
Citation : *Estabrooks v. New-Brunswick (Director of Consumer Affairs)*, 2016 NBFCST 11

PROVINCE OF NEW-BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *REAL ESTATE AGENTS ACT*, S.N.B. 2011, c. 215

Date: 2016-11-01
Docket: CA-001-2016

BETWEEN :

Larry Nicholas Estabrooks,

Applicant,

- and -

Director of Consumer Affairs,

Respondent.

REASONS FOR DECISION ON MOTION

PANEL: John M. Hanson, Q.C., Panel Chair
Raoul Boudreau, Panel Member
Gerry Legere, Panel Member

DATE OF HEARING: September 30, 2016

WRITTEN REASONS: November 1, 2016

APPEARANCES: Brian Maude for the Director of Consumer Affairs;
Larry Estabrooks, in his own capacity, appearing by telephone.

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I. INTRODUCTION

- [1] Mr. Estabrooks appeals the decision of the Director of Consumer Affairs [Director] refusing his renewal application for his real estate agents licence.
- [2] This motion is a challenge by the Director to the manner in which the Financial and Consumer Services Tribunal [the Tribunal] has historically conducted appeals of decisions of regulators under financial and consumer services legislation. While the motion is restrained to appeals filed under the *Real Estate Agents Act*, S.N.B. 2011, c. 215 [*Real Estate Agents Act*], it will have ramifications for appeals heard by the Tribunal under other financial and consumer services legislation.
- [3] The Director contends that the appeal to the Tribunal under subsection 10(6) of the *Real Estate Agents Act* should be conducted as a true appeal with a reasonableness standard of review. The Director's position is based on the following arguments:
- The only statutory language dealing with an appeal of a decision of the Director to the Tribunal is subsection 10(6) under the *Real Estate Agents Act*.
 - There is no statutory language providing for the procedure on an appeal under the *Real Estate Agents Act*.
 - Faced with a statutory provision providing for an "appeal", a decision should not be reviewed on a trial *de novo* basis but rather on a judicial review standard.
 - The caselaw is clear that in Canada that clear statutory language is required for an appeal to proceed by means of a hearing *de novo*.
 - Paragraph 2(1) of Local Rule 15-501 *Proceedings before the Tribunal* [Tribunal's procedural rules] requires that the Rule be construed to secure the most expeditious and less expensive determination of every proceeding on its merits and a *de novo* hearing for an appeal is not consistent with proceeding in the most expeditious and less expensive manner.
- [4] Mr. Estabrooks on the other hand contends that this appeal should be conducted as a hearing *de novo* as he did not have a hearing before the Director. He indicates that the Record is lacking certain documents. He expects to be able to present all his documents at the hearing of the appeal. He would like natural justice and the opportunity to be heard and present evidence.
- [5] On September 23, 2016, the Registrar advised the parties that we wanted them to consider seven additional decisions at the hearing of the motion:
- a) *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93;
 - b) *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080;
 - c) *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331;
 - d) *Kikino Métis Settlement v Métis Settlements Appeal Tribunal*, 2013 ABCA 151;

e) *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38;

f) *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, 2002 BCCA 473; and

g) *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55.

[6] For the reasons that follow, we conclude that this appeal should proceed as a hybrid appeal and that the decision of the Director will be reviewed for correctness.

II. PRELIMINARY ISSUE

[7] There was one preliminary issue to consider on this motion. It was whether we would accept Mr. Estabrooks' September 29, 2016 e-mail to the Registrar of the Tribunal setting out his submissions and evidence on this motion as it was filed out of time. We decided to include Mr. Estabrooks' e-mail into the record of this motion for the reasons set out below.

[8] Mr. Estabrooks had until September 23, 2016 to file his pre-hearing submissions and evidence opposing this motion pursuant to paragraphs 6(6) and 14(1) of the Tribunal's procedural rules, which read:

6(6) Response - A Party served with a Notice of Hearing of Motion, who intends to provide evidence in reply, must serve on the person making the motion and on all other Parties an affidavit(s) in response, at least five (5) days before the day on which the motion is to be heard.

[...]

14(1) Pre-hearing submission - All Parties to a hearing may file and serve upon all other Parties a concise pre-hearing submission containing the relevant facts and applicable law and argument in support of a Party's position. A pre-hearing submission must be filed no later than five (5) days before the scheduled date of the hearing.

[9] In addition to being filed outside the prescribed time limits, Mr. Estabrooks' evidence in his September 29, 2016 e-mail was not presented by way of Affidavit evidence as required by paragraph 6(6) of the Tribunal's procedural rules.

[10] At the hearing of the motion, Mr. Estabrooks indicated that he was asking us to waive the time limits for providing his pre-hearing submissions and evidence.

[11] Mr. Maude, counsel for the Director, indicated at the hearing that he did not oppose this request.

[12] Paragraph 2(2) of the Tribunal's procedural rules provides a panel the authority to vary any requirement of the rule, including time limits. It states:

2(2) Variation of rule – The purpose of this Rule is to provide certainty and consistency in the administration of Proceedings. However, a Panel or single Panel member

assigned to a matter may waive or vary any provision of this Rule and may issue general or specific procedural directions at any time, if it is of the opinion that to do so would be in the public interest or would otherwise be advisable to secure the just and expeditious determination of the matters in issue.

[13] Given the Director's consent and our authority in paragraph 2(2) of the Tribunal's procedural rules, we decided to consider Mr. Estabrooks' September 29, 2016 e-mail on this motion.

III. ISSUES

[14] There are two issues on this motion:

- a) What type of appeal should be conducted pursuant to subsection 10(6) of the *Real Estate Agents Act*?
- b) What is the applicable standard of review?

IV. FACTS

[15] Mr. Estabrooks was licensed as a real estate agent under the *Real Estate Agents Act* until May 31, 2016. He submitted his annual renewal application in late May 2016.

[16] In a decision dated July 12, 2016, the Director refused to renew Mr. Estabrooks' agent's licence.

[17] On July 29, 2016, Mr. Estabrooks filed a Request for Hearing with the Tribunal, thus commencing an appeal of the Director's decision pursuant to subsection 10(6) of the *Real Estate Agents Act*.

[18] On August 9, 2016, the Director provided Mr. Estabrooks with the Record of decision-making process [Record], as required by the Tribunal's procedural rules and Practice Direction No. 7 - *Procedure for an Appeal* [Practice Direction No. 7]

[19] Mr. Estabrooks filed the Record with the Tribunal on September 7, 2016, as required by the Tribunal's procedural rules and Practice Direction No. 7.

[20] In correspondence dated September 7, 2016, the Registrar of the Tribunal informed the parties that the next step in the proceeding would be scheduling the hearing. In order to assist the parties in determining how many days would be required for the hearing of the appeal, the Registrar informed the parties that:

- The appeal would be conducted as a hearing *de novo* at which the parties could testify, call witnesses, and present evidence in addition to that contained in the Record;
- The parties should consider subsection 14(2) of Local Rule 15-501 which deals with the possibility of filing an Agreed Statement of Facts;
- Subsection 8(4) of Local Rule 15-501 requires the parties, at least 10 days before the scheduled hearing date to provide every other party and the Registrar with a list of the witnesses the party intends to call together with a summary of the evidence that the witness

is expected to give. Subsection 8(5) dictates the content of the witness summary and subsection 8(6) sets out the consequences for failure to provide witness information;

- Subsection 8(2) of Local Rule 15-501 indicates that a party wishing to summon a witness must provide the Registrar with a completed Form 15-501F1 *Summons to Witness*. The Summons will be executed by the Registrar and returned to the party for service upon the witness. Subsection 8(3) sets out the conduct money payable to witnesses and subsection 8(3.1) deals with witness expenses. Form 15-501F1 *Summons to Witness* could be found on the Tribunal's website;
- Subsections 8(7) and 8(8) of Local Rule 15-501 deal with expert witnesses and expert reports as well as the timelines for production of an expert's report;
- Pursuant to subsection 16(3) and 16(4) of Local Rule 15-501, Tribunal hearings are open to the public and media. Closing a hearing to the public and/or media requires an application for confidentiality under subsection 16(2) of Local Rule 15-501.

[21] On September 16, 2016, counsel for the Director filed a motion seeking an order that the appeal proceed as a true appeal as opposed to a hearing *de novo* with the applicable standard of review.

V. LEGISLATIVE SCHEME

[22] Before turning to our analysis, we set out the legislative scheme. This includes the relevant provisions of the *Real Estate Agents Act*, the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30 [*FCSC Act*], the Tribunal's procedural rules and Practice Direction No. 7.

[23] The relevant provisions of the *Real Estate Agents Act* are reproduced below:

Issuance, refusal, suspension, cancellation and expiry of licence

10(1) On receipt of an application for a licence and on payment of the prescribed fee, if the Director is satisfied that the applicant is suitable to be licensed and that the issuing of the proposed licence is not objectionable for any reason, the Director may issue to the applicant a licence authorizing the holder during the term of the licence to carry on the business of an agent or act as a manager or salesperson within the Province, but if, after due investigation made by the Director, the Director is, for any reason, of the opinion that the applicant should not be granted a licence, the Director may refuse a licence to the applicant.

10(1.1) The Director may at any time restrict a licence by imposing any terms and conditions that he or she considers appropriate on the licence.

10(1.2) A licensee shall comply with the terms and conditions imposed by the Director on the licence.

10(1.3) The Director shall not refuse an application for a licence or impose terms and conditions on the licence without giving the applicant or licensee an opportunity to be heard.

10(2) The Director may suspend or cancel a licence if he or she is of the opinion it is in the public interest to do so.

10(2.1) The Director shall not suspend or cancel a licence without giving the licensee an opportunity to be heard.

10(5) No person whose licence has been cancelled because of the person's misconduct shall be entitled to apply for a new licence for one year after the cancellation.

10(6) A person dissatisfied with a decision of the Director under this section may appeal the decision to the Tribunal.

Reference by Director to Association 2013, c.31, s.33

33(1) Before deciding whether to grant or refuse an application for a licence of an agent, a manager or a salesperson, or to suspend or cancel an existing licence, or to reinstate a suspended or cancelled licence, the Director may refer any matter to the Association for its recommendation.

33(2) When a matter is referred to the Association under subsection (1), the Association may, and if requested by the Director or by a person affected shall, hold a hearing into the matter at which the person affected has a right to be heard and may be represented by counsel.

33(3) The Association may appoint a hearing committee of not less than three members of the Association to conduct a hearing under this section, and, for the purpose of conducting a hearing, the Association or the committee may exercise the powers of commissioners under the Inquiries Act.

33(4) The Association shall submit to the Director a report on its activities in relation to a matter referred to it under this section, together with its recommendation as to the granting, refusal, suspension, cancellation or reinstatement of the licence.

34 In addition to any other powers and duties given to it under this Act or the regulations, the Association may, and on request of the Director shall, advise the Director in relation to the Director's powers under this Act.

[24] The *Financial and Consumer Services Commission Act* is the Tribunal's enabling legislation. The most relevant provisions of the *FCSC Act* are reproduced here:

Definitions

1 The following definitions apply in this Act.

"hearing" includes a review or an appeal.

"financial and consumer services legislation" means

- (a) this Act,
- (b) the *Auctioneers Licence Act*,
- (c) the *Collection Agencies Act*,
- (d) the *Commissioners for Taking Affidavits Act*,
- (e) the *Consumer Product Warranty and Liability Act*,
- (f) the *Co-operative Associations Act*,
- (g) the *Cost of Credit Disclosure Act*,
- (h) the *Credit Unions Act*,
- (i) the *Direct Sellers Act*,
- (j) the *Franchises Act*,
- (k) the *Gift Cards Act*,
- (l) the *Insurance Act*,
- (m) the *Loan and Trust Companies Act*,
- (m.1) the *Mortgage Brokers Act*,
- (n) the *Nursing Homes Pension Plans Act*,
- (o) the *Pension Benefits Act*,
- (p) the *Pre-arranged Funeral Services Act*,
- (q) the *Real Estate Agents Act*,
- (r) the *Securities Act*,
- (s) the *Securities Transfer Act*,
- (t) any other Act designated by regulation, and
- (u) any regulation or rule made under the Acts referred to in paragraphs (a) to (t);

“regulated sector” means a sector or industry regulated under financial and consumer services legislation.

Independence

30 In the performance of its adjudicative functions, the Tribunal is independent of the Commission.

Members of the Tribunal

31(1) The members of the Tribunal, including the chair, shall be appointed by the Lieutenant-Governor in Council for a term not exceeding five years and, subject to subsections (2) and (3), may be reappointed.

Chair of the Tribunal

32 The chair of the Tribunal shall

- (a) be a barrister and solicitor who
 - (i) has been a member in good standing of a law society in Canada for at least ten years immediately preceding the date of appointment, and
 - (ii) is a member in good standing of the Law Society of New Brunswick, and
- (b) have knowledge of administrative law.

Powers and duties of the Tribunal

37(1) The Tribunal may exercise any powers imposed on the Tribunal under financial and consumer services legislation.

37(2) The Tribunal shall perform any duties imposed on the Tribunal under financial and consumer services legislation.

Power regarding hearings

38(1) With respect to the following matters, when the Tribunal holds a hearing under financial and consumer services legislation, the Tribunal has the same power that the Court of Queen's Bench has for the trial of civil actions:

(a) summoning and enforcing the attendance of witnesses;

(b) compelling witnesses to give evidence under oath or in any other manner; and

(c) compelling witnesses to produce books, records, documents and things or classes of books, records, documents and things.

38(5) The Tribunal may decide all questions of fact or law arising in the course of a hearing.

38(6) The Tribunal may receive in evidence any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it, regardless of whether the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law.

38(7) A hearing shall be commenced and conducted in accordance with any rules of the Commission made under paragraph 59(3)(a).

Procedures for hearings

77 The rules made under subsection 200(1)(qqq.3) of the Securities Act, as those rules existed immediately before the commencement of this section, apply, with the necessary modifications, to a hearing held by the Tribunal until a rule is made under paragraph 59(3)(a).

[25] The Tribunal's procedural rules also contain provisions dealing with an appeal of a decision to the Tribunal. The relevant provisions are:

1(1) Definitions – In this Rule

"Appeal Proceeding" means a Proceeding relating to the appeal of a decision of the Superintendent of Insurance, the Superintendent of Pensions, the Superintendent of Credit Unions, the Superintendent of Loan and Trust Companies, the Inspector of Co-operative Associations or the Director of Consumer Affairs appointed under the

Financial and Consumer Services Commission Act;

“Proceeding” means the entire process of a hearing, review, or appeal conducted before a Panel pursuant to the Financial and Consumer Services Commission Act or Financial and Consumer Services Legislation;

1(2) Application - This Rule applies to all Proceedings before a Panel where the Tribunal is required under Financial and Consumer Services Legislation or otherwise by law to hold a hearing, hear an appeal, review a decision, approve an agreement or provide a Party with an opportunity to be heard.

2(1) Construction – This Rule should be construed to secure the most expeditious and least expensive determination of every Proceeding on its merits.

2(4) Practice directions - The Registrar may, from time to time, issue Practice Directions with respect to the application of this Rule. The Registrar shall publish the Practice Directions on the Tribunal’s website.

PART 11

REVIEW OR APPEAL PROCEEDINGS

NOTE: The procedure for an appeal of a decision of the Superintendent of Insurance, the Superintendent of Pensions, the Superintendent of Credit Unions, the Superintendent of Loan and Trust Companies, the Inspector of Co-operative Associations or the Director of Consumer Affairs, is set out in Practice Direction No. 7 – Procedure for an Appeal, which can be obtained from the Registrar’s office or the Tribunal’s website: <http://fcbtribunal.ca>.

- [26] The Registrar of the Tribunal issued Practice Direction No. 7 which essentially takes the content of Part 11 of the Tribunal’s procedural rules and makes it applicable to an appeal. The relevant portions of Practice Direction No. 7 are:

Local Rule 15-501: *Proceedings Before a Panel of the Tribunal* was drafted prior to the July 1, 2013 creation of the Financial and Consumer Services Tribunal. The Rule does not set out the procedure for an appeal of a decision of the Superintendent of Insurance, the Superintendent of Pensions, the Superintendent of Credit Unions, the Superintendent of Loan and Trust Companies, the Inspector of Co-operative Associations or the Director of Consumer Affairs.

Section 77 of the *Financial and Consumer Services Commission Act*, indicates that Rule 15-501 applies, with necessary modifications, to Tribunal proceedings. Part 11 of the Rule deals with Review proceedings.

This Practice Direction sets out the necessary modifications to Part 11 of the Rule to make it applicable to appeals of decisions.

Part 11 of the Rule should be read as follows for appeals:

11(1) Requesting an appeal – A person wishing to appeal a decision of the Superintendent of Insurance, the Superintendent of Pensions, the Superintendent of Credit Unions, the Superintendent of Loan and Trust Companies, the Inspector of Co-operative Associations or the Director of Consumer Affairs to the Tribunal, must file and serve a Request for Hearing within the time period set out in the statute establishing the right to appeal, or within 30 days of the decision if no time period is provided in the statute.

11(2) Content of Request for Hearing – A Request for Hearing shall contain:

- (a) the Applicant's name, address, telephone number, fax number and e-mail address;
- (b) the name, address, telephone number, fax number and e-mail address of the Applicant's legal counsel;
- (c) particulars of the decision in respect of which the appeal is being brought;
- (d) particulars of how the Applicant is directly affected by the decision;
- (e) the alleged errors in the decision and the reason(s) for requesting the appeal;
- (f) the relief sought; and
- (g) particulars of the official language in which the Applicant wishes to be heard.

11(4) Record of the decision-making process – Upon receipt of a copy of the filed Request for Hearing, the Applicant shall obtain from the Superintendent of Insurance, the Superintendent of Pensions, the Superintendent of Credit Unions, the Superintendent of Loan and Trust Companies, the Inspector of Co-operative Associations or the Director of Consumer Affairs, as the case may be, a record of the decision-making process relating to the decision that is the subject of the appeal, which shall include the following documents, unless all Parties consent to the omission of any of the documents from the record or the Panel otherwise directs:

- (a) the application or other Pleadings, if any, by which the decision-making process was commenced;
- (b) the notice of any hearing and the transcript, if any, of the oral evidence given at the hearing, if any;
- (c) any intermediate orders made in the decision-making process;
- (d) any documentary or other evidence considered in the decision-making process, subject to any limitation expressly imposed by any statute, regulations or guidelines on the extent to which or the purpose for which any such documents

may be used; and

(e) the decision that is being appealed together with any reasons.

11(5) Time for delivery of record – The Superintendent of Insurance, the Superintendent of Pensions, the Superintendent of Credit Unions, the Superintendent of Loan and Trust Companies, the Inspector of Co-operative Associations or the Director of Consumer Affairs, as the case may be, shall provide the Applicant with the record as specified in subsection 11(4) within 30 days from the date of request, or in the event such provision is impractical shall so advise the Applicant within 30 days and provide an estimate of when the provision of the record is likely to take place.

11(7) Setting of date for hearing – Upon the filing of the record and proof of service, the Registrar shall, in consultation with the Applicant and the other parties to the appeal, set a date for the hearing of the matter and issue a Notice of Hearing.

[27] The Registrar also issued Practice Direction No. 8 - *Content of the Record of the decision-making process* providing clarification on the content of the Record of the decision-making process required in a review or appeal. Practice Direction No. 8 states:

Paragraph 11(4)(d) of Local Rule 15-501 should be read to include all documentary or other evidence before the decision-maker during its decision-making process, subject to any limitation expressly imposed by any statute, regulations or guidelines on the extent to which or the purpose for which any such documents may be used.

VI. ANALYSIS

A. WHAT TYPE OF APPEAL SHOULD BE CONDUCTED?

[28] We are of the view that the hybrid appeal is the appeal model consistent with the purpose of the *Real Estate Agents Act* and the *FCSC Act*, the nature of the administrative bodies, the significant impact of the decision on individuals' rights and the expectations of the parties.

(1) The Caselaw

[29] We comment first on the decisions cited by the Director which deal with an appeal of a decision of an administrative decision-maker to a court. These are: *Grass Home Ltd. v. New Brunswick (Provincial Fire Marshall)* 2009 NBQB 259; *Yeager v. Canada (National Parole Board)*, 2008 FC 113; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al.*, 2011 MBCA 20; and *Cleary v. McAllister*, (1999), 213 NBR (2d) 156 (NBCA).

[30] We find these decisions are not applicable to this matter. The Tribunal is not a superior court, but rather a specialized administrative tribunal having an appellate function; this role is significantly different from that of an external reviewing court. Multiple courts have stated that the caselaw dealing with how to conduct an appeal of a decision of an administrative tribunal to a superior court is not applicable to the determination of how to conduct an appeal from the decision of an administrative decision-maker to an appellate administrative tribunal. [See *Paul v. British Columbia (Forest Appeals*

Commission), 2003 SCC 55 at par. 44[; *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*], 2002 BCCA 473 at para. 14.]

[31] We turn now to the decision of *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 [Newton] on which the Director relies for the proposition that absent clear express statutory language indicating that an appeal is to proceed as a hearing *de novo*, it must proceed as a true appeal. The Alberta Court of Appeal found that it would be “singularly inefficient” for an appellate administrative tribunal to conduct a hearing *de novo*.

[32] The Alberta Court of Appeal also stated that in determining what standard of review to apply to the decision of an administrative tribunal of first instance, an appellate administrative tribunal should generally examine the factors set out in the Supreme Court of Canada’s decisions in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, *Housen v. Nikolaisen*, 2002 SCC 33 [Housen] and *Dunsmuir v. New Brunswick*, 2008 SCC 9 [Dunsmuir]. The Alberta Court of Appeal set out these factors at paragraph 43 as:

(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;

(b) the nature of the question in issue;

(c) the interpretation of the statute as a whole;

(d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;

(e) the need to limit the number, length and cost of appeals;

(f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and

(g) other factors that are relevant in the particular context.

[33] The *Newton* decision has been heavily criticized in recent years. In *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331, the Court declined to follow the decision for several reasons. Amongst these reasons is the recognition of only the true appeal and the *de novo* hearing and the failure to recognize the third type of appeal being the hybrid appeal. The Court was also critical of the reasoning in *Newton* with respect to the standard of review to be applied by an appellate administrative tribunal, which it found inconsistent with subsequent pronouncements of the Supreme Court of Canada.

[34] In *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080 [Djossou], the Federal Court also refused to follow *Newton*. The Federal Court questioned the logic of an appellate administrative tribunal applying a standard of review when hearing an appeal of a lower administrative decision-maker. The Court states at paragraph 42: “But why would an appellate body adopt such an approach when it was created for the express purpose of hearing appeals – thus adding another level of adjudication – and when its decisions are themselves subject to judicial review?” Like the Court in *BC Society for the Prevention of Cruelty to Animals*, the Federal Court was also critical of the “exportation” into the administrative sphere of the standards of review that were developed by

traditional appellate courts.

- [35] In the most recent decision of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 [*Huruglica*], the Federal Court of Appeal also declined to follow *Newton* and reiterated at paragraph 47 that “[t]he principles which guided and shaped the role of courts on judicial review of decisions made by administrative decision-makers (as set out in *Dunsmuir* at paras. 27-33) have no application here.” The Federal Court of Appeal also indicated that it would be inappropriate to apply the notion of deference set out in the *Housen* decision to the administrative context as the high level of deference afforded by appellate courts to lower courts on questions of fact and mixed fact and law was mainly guided by judicial policy. The Federal Court of Appeal insisted that the role of our superior courts is to uphold the constitutional imperative of preserving the rule of law.
- [36] It is clear from the caselaw that the determination of the standard of review on the basis of either the *Dunsmuir* or *Housen* principles is not the correct approach on this motion.
- [37] So what is the correct approach to determining the type of appeal to conduct under the *Real Estate Agents Act*?
- [38] As often stated by the Supreme Court of Canada, the interpretation of a word or phrase in a statute should be ascertained by a consideration of its grammatical and ordinary sense, the overall context, the object of the statute and the intent of the Legislature. [*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 as cited in *Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al.*, 2011 MBCA 20 at paragraph 20.]
- [39] This approach was adopted in *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331, where the Court stated that the key to determining the type of appeal is the statute and that the words “may appeal” cannot be read in isolation from the rest of the statute.
- [40] *Djossou* adopts the same approach. The Federal Court states that the appellate administrative tribunal must answer the following question: What type of appeal are we speaking of? According to the Court, the answer to this question is determined from the legislative context, the nature of the bodies, and the impact of the decision on individuals’ rights.
- [41] The Court cautions at paragraph 47 that the lax use of the terms “appeal *de novo*”, “appeal” or “full appeal” adds to the confusion among parties and lawyers. The Court adds that it is not necessary that the statute specify that an appeal is heard *de novo* in order to have a hearing *de novo*.
- [42] The Court discusses the three usual types of appeals: true appeal, appeal *de novo*, and hybrid appeal. These three types of appeal are described as follows:

[46] There is general agreement that there are usually three types of appeal: true appeal (“*appel veritable*”); appeal *de novo*; and hybrid appeal. Frank Falzon provides the following overview:

3. There are three general types of appeals to specialized administrative tribunals. The most narrow is what *Dupras [v Mason]*, 1994 CanLII 2772 (BC CA) refers to as a true appeal, where the appeal is founded on the record

and where the appellant must demonstrate a reviewable error of law, fact or procedure. The broadest is what *Dupras* describes as an appeal *de novo*, where the original decision is ignored in all respects, except possibly for purposes of cross-examination. The third is a mixed model of appeal in which the appellant retains the onus of demonstrating error and the appeal board receives the record, but the appeal is not limited as to grounds, the appeal board reviews the decision below for correctness and fresh evidence may be adduced without constraint. These three broad models are conceptual starting points, and are subject to variation according to the specific intent of the governing legislation. *Appeals to Administrative Tribunals* (2005) 18 Can J Admin L & Prac 1 at pp. 34-35.

[43] In *Huruglica*, the Federal Court of Appeal reiterated the importance of applying the rule of statutory interpretation for determining the type of appeal because the legislator can design any type of multilevel administrative framework to fit any particular context. The Court explains that when the legislator designs a multilevel administrative framework, it is for the legislator to account for considerations such as budget and whether it is necessary to limit the number, length and cost of administrative appeals. The Court adds that these policy considerations are unique to the particular statute.

[44] We turn now to our interpretation of the words “may appeal” found in subsection 10(6) of the *Real Estate Agents Act* in the context of the purpose of the applicable statutes, the nature of the bodies, the impact of the decision on individuals’ rights and the expectation of the parties.

(2) The Purpose of the Legislation

[45] The purposes of the *Financial and Consumer Services Commission Act* are expressly stated in section 2 of the *Act* as follows:

Purposes of the Act

2 The purposes of the Act are to

(a) enable the Commission to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors, and

(b) enable the Commission to disseminate knowledge and promote understanding of the regulated sectors and develop and conduct educational programs.

[46] The parties did not provide any further guidance on the purpose of the *FCSC Act*, such as the Journal of Debates of the Legislative Assembly (Hansards).

[47] As for the purpose of the *Real Estate Agents Act*, it is not expressly stated. A review of the *Real Estate Agents Act* reveals that it contains provisions relating to:

- the licensing of real estate agents, salespersons and managers;
- the regulation of the real estate industry;
- the establishment of industry standards;
- educational requirements for agents, salespersons and managers in conjunction with the

General Regulation; and

- the provision of compliance, investigative and enforcement powers to ensure licensees abide by the regulatory requirements of the *Act* and in the event they do not, to sanction non-compliant behavior.

[48] These provisions have a common purpose: to protect the public interest and enhance public confidence in the real estate sector. Not surprisingly, this purpose comes squarely within one of the stated purposes of the *FCSC Act*.

(3) *The Nature of the Bodies*

[49] The Director and the Tribunal are bodies of a very different nature.

[50] The Director is the regulator of the real estate sector pursuant to the definition of “regulator” found in the *FCSC Act*. As such, the Director is responsible for the licensing of real estate agents, salespersons and managers. In determining whether to issue a licence, the Director must determine whether the applicant is “suitable to be licensed and that the issuing of the proposed licence is not objectionable for any reason” pursuant to subsection 10(1) of *Real Estate Agents Act*. In determining suitability for a licence, the Director can make inquiries and require the applicant to provide further information or material pursuant to subsection 11(2) and section 14 of the *Real Estate Agents Act*.

[51] The Director’s other duties under the *Real Estate Agents Act* include:

- Ordering an institution in which an agent’s trust account is held to refrain from paying out all or any part of the money in the account if an agent’s licence is suspended or cancelled [s. 20(2)];
- Directing the examination of the books, records and accounts of a person engaged in a real estate transaction [s. 26];
- Declaring a bond given under the *Act* forfeited in certain circumstances [s. 31(2)];
- Requiring the delivery of books, records and accounts required to be kept by an agent under the *Act* as well as any filings, reports or other communications made to any other regulatory authority [s. 43.1(7)];
- Prohibiting a licensee from using an advertisement which, in the opinion of the Director, contains a false, misleading or deception statement [s. 43.11(2)];
- Making a production order requiring a licensee, former licensee, or unlicensed person carrying out the regulated activity, of providing information or to produce books, records or accounts [s. 43.3].

[52] The issuing of licences and the other duties described above are regulatory in nature.

[53] On the other hand, the Director assumes adjudicative functions under the *Real Estate Agents Act* when she is required to provide an applicant or licensee an opportunity to be heard in the following circumstances:

- before imposing terms and conditions on a licence pursuant to subsection 10(1.1);
- before suspending or cancelling a licence pursuant to subsection 10(2);
- before refusing to grant a licence pursuant to subsection 10(1); or
- conducting a hearing to determine the rights of the parties in respect of a deposit pursuant to subsections 22(1) and 22(2).

[54] The Director also assumes adjudicative functions when conducting a hearing to determine the rights of parties in respect of a deposit pursuant to subsections 22(1) and 22(2) of the *Real Estate Agents Act*.

[55] In our view, the Director's expertise is in administering the *Real Estate Agents Act*. The Director does not have any particular expertise in adjudication as the vast majority of the Director's duties under the *Real Estate Agents Act* are not adjudicative in nature. In fact, when exercising adjudicative functions in regards to licensing matters, subsection 33(1) of the *Real Estate Agents Act* allows the Director to refer a matter to The New Brunswick Real Estate Association for its recommendation (and a potential hearing) before the Director decides to (1) grant or refuse an application; (2) suspend or cancel an existing licence; or (3) reinstate a suspended or cancelled licence.

[56] As for the Tribunal, its sole purpose is to adjudicate. The Tribunal is specialized in financial and consumer services legislation.

[57] The Tribunal hears first instance matters consisting primarily of enforcement proceedings under financial and consumer services legislation, including the *Real Estate Agents Act*. These first instance proceedings come squarely within the purpose of protecting the public interest and enhancing public interest in the regulated sectors.

[58] The Tribunal also has an appellate function when it hears appeals and reviews of decisions of regulators, including the Director.

[59] Before July 1, 2013, the Minister of Justice administered the *Real Estate Agents Act*. An appeal of a licensing decision of the Minister of Justice was directly to the Court of Queen's Bench pursuant to subsection 10(6) of the *Real Estate Agents Act*, as it then was. That subsection read:

10(6)A person dissatisfied with a decision of the Minister under this section may appeal the decision to a judge of The Court of Queen's Bench of New Brunswick.

[60] Since July 1, 2013, the newly created Financial and Consumer Services Commission administers the *Real Estate Agents Act* and the Director is the regulator of the real estate sector. The Tribunal was also created on July 1, 2013. The change in this legislative scheme also brought about an amendment to subsection 10(6) of the *Real Estate Agents Act* in that an appeal of a licensing decision of the Director is to the Tribunal.

[61] In *Djossou*, there had been important amendments to the appeal powers of the Refugee Appeal Division under the *Immigration and Refugee Protection Act*. The Refugee Appeal Division had

concluded that it should conduct a true appeal with a reasonableness standard of review. The Court questioned why an appellate administrative body would apply appellate standards of review applied by courts when it was created to hear appeals and its decisions were subject to judicial review. The Federal Court found the Refugee Appeal Division erred in its analysis of the standard of review as it failed to conduct an extensive analysis of its new role and the wording of the new statutory provisions brought about by the legislative amendments or the history of the legislative amendments.

[62] We agree with the logic in *Djossou*. In our view, the change in the appeal rights in subsection 10(6) of the *Real Estate Agents Act* did not simply change the place where “judicial review” is held. It did more than that.

[63] It appears the Legislature intended to impart greater legal expertise upon the Tribunal than upon the Commission’s regulators, including the Director, as evidenced by the following provisions of the *FCSC Act*:

- Section 30 of the *FCSC Act* states that “[i]n the performance of its adjudicative functions, the Tribunal is independent of the Commission”;
- Section 31 of the *FCSC Act* states that the members of the Tribunal are appointed by the Lieutenant-Governor in Council;
- Section 32 of the *FCSC Act* imparts legal expertise on the Tribunal by requiring that the chair of the Tribunal be a lawyer having knowledge of administrative law and a member in good standing of a law society in Canada for at least 10 years; and
- Subsection 39(1) of the *FCSC Act* requires that proceedings before the Tribunal be heard by two or more Tribunal members.

[64] We find that when the Tribunal hears an appeal of a regulator’s decision, where an individual’s ability to work in their chosen field is at stake, it assumes the additional role of providing independent legal oversight of a regulator’s decisions. In our view, by adding a level of specialized adjudication to the administrative scheme, the Legislature intended to confer a different appeal role upon the Tribunal than upon the Court. We believe the intent was to create a right to appeal to an independent body having expertise in financial and consumer services legislation. The Tribunal’s role consists of providing increased oversight of the Director’s decision-making by ensuring its’ decisions are correct and ensuring procedural fairness. In our view, this suggests a more fulsome type of analysis than a true appeal.

(4) Impact of the Decision on Individual’s Rights and Expectation of the Parties

[65] A decision of the Director to refuse to renew, cancel or suspend a licence has a very significant impact on an individual’s rights. An individual’s licence is a means of earning an income and ensuring his or her basic needs of food and shelter are met.

[66] Given the importance of the Director’s licensing decision, the licensee or applicant can expect a high degree of procedural fairness.

[67] Self-represented individuals frequently appear before the Tribunal. Mr. Estabrooks is an example of

this. In our view, these parties expect to be able to tell their story at the hearing of an appeal.

- [68] Conducting an appeal as a true appeal involves the determination and application of standards of review. This is a complex legal exercise. Indeed, in the course of a single appeal, a court can be called upon to apply different standards of review depending on the type of decision (i.e. constitutional issue, question of general law of central importance to the legal system, a question outside the decision-maker's expertise, or a true question of jurisdiction). Our review of the caselaw suggests that many lawyers and judges may struggle with this exercise. In our view, these notions are too complex for the vast majority of self-represented parties and the true appeal does not reflect the expectation of the parties.
- [69] Conducting a true appeal with the determination of the standard of review will effectively render the applicant a bystander rather than a participant in his appeal. This cannot have been the intent of the Legislature.

(5) Our Statutory Interpretation

- [70] The words "may appeal" found in subsection 10(6) of the *Real Estate Agents Act* cannot be read in isolation. As stated in *Djossou* at paragraph 38, "the law does not operate in a vacuum and the tribunal is always required to take into account the legal context in which it is called to apply the law". Consequently, the words "may appeal" must be considered in the broader context of financial and consumer services legislation which includes the *FCSC Act*. Only then can we determine the nature of the appeal intended by the Legislature.
- [71] Turning now to our analysis, we note that no section of the *FCSC Act* expressly sets out how an appeal to the Tribunal is to be conducted. Section 1 of the *FCSC Act*, however, defines "hearing" as including an appeal.
- [72] Section 38 sets out the Tribunal's powers regarding hearings. Subsection 38(1) states: "With respect to the following matters, when the Tribunal holds a hearing under financial and consumer services legislation, the Tribunal has the same power that the Court of Queen's Bench has for the trial of civil actions..." The powers set out in subsection 38(1) include summoning and enforcing the attendance of witnesses, compelling witnesses to give evidence under oath or in any other manner; and compelling witnesses to produce documents.
- [73] The Director contends that section 38 applies only to first instance proceedings and not appeals heard by the Tribunal. We disagree. This position is incompatible with the definition of hearing and our view that the role of the Tribunal on an appeal is to provide independent legal oversight and ensure procedural fairness.
- [74] In addition, section 38 does not indicate that it is inapplicable to hearings that are appeals. In our view, unless expressly indicated otherwise, all sections of the *FCSC Act* dealing with hearings conducted by the Tribunal must include appeals. We therefore find that the powers set out in subsection 38(1) apply to an appeal before the Tribunal. These powers are typical first instance powers and suggest that the appeal should proceed as a hearing *de novo*.
- [75] Subsection 38(5) of the *FCSC Act* indicates that the Tribunal may "decide all questions of fact or law arising in the course of a hearing". Again, an appeal is not specifically excluded from the application of

subsection 38(5). This means that on an appeal, the Tribunal can re-examine the facts and draw its own factual and legal conclusions. This, again, is a typical first instance power, which favours a hearing *de novo*.

- [76] Subsection 38(6) of the *FCSC Act* also provides the Tribunal authority to receive in evidence “any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it”, regardless of whether it is given or produced under oath or would be admissible as evidence in a court of law. Again, this broad authority to admit evidence is a typical first instance power.
- [77] While several sections of the *FCSC Act* favour a hearing *de novo*, we must consider the entire legislative scheme in determining the type of appeal we should conduct under the *Real Estate Agents Act*.
- [78] In that light, we must consider subsection 38(7) of the *FCSC Act* which indicates that a hearing is commenced and conducted in accordance with any rules of the Commission made under paragraph 59(3)(a), which are the Tribunal’s procedural rules.
- [79] Part 11 of the Tribunal’s procedural rules and Practice Direction No. 7 set out certain procedural requirements for an appeal, and in particular: (1) the requirement for an applicant to set out grounds for an appeal; and (2) the requirement for a regulator to provide a Record of the decision-making process. These requirements are typical of a true appeal.
- [80] The Director relies heavily on the Tribunal’s procedural rules and Practice Direction No. 7 for its contention that the appeal should be conducted as a true appeal. The Director submits that nothing in Part 11 or Practice Direction No. 7 indicates that the appeal should be conducted as a hearing *de novo* or that the parties can call witnesses or experts to testify at the hearing of the appeal.
- [81] In our view, this interpretation is too restrictive. Part 11 of the Tribunal’s procedural rules and Practice Direction No. 7 are not a complete code for an appeal.
- [82] In other types of proceedings, there is intent to exclude the application of other parts of the Tribunal’s procedural rules such as Part 7 dealing with documentary disclosure and Part 8 dealing with witnesses. That is the case, for example, with Part 9 which deals with settlements. The relevant portions of Part 9 are below:

9(2) Settlement Agreement – A settlement shall be evidenced by a Settlement Agreement between Parties. A Settlement Agreement shall contain:

(a) a full and accurate statement of the relevant facts admitted by the Respondent;

[...]

(e) subject to approval of the Settlement Agreement by the Settlement Panel:

(i) a waiver by the Respondent of a full hearing and any review or appeal rights;

9(4.1) Settlement hearing in writing - A settlement hearing may proceed in writing in

accordance with Part 15.

- [83] That is not the case with Part 11 of the Tribunal's procedural rules or Practice Direction No. 7. Nothing in Part 11 or Practice Direction No. 7 indicates the appeal is limited to the Record or to the grounds set out in the Request for Hearing. Rather, the definition of "proceeding" in the Tribunal's procedural rules which includes an appeal suggests otherwise:

"Proceeding" means the entire process of a hearing, review, or appeal conducted before a Panel pursuant to the Financial and Consumer Services Commission Act or Financial and Consumer Services Legislation;

- [84] In our view, the Tribunal's procedural rules contain parts of general application and parts of a specific nature applicable only to a particular type of proceeding. Here are the 19 parts of the Tribunal's procedural rules:

PART 1- Interpretation and application

PART 2- Interpretation and timing

PART 3- Parties

PART 4- Language of Proceeding

PART 5- Service and filing

PART 6 - Motions

PART 7- Disclosure

PART 8- Witnesses

PART 9 - Settlements

PART 10- Pre-hearing conferences

PART 11- Review or appeal proceedings

PART 12- Opportunity to be heard proceedings

PART 13- Enforcement proceedings

PART 14- Proceedings generally

PART 15- Proceedings in writing

PART 16- Proceedings, pleadings and other Documents

PART 17- Decisions

PART 18- Further decision pursuant to subsection 195(7) of the *Securities Act* or revocation or variation of a decision pursuant to section 42 of the *Financial and Consumer Services Commission Act*

PART 19- Effective Date

- [85] Part 9 - Settlements, Part 11 - Review or Appeal proceedings, Part 12 - Opportunity to be Heard Proceedings, and Part 13 - Enforcement Proceedings provide procedural requirements for those particular types of proceedings.

- [86] The remainder of the Tribunal's procedural rules deals with general matters which are applicable to all proceedings, such as: interpreting and applying the rules, calculating time, language of proceedings, filing and service of documents, motions, disclosure of evidence, witnesses, pleadings, decisions, adjournments, constitutional questions, public access to hearings and documents, and requests for confidentiality. In our view, these provisions are applicable to an appeal.

- [87] The Director further submits that on an appeal, a party should only be entitled to present new or

additional evidence to that contained in the Record with the permission of the panel. We disagree. Neither the *Real Estate Agents Act*, the *FCSC Act*, the Tribunal's procedural rules nor Practice Direction No.7 require that a party obtain permission of the panel to introduce additional evidence to that contained in the Record on an appeal. If that was the intent of the Legislature, it would be indicated in the statutes or the Tribunal's procedural rules.

- [88] The *FCSC Act* has given the Tribunal broad first instance powers on appeal as set out in subsections 38(1), 38(5) and 38(6). These statutory provisions are not consistent with a legislative intent to require the Tribunal to undertake a true appeal.
- [89] When we look at the *FCSC Act* as a whole, the clear intent was to give the Tribunal, as a specialized appeal body, full authority to operate in a way that is flexible and accessible to applicants including self-represented persons and to use its expertise to ensure that fair decisions are made. The Tribunal's expertise in financial and consumer services legislation would be lost if it were required to grant deference to the Director and to conduct an appeal limited to the grounds set out in the Request for Hearing.
- [90] Engaging in discussions about the applicable standard of review or multiple standards of review and the level of deference would completely frustrate self-represented individuals. In addition, requiring the Tribunal to defer to findings and decisions that it believes were rendered without procedural fairness or are wrong on the merits does little to enhance the purposes of the *FCSC Act*.
- [91] The Director also submits that this appeal should proceed as a true appeal as it will be the most expeditious and least expensive determination of the appeal on its merits as required by paragraph 2(1) of the Tribunal's procedural rules.
- [92] In our view, paragraph 2(1) does not assist us in determining what type of appeal to conduct under the *Real Estate Agents Act*. This paragraph does not change the Tribunal's powers under the *FCSC Act*. We reiterate the Federal Court of Appeal's comments in *Huruglica* that it is for the legislator to account for budget considerations and whether it is necessary to limit the number, length and cost of administrative appeals.
- [93] In our view, the *de novo* powers granted to the Tribunal in the *FCSC Act* are limited by the requirement in Part 11 of the Tribunal's procedural rules and Practice Direction No. 7 to set out grounds of appeal and to provide a Record. However, a true appeal is not intended given that the Tribunal's procedural rules and Practice Direction No. 7 do not limit the appeal to the Record or to the grounds of appeal. In addition, the parts of general application of the procedural rules dealing with witnesses and disclosure of evidence are not excluded. It is our conclusion that the legislative scheme creates a hybrid appeal.
- [94] We find the hybrid appeal is consistent with the expectation of the parties, the purposes of the legislation, the nature of the bodies, and the impact of the decision on individuals' rights.
- [95] So how will this hybrid appeal proceed? As set out in our Order of October 5, 2016, the appeal will proceed as follows:
- a) The appeal will proceed to an oral hearing;
 - b) The Record constitutes evidence on the appeal;

- c) The parties can present evidence in addition to that contained in the Record in accordance with Part 7 of the Tribunal's procedural rules and its admissibility will be determined in accordance with subsection 38(6) of the *FCSC Act*;
- d) The parties may call witnesses to testify at the hearing of the appeal in accordance with Part 8 of the Tribunal's procedural rules;
- e) Leave of the panel will not be required to call witnesses or present additional evidence;
- f) No deference will be afforded to the decision of the Director; and.
- g) The decision of the Director will be reviewed for correctness

[96] We add to this that the appeal is not limited to the grounds set out in the Request for Hearing. We will review the entirety of the evidence and the arguments of the parties.

[97] We note that some appeals may not require the testimony of witnesses or the presentation of additional evidence and may be limited to the Record. However, even in those instances, the appeal will not be limited to the grounds and the Tribunal will review the Director's decision for correctness.

B. WHAT IS THE APPLICABLE STANDARD OF REVIEW?

[98] Given our conclusion that the appeal should be conducted as a hybrid appeal and that the decision will be reviewed for correctness, it is unnecessary to address this issue further.

VII. DECISION

[99] For the reasons set out above, we find the appeal in this matter will be conducted as a hybrid appeal and the Director's decision will be reviewed for correctness.

DATED this 1st day of November, 2016.

"original signed by"

Christine M. Bernard

Registrar

Signed for panel members John M. Hanson, Q.C., Raoul Boudreau and Gerry Legere pursuant to subsection 40(3) of the *Financial and Consumer Services Commission Act*