 listing the following grounds of appeal:

1. That the Registrar breached the rules of natural justice in failing to provide a hearing in accordance therewith;

2. Failed to provide a fair hearing;

3. Failed to provide a statement of finding of facts upon which it relied to make its findings and its decision;

4. Made findings that were not correct;

5. Failed to provide the appellant with an opportunity to address the issue of penalty;

6. Failed to take into account the mitigating actions of the appellant;

7. Gave an excessive and unduly harsh penalty.

[4] The appellant requests that the decision of the Registrar of Business Licensing and Regulations be quashed or, in the alternative, varied and the penalty set aside.

[5] Affidavits have been filed by Wayne Purdy and Kelly Purdy on behalf of the appellant and Jo-Anne Hamilton, an employee of Service Nova Scotia and Municipal Relations, on behalf of the respondent.

RELEVANT LEGISLATION

[6] The Registrar has authority to cancel or suspend a collection agency's license under s. 15(1) of the *Collection Agencies Act*:

> 15(1) The Registrar may suspend or cancel a license where he is satisfied that the licensee
>
> (a) has violated any provision of this *Act* or the regulations or has failed to comply with any of the terms, conditions or restrictions to which his license is subject;
>
> (b) has made a material mis-statement in the application for his license or in any of the information or material submitted by him to the Registrar pursuant to Section 6;

> (c) is guilty of misrepresentation, fraud, or dishonesty, false or misleading advertising; or
>
> (d) has demonstrated his incompetency, unfitness, or untrustworthiness to carry on the business in respect of which his license was granted.

[7] Section 17(1) permits an appeal from the Registrar's decision:

> 17(1) A person who is dissatisfied with a decision of the Registrar under this *Act* may, within thirty days from the date of the decision, appeal to a judge of the county court who may upon hearing the appeal, which shall be heard in accordance with the *Summary Proceeding Act*, by order do any one or more of the following things:
>
> (a) dismiss the appeal;
>
> (b) allow the appeal;
>
> (c) allow the appeal subject to terms and conditions;
>
> (d) vary the decision appealed against;
>
> (e) refer the matter back to the Registrar for further consideration and decision;
>
> (f) award costs of the appeal;
>
> (g) make such other order as to him seems just.

BACKGROUND

[8] The appellant is a collection agency that carries on business in Nova Scotia, New Brunswick and Prince Edward Island.

[9] In 2001 an inspection of the appellant's records and books of accounts, pursuant to the *Collection Agencies Act,* raised a number of questions

respecting the appellant's compliance with the provisions of the *Act* and its regulations. In particular, the inspection revealed irregularities in the handling of trust accounts, such as not depositing trust funds when so required by the *Act.*

[10] The appellant admitted to irregularities and contraventions of the *Act* and regulations and agreed to make changes to its operations in order to comply with the legislation. The appellant's president, Wayne Purdy, signed an assurance of voluntary compliance dated September 6, 2001. This document provided that any further contraventions of the *Act* or regulations could result in disciplinary action by the Registrar.

[11] In April of 2004 the Registrar received a complaint about the appellant's conduct from Linden Landscapes and Construction Inc. This complaint was investigated and a report provided to the appellant on or about November 1, 2004. The appellant denied any wrong doing and a hearing was scheduled to allow it to address Linden's complaint. The notification of the hearing

date was by letter of January 4, 2005, which specifically referred to s. 15 of the *Act*:

> "Further to our letters of November 1 and December 3, 2004, **prior to the Registrar making a decision under Section 15 of the *Collection Agencies Act* with respect to the status of the collection agency license held by Atlantic Collection Agencies Limited**, a hearing has been scheduled to provide you an opportunity to address the findings of Mr. Greg Mitchell as indicated in his report. A copy of Mr. Mitchell's report was previously forwarded to your attention.

[12] Before the hearing the Registrar's office received another complaint about the appellant's conduct. This complaint was made by a lawyer on behalf of Mr. Earl Hickey. The appellant was advised about this additional complaint and informed that a further investigation would be undertaken. Mr. Purdy, the company president, was advised that the results of the investigation respecting the Hickey complaint would be dealt with at the hearing scheduled for the Linden matter. A copy of the investigative report concerning the Hickey matter was provided to the appellant prior to the hearing.

[13] According to the evidence of Jo-Ann Hamilton, an employee of Service Nova Scotia and Municipal Relations who is responsible for day-to-day administration of matters arising under the *Collection Agencies Act*, in January 2005 she received a telephone call from Mr. Zatzman, the appellant's counsel,

who asked about the format of the hearing. She told him that questions would be asked of his client and that "they would be free to address the findings of Mr. Mitchell's reports and to provide any information that they felt should be considered prior to my decision being made". Ms. Hamilton's evidence is that Mr. Zatzman did not express any concern about these procedures or request any different procedure during that conversation.

[14] At the hearing on February 16, 2005, the applicant was represented by counsel. Wayne Purdy attended, as did Kelly Purdy, who was involved as a collector on the Linden and Hickey matters. According to Mr. Purdy, the meeting was relatively informal. No recording of the proceedings was made. The issue of the assurance of voluntary compliance agreement signed in 2001 was raised, suggesting that some of the matters relating to the present complaints were the same as the matters dealt with in that agreement. The appellant explained its position and the steps taken to correct oversights and certain requests for further information were given respecting the Linden matter. These were subsequently supplied by the appellant. Atlantic's representatives were asked questions about the complaints made by Linden and Earl Hickey. It was noted by Jo-Anne Hamilton that some of the matters relating to the complaints by Linden

and Hickey were the same as matters that were addressed in 2001. She indicated that at the end of the hearing the appellants representatives were asked whether there was anything else that they wanted to add that they thought would be relevant to the Registrar's decision.

[15] On June 21, 2005 the Registrar issued a decision suspending the appellant's license and imposing conditions for reinstatement. It is from this decision that the appellant appeals.

ISSUES

The issues are as follows:

1. **Whether the Registrar breached the rules of natural justice by failing to provide a fair and proper hearing.**

2. **Whether the Registrar failed to state the facts on which he relied to make his findings and his decision.**

3. **Whether the Registrar's findings were correct.**

4. **Whether the Registrar, after finding that the appellant had breached certain provisions of the *Collection Agencies Act*, failed to provide the appellant with an opportunity to address the issue of penalty.**

5. Whether the Registrar failed to take into account the mitigating actions of the appellant and gave an excessive and unduly harsh penalty.

DECISION

1. Whether the Registrar breached the rules of natural justice by failing to provide a fair and proper hearing.

[16] The appellant argues that the Registrar failed to act fairly and observe the rules of natural justice in the decision to suspend its license. The appellant states that the suspension or cancellation of a collection agency license is a decision that carries serious consequences and requires the Registrar to "act judicially and observe the rules of natural justice".

[17] The appellant states that the hearing was an informal meeting conducted around a boardroom table. No evidence was given under oath, no cross-examination took place and no record of the proceeding was kept. Simply put, the appellant claims that the meeting was more in the nature of an investigation by the Registrar than a hearing.

[18] The respondent concedes that this case involves an administrative decision affecting the interests of the appellant and, as such, is subject to a duty of procedural fairness. The question to be determined is whether the Registrar breached this duty of procedural fairness by the manner in which the hearing was conducted. As the parties agree that a duty of fairness exists, the question is what requirements would fulfil that duty in these circumstances, and whether these requirements have been breached.

[19] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (paras. 21 and 22) the Supreme Court of Canada noted that where a duty of fairness exists the requirements of that duty will vary with the circumstances:

> **The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682, ‘the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness**: Knight at pp. 682-83; Cardinal, supra, at p. 654; Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170 (S.C.C.), per Spoinka J.,
>
> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that

> administrative decisions are made using a fair and open procedure, appropriate to the decisions being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[20] In *Baker, supra* the Supreme Court of Canada identified several factors that are relevant to determining what is required by the common law duty of procedural fairness. These factors can be summarized as follows:

1. The nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme;
3. the importance of the decision to the individual or individuals affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the agency itself.

[21] I will now analyze these factors in the context of the situation before me to determine whether there has been a breach of the duty of procedural fairness by failing to provide a fair and proper hearing.

1. **<u>THE NATURE OF THE DECISION</u>**

[22] The closer the administrative process in question resembles a judicial process, the more likely it is that procedural protections closer to a trial model will be required by the duty of fairness. A review of the *Collection Agencies Act* and its regulations suggests a regulatory process that ensures that those carrying on the business of collection agencies follow appropriate practices as set out in the legislation. The purpose of this process is to safeguard the public interest. There is nothing in the legislation that would, in my view, suggest a judicial model. Under s.15(1) the Registrar has authority to suspend or cancel a license. There is no reference to any right to be heard for the appellant. The remedy for a person who is dissatisfied with the Registrar's decision is an appeal to this court under Section 17(1) of the *Act*.

2. **STATUTORY SCHEME**

[23] This aspect of the analysis considers the role of the particular decision within the statutory scheme. There is no requirement under s.15 of the *Collection Agencies Act* for a hearing to be held by the Registrar as a pre-requisite to making a decision. The decision-making authority is exercised by the Registrar, an administrative official whose main duty is to oversee the conduct

of collection agencies. If a complaint is filed with the Registrar an investigation is undertaken and, if merited, administrative action is taken.

3. **<u>IMPORTANCE OF THE DECISION TO THE INDIVIDUAL OR INDIVIDUALS AFFECTED</u>**

[24] A suspension of a collection agency's license by the Registrar has severe consequences. The agency would be unable to carry on its business, with a consequent loss of profit and employment.

4. **<u>THE LEGITIMATE EXPECTATION OF A PERSON CHALLENGING THE DECISION</u>**

[25] If the person challenging a decision has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. As I have indicated, there is no requirement for a hearing in the *Collection Agencies Act*. A hearing was held and counsel for the appellant did not raise any objection or concern about the stated procedures for the hearing, nor was there a request for any changes to the procedure. Legal counsel was present for the hearing, and prior to the hearing had inquired as to the process.

It was only after the decision was reached by the Registrar that the appellant objected to the manner in which the hearing was conducted.

5. **THE CHOICES OF PROCEDURE MADE BY THE AGENCY ITSELF**

[26] Although there was no statutory requirement for a hearing in the present case, one was held, albeit in an informal manner. The appellant attended with counsel, and had been provided with copies of the investigative reports relating to the two specific complaints against it. There does not appear to be any dispute that the appellant was able to bring forth its position on these investigations and reports.

[27] The question is whether, on these facts, there has been a breach of the rules of natural justice.

[28] The respondent's position is that, while the appellant did not receive a judicial hearing in the normal sense, with direct examination, cross-examination and the

like, it did receive a hearing that was fair and open and in which the appellant had an opportunity to put forward its views and evidence fully.

[29] The appellant argues that the meeting was more in the nature of an investigation by the Registrar than a hearing, with no evidence given under oath, no cross-examination and no record of the proceeding kept.

[30] It was noted in *Baker, supra* at para. 22:

> I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made **using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.**

[31] I am satisfied that the appellant was given a full and fair opportunity to present its case appropriate to the decision being made and the statutory scheme set up under the *Collection Agencies Act*.

[32] The appellant's counsel consulted on the procedure to be followed and the appellant was provided with all of the investigative reports respecting the two complaints that were dealt with at the hearing. The appellant was a party to the voluntary assurance agreement signed in 2001. The correspondence of January 24, 2005 clearly set out the applicability of Section 15 of the *Act.*

[33] The appellant had an opportunity to address the complaints and the contents of the investigative reports. The appellant complains specifically that the hearing was informal, evidence was not given under oath, no cross-examination was permitted and no record of the proceedings were kept.

[34] Despite the informality of the meeting, the appellant had a full and fair opportunity to present its case, as I outlined earlier. While evidence was not given under oath, I cannot conclude that this suggests procedural unfairness, nor does the inability to cross-examine witnesses necessarily lead to unfairness in an administrative process such as this one. The appellant was represented by counsel and counsel did not request to cross-examine witnesses, nor request that witnesses be sworn. There was no hearing mandated under the *Collection*

Agencies Act. Moreover, the evidence is that appellant's counsel did not object to the procedure until the decision of the Registrar was issued.

[35] Finally the appellant has raised the issue of there being no record of the proceeding. There is no evidence to suggest that such a record was kept and, in fact, I am satisfied that there is no requirement to do so.

[36] What the appellant suggests is that because there has not been a judicial hearing in trial format it has not had a meaningful opportunity to present its case fully and fairly. With respect, I disagree.

[37] The appellant has quoted a number of authorities. In *Theriault v. Nova Scotia Marketing Board and Nova Scotia Egg and Pullet Producers Marketing Board* (1981) 48 N.S.R. (2d) 116 (S.C.T.D.), Hallett, J. stated, at paragraph 32:

> The author [S.A. de Smith, *Judicial Review of Administrative Action*, 3d edn.] makes reference to the fact that where interest in preserving one's livelihood is involved, for example, with respect to licenses, this is the sort of interest which procedural protection of a hearing may be accorded by the courts; the more severe the penalty, the more likely it is that the courts will require that the party be given an opportunity to be heard.

[38] In *Theriault* there was a specific statutory right to a hearing before the Natural Products Marketing Board before any license could be suspended. The individual involved had not been given an opportunity to be heard before his license was suspended. In the present case there was no statutory requirement for a hearing, although one was afforded to the appellant.

[39] I am not persuaded that the Registrar has breached its duty of procedural fairness as the appellant alleges. The decision to suspend the license was made only after hearing the appellant respecting the investigative reports, with which it had been provided. There is no suggestion that the appellant was not able to put forward its position. The appellant had legal counsel present throughout the proceeding.

2. Whether the Registrar failed to state the facts on which he relied to make his findings and his decision.

[40] The Appellant states that there is a requirement for an administrative tribunal to give reasons for its decision and to provide a statement of facts on which it relied in reaching that decision. The respondent disagrees with the claim that there is a generally recognized requirement for tribunals to give reasons, and quite rightly points out that all of the cases cited by the appellant contain a statutory requirement to provide reasons. There is no requirement for a written decision under the *Collection Agencies Act* or its regulations.

[41] The Appellant states that the Registrar's conclusions were based on generalized information that was not supported in the decision. The appellant refers to a portion of the Registrar's decision as follows:

> I am satisfied that the licencee has, in some cases repeatedly, violated a number of provisions of the legislation and, further, has continued to conduct business in violation of the Assurance of Voluntary Compliance commitment made in relation to previous similar contraventions.

[42] According to the Appellant, the Registrar failed to provide the background facts upon which he relied to make his findings.

[43] Although there is no requirement in the Legislation for a written decision, since one has been issued a review of its sufficiency is appropriate. The appellants argument is that there is no recitation in the decision of which provisions of the *Collection Agencies Act* and regulations were violated. With respect, I am not satisfied that the appellant can succeed on this ground. Before the hearing the appellant was provided with the background investigative reports that were prepared after the Hickey and Linden complaints were investigated. These reports identify the sections of the *Collection Agencies Act* that the Registrar later concluded were violated by the appellant.

[44] As to the Assurance of Voluntary Compliance agreement, the appellant entered into this agreement in 2001 and obviously would be aware of its contents.

[45] The Registrar's decision was sufficient given the regulatory nature of the proceedings. The decision referred to the reports prepared by Gregory D. Mitchell, the investigator, and to the information provided by the appellant and its counsel. After the reference to this documentation there were a number of findings, and a reference to Section 15(1) of the *Collection Agencies Act.*

[46] I am satisfied that the Registrar's reasons for decision are sufficient. The appellant cannot succeed on this ground.

3. <u>Whether the Registrar's findings were correct.</u>

[47] On this issue, the appellant assumes that the Registrar must be correct in its determinations. The appellant suggests that the Registrar's decision does not have a factual basis and therefore should be quashed. This question requires an analysis of the standard of review applicable on an appeal of the Registrar's decision that the appellant breached the statute. The appellant argues that the proper standard is correctness; the respondent argues for review on a standard of reasonableness.

[48] The Supreme Court of Canada has confirmed that the standard of review is to be determined by applying the "pragmatic and functional approach". Courts must consider four categories of factors when determining the appropriate standard of review for a statutory appeal or a judicial review:

a. The presence or absence of a privative clause or statutory right of appeal;

b. The expertise of the tribunal relative to that of the reviewing court on the issue in question;

c. The purpose of the legislation and the provision in particular; and

d. The nature of the question - is it a question of law, fact, or mixed law and fact?

[49] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226, the Supreme Court of Canada stated that the purpose of the "pragmatic and functional" approach is to discern the appropriate standard of review to be applied to the particular issue in question. Depending on the courts determination of the four factors there are three possible standards of review. In *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board),* 2005 N.S.C.A. 141 the pragmatic and functional approach was summarized by Justice Fichaud as follows:

> [21] Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this the court selects, for each issue, a standard of review of correctness, reasonableness or patent unreasonableness. *Dr. Q*, at paragraphs 26-35; *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, at paragraph 27; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paragraphs 55-62.

[50] The appellant's position is that the standard of review is correctness. The respondent suggests reasonableness *simpliciter*. I will review the factors to determine the appropriate standard of review.

A. <u>The presence or absence of a privative clause or statutory right of appeal.</u>

[51] There is no privative clause in the *Collection Agencies Act.* There is, however, a broad right of appeal under Section 17. The powers of the court as set forth in section 17 are close to a *trial de novo*, in that the court has authority to dismiss the appeal, allow the appeal, allow the appeal subject to terms and conditions, vary the appeal or make such other order as it deems just. In addition to the broad powers in s. 17(1), under s.17(3) this court can hear further evidence, suggesting little deference to the tribunal's decision.

B. The Expertise of the Tribunal Relative to that of the Reviewing Court on the Issue in Question.

[52] The Nova Scotia Court of Appeal recently stated, in *Johnson v. Nova Scotia,* 2005 N.S.C.A. 99:

> [40] The second contextual factor concerns the relative expertise of the Board as compared to that of the reviewing court. Greater deference is required only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of the greater expertise: see Moreau-Berube c. Nouveau-Brunswick, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.) at s. 50 and Q. [Q.v. College of Physicians & Surgeons (British Columbia), 2003 CarswellBC 713 (S.C.C.)], supra at s. 28.

[53] The Registrar is appointed by the Governor in Council. The respondent notes that the Registrar, in addition to his duties under the *Collection Agencies Act*, is the Director of Consumer Services appointed under the *Consumer Services Act*. The Registrar administers several acts including the *Collection Agencies Act, The Consumer Protection Act,* the *Real Estate Brokers Licensing Act*, etc. The respondent suggests that the Registrar's responsibilities across different statutes would lead to some degree of specialization concerning consumer protection, policies and practices, and therefore some deference should be given to these decisions.

[54] With respect, after a review of the relevant provisions of the *Collection Agencies Act*, I cannot accept that there is any degree of specialized knowledge attributable to the Registrar.

[55] In Brown and Evans' *Judicial Review of Administrative Action in Canada*, in their chapter on review for correctness the authors state at p. 14-73:

> ...where the issue in dispute falls within the tribunal's expertise, or the "field sensitivity" it has acquired by regular contact with that type of problem, a court will often conclude that judicial intervention should occur only when the administrative decision is "unreasonable." Conversely, where the agency's expertise is not regarded as more relevant than that of an independent generalist court, the court will usually conclude that it can review the tribunal's interpretation for correctness...

[56] The respondent suggests that the Registrar's responsibilities under different statutes suggest that "some degree of specialization in consumer protection policies and practices would be developed and applied to decisions". I am not satisfied that this constitutes superior expertise to that of the court on the specific question of the violation of the *Collection Agencies Act*. Expertise would seem more likely to be found where a decision-maker's duties are more narrowly defined. It seems that having broad responsibilities for the

supervision of several statutes would militate against a finding that an administrative decision-maker has greater expertise than the court.

[57] The Registrar is not a specialized decision-maker but is an official of the respondent with a broader mandate, for whom the supervision of the Act is one duty among many.

[58] In *Johnson, supra* the Nova Scotia Court of Appeal considered the expertise of members of the Utility and Review Board:

> [41] According to the *URB Act* (s.5(1)), Board members are appointed by the Governor in Council. There are no statutorily prescribed expert qualifications, such as specialized knowledge in any field, for membership on the Board. It consists of eight full-time members, each holding office on good behaviour until age 65 (s.5(3)), and eight or fewer part-time members. Expertise may be recognized where an administrative body is charged with developing policies: see ***Deputy Minister of National Revenue v. Mattel Canada Inc.,*** [2001] 2 S.C.R. 100 (S.C.C.) at s. 28 and 31. Neither the ***URB Act*** nor the ***Act*** gives the Board any such role. However, unlike an administrative body appointed on an ad hoc basis, a degree of permanence attaches to Board membership. It is likely then that the Board (or a member who constitutes the Board) would accumulate expertise from repeated examination of the types of materials and evidence presented in expropriation matters and from repeated application of the ***Act***.

[59] Here, unlike a specialized tribunal such as the Utility and Review Board, the registrar does not deal with a significant number of complaints under the

Collection Agencies Act. A review of the legislation suggests that the administration of the *Collection Agencies Act* is but one of many functions the Registrar carries out. As Director of Consumer Services, the Registrar has a responsibility for consumer protection under several statutes, yet there is no particular qualification for this appointment and no indication that the Registrar's expertise is any greater than that of the reviewing court. I am not satisfied that the responsibility for administering the *Collection Agencies Act*, in itself, confers any particular expertise on the Registrar.

C. **The Purpose of the Legislation and the Provision**

[60] The analysis under the third factor considers the purpose of the *Act* as a whole and the provision in particular. Decisions of the Registrar are regulatory in nature and are intended to safeguard the public interest in consumer related matters and, therefore, some deference should be shown.

[61] In *Johnson, supra* the Nova Scotia Court of Appeal provided insight into the third prong of the pragmatic and functional approach in the context of a statutory appeal from the Utility and Review Board:

> [42] The third contextual factor that a reviewing court is to take into account is the purpose of the *Act* as a whole and the provision in particular. In *Dr. Q., supra*, at s. 31, McLachlin, C.J. for the court stated that **greater deference is demanded where a statute's purpose requires an administrative body "to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations."** The *Act* states that its intent and purpose is that every person whose land is expropriated shall be compensated for that taking (s.2). While there is an element of public policy in its determinations, the work of the Board pursuant to that legislation concerns the resolution of disputes between two parties, namely an owner of land whose property is taken and an expropriating authority. Accordingly the statutory purpose of the *Act* does not mitigate in favour of greater deference. [Emphasis added].

[62] Here, the Registrar is concerned with the protection of the public and has statutory authority under s.15(1) of the *Collection Agencies Act* to suspend or cancel a license under certain specified conditions. Given that the statute's purpose requires the Registrar to make an administrative decision and is concerned with the protection of the public, this consideration would support a degree of deference.

D. <u>The Nature of the Question</u>

[63] The final factor requires the Court to characterize the question addressed in the decision as a one of law, fact, or mixed law and fact. The closer an issue

becomes to being one of pure law, the less deference the decision-maker should receive.

[64] In my view, this factor is affected by the broad appeal powers provided under the *Act*. Normally the Registrar, as the original decision-maker, would enjoy the advantage of having heard the evidence. Here, there is provision for the reviewing judge to hear additional evidence, so this advantage is minimized; as a result, I conclude that this consideration does not warrant a higher level of deference in these circumstances.

STANDARD OF REVIEW

[65] After considering the above factors, I am satisfied that the standard of review should be correctness.

[66] In *Granite Environmental Inc. v. Nova Scotia Labour Relations Board, supra*, Justice Fichaud summarized the Supreme Court of Canada's comments in *Law Society of New Brunswick v. Ryan, supra,* as to the difference in the application

of the standards of correctness, reasonableness and patent unreasonableness by a reviewing judge:

> [43] For purposes of the analysis, I summarize *Ryan* as follows:
>
> **(a) Under correctness, the reviewing judge follows her own reasoning path. If the judge's conclusion differs materially from the conclusion of the tribunal, then the tribunal is incorrect.**
>
> (b) Under reasonableness and patent unreasonableness, the reviewing judge does not follow her own reasoning path. She does not ask whether her view is correct, reasonable or preferred. She follows the tribunal's reasoning path. She does not ask whether the tribunal's decision is correct or preferred. She asks whether there is any line of reasoning to support the tribunal's conclusion. If the answer is "yes", then the decision is upheld, even if there are other reasonably supportable conclusions which the reviewing judge prefers.
>
> **(c) This difference between correctness and the two reasonableness standards is especially important when reviewing a tribunal's decision under a statute, such as the *Trade Union Act* here, which authorizes the tribunal to balance competing interests and interpret and apply legislative policies. Then there often may be more than one conclusion with reasonable support. Under the two reasonableness standards any one of these is upheld. Under the correctness standard, a court upholds only its preferred conclusion.**
>
> (d) The difference between reasonableness and patent unreasonableness is the degree of probing which the reviewing court is entitled to undertake or, conversely, the obviousness of the defect. Under a reasonableness approach the reviewing court is entitled to undertake a somewhat probing analysis with significant searching and testing before asking whether the tribunal's conclusion has rational support. Under a patent unreasonableness standard, the court, once it has grasped the dimensions of the problem facing the tribunal - a process that may well require some considerable reading and thinking - may do no more than look for a clear, evident and patent defect apparent on the face of the tribunal's reasons. A patently unreasonable error does not sprout from a subtle distinction. [Emphasis added]

[67] The Registrar's findings are based on circumstances detailed in investigation reports that were available to all parties and referred to in the decision. According to the record, most if not all of the infractions of the *Collection Agencies Act* were admitted by the appellant. The various sections of the *Act* which were violated are set out in the investigative reports that were considered in the Registrar's decision.

[68] I am not persuaded by the Appellant's arguments that the Registrar's decision is incorrect.

4. Whether the Registrar, after finding that the appellant had breached certain provisions of the *Collection Agencies Act*, failed to provide the appellant with an opportunity to subsequently address the issue of penalty.

[69] The appellant states that the written decision does not address the basis for the penalty nor the evidence upon which the penalty was based. Further, the appellant states that the Registrar failed to take into account the mitigating actions of the appellant to correct the matters which had arisen, the cooperation of the appellant in the investigations and the fact that the two complaints involved a company, the appellant, which did several thousand collections per year.

[70] The hearing was set up to afford the appellant an opportunity to address the findings of investigation reports concerning the two complaints. In correspondence with the respondent the Registrar specifically referred to s.15 of the *Act*, making clear that the Registrar would be making a decision with respect to the appellant's license.

[71] The appellant had legal counsel at the hearing. I am satisfied that the purpose of the proceeding was communicated to the appellant and that the appellant should have been aware that the purpose of the hearing was to determine whether the license should be suspended or cancelled. Consistent with this fact is that the appellant's representatives, at the hearing, suggested that the Registrar should take into account the actions that it had taken to mitigate the admitted infraction of the legislation. These comments suggest that the appellant was alive to the issue of penalty.

[72] As I indicated earlier, in her affidavit, Ms. Hamilton indicates that the appellant's representatives, at the end of the hearing, were asked whether there

was anything they wanted to add that the thought would be relevant to the Registrar's decision.

[73] I am not satisfied that the appellant can succeed on this ground of appeal.

5. Whether the Registrar failed to take into account the mitigating actions of the appellant and gave an excessive and unduly harsh penalty.

[74] The appellant argues that suspending its license for a period of four months was an excessive and unduly harsh penalty. The effect, argues the appellant is that the company must cease operations. The appellant argues that this fact was not taken into account by the Registrar.

[75] The issue of penalty will be reviewed on the basis of correctness, for the reasons set out in the analysis of standard of review above.

[76] Under s.15 of the *Collection Agencies Act* the Registrar could:

1. Suspend the appellant's license;
2. Cancel the appellant's license.

[77] There are no options under the legislation except cancellation or suspension of a license. Quite apart from the legislation, another option would be for the Registrar to "do nothing" which would, in my view, defeat the purpose of the Registrar's role in overseeing the protection of the public in relation to the operation of collection agencies in Nova Scotia.

[78] The Registrar has chosen to suspend, not cancel, the appellant's license. The Registrar clearly considered the difficulties it had with the appellant in 2001, which culminated in the signing of an Assurance of Voluntary Compliance agreement. I am satisfied that it was appropriate for the Registrar to take into account the previous conduct of the appellant. Clearly the legislation is designed to protect the public. There were difficulties experienced with the appellant in 2001 and by signing a voluntary agreement the appellant agreed that further contraventions could result in suspension or cancellation of its license. The two further complaints that are the basis of the present matter were considered in addition to the previous infractions. I do not find the penalty unduly harsh and excessive under the circumstances. In fact, the suspension is the lesser sanction; the Registrar could have cancelled the appellant's license. A license holder under the *Collection Agencies Act* must act within the

legislation and regulations. If the legislation is breached then it is appropriate that either a suspension or cancellation of license follow. I am not persuaded that the Registrar's decision on penalty is incorrect.

[79] I do have difficulty with the operational directives that were appended to the decision.

[80] The Registrar required the appellant during the suspension of its license to comply with the following operational directives:

> 1. Any money currently in the trust account of ACAL's is to be remitted to the creditors by the 20th of July 2005;
>
> 2. ACAL shall perform no collection activities nor may it perform the solicitation of additional or new business during the suspension period;
>
> 3. The company shall not negotiate any post-dated cheques during the suspension period;
>
> 4. The company must notify all creditors with whom they have contact for the collection of debts of the suspension within two weeks of the suspension date and provide the Registrar with a copy of all notification letters forwarded to creditors in this regard;
>
> 5. ACAL is to endorse and forward any post-dated cheques payable during the suspension period to the appropriate creditors and shall not collect commission for any monies so forwarded.

[81] The effect of operational directives 3 and 5 is that the appellant is not to receive a commission for collections carried out prior to the suspension period and for which post-dated cheques have been obtained and are to be negotiated during the suspension period. These post-dated cheques would reflect work carried out prior to the suspension period for which the appellant is entitled to a commission. It seems unfair to impose this condition on the appellant, because the collection activity was carried out before the suspension period. Further, as the appellant argues, it is almost akin to a fine as the effect of these directives are to deprive the appellant of revenue that it validly should earn. I direct that operational directives 3 and 5 be re-worked by the Registrar so that commissions earned outside the suspension period are payable. I leave it to the Registrar to devise a method for the negotiation of these cheques. I do not agree with the stated position of the Registrar that to negotiate a post-dated cheque during the suspension period is to carry out a collection activity while suspended.

[82] The appeal is dismissed except that the operational directives attached to the decision shall be amended by the Registrar to allow for post-dated cheques to

be negotiated which represent commissions earned prior to the suspension period.

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Justice Arthur W. D. Pickup