Court of King's Bench of Alberta

Citation: Sunray Manufacturing Inc v Alberta, 2024 ABKB 130

Date: 20240308
Docket: 2203 01695
Registry: Edmonton

Between:

Sunray Manufacturing Inc

Appellant

- and -

His Majesty the King In the Right of Alberta, Minister of Justice & Solicitor General, Minister of Service Alberta, Director of Fair Trading, The Appeal Board Appointed Pursuant to the *Consumer Protection Act*, Appeal Board Regulation, Alta Reg 195/1999

Respondents

Memorandum of Decision
of the
Honourable Justice L.K. Harris

I. Introduction

[1] On May 31, 2018, Bob Boyechko and his wife, Rita Sibbio (the "Purchasers"), signed a contract for the purchase of a hot tub from Sunray Manufacturing Inc. (the "Purchase Agreement"). The Purchase Agreement required Sunray to manufacture a custom hot tub to the specifications ordered by the Purchasers. The Purchasers paid a deposit of $2,500, with the balance to be paid upon delivery.

[2] Despite Sunray advising the Purchasers that the estimated delivery date for their hot tub would be within 10 – 12 weeks, it took over three and a half years for the Purchasers to receive it.

[3] In November 2019, the Purchasers filed a complaint with Service Alberta's Consumer Investigations Unit ("CIU"). At the conclusion of CIU's investigation, the Director of Fair Trading (the "Director") issued an Order finding that Sunray had contravened the *Consumer*

Protection Act, RSA 2000 c. C-26.3 ("*CPA*"), and directing that Sunray cease certain unfair practices. The Order did not contain any administrative penalty or license cancellation.

[4] Sunray appealed the Order under s 179 of the *CPA*. Following a hearing on November 3, 2021, the Appeal Board upheld the Order (the "Decision").

[5] Sunray now appeals the Decision to this Court.

II. Background

[6] On May 31, 2018, the Purchasers attended the Sunray showroom in Edmonton. After speaking with Mr. O'Bertos, one of Sunray's sales staff, they decided to purchase a custom-made Gateway hot tub. Mr. O'Bertos presented the Purchasers with a contract for their signature.

[7] The Purchase Agreement included the following terms:

- The Purchasers agreed to purchase a custom Gateway model hot tub, in ocean wave color with a black cabinet, 16 jets, electronic controls and lighting, a grey cover, deluxe water kit and steps for a total purchase price of $6,720;
- The Purchasers paid a deposit of $2,500 with the balance due upon delivery;
- "No cancellations permitted and no refunds on deposits or merchandise";
- "The delivery date is an estimate and does not represent a warranty by the seller. The delivery date is subject to, among other factors the availability of materials and labour and demand upon the manufacturer";
- "The customer warrants that he is the owner of the property where the goods and services are being delivered and received and agrees that the goods and services are an improvement to the land and are subject to the provisions of the *Builders Lien Act* of Alberta."

[8] Mr. O'Bertos initially advised the Purchasers that their hot tub would be ready within 8 – 10 weeks, but as the Purchasers would be away during that time, they requested a delivery date of between 10 – 12 weeks.

[9] The Purchasers signed the Purchase Agreement and paid the deposit.

[10] When the hot tub was not delivered within 10 – 12 weeks, Ms. Sibbio began calling Mr. O'Bertos. During those phone calls Mr. O'Bertos advised that the manufacturing facility was not operational, that their hot tub was "at the top of the list" but there were a few ahead of them.

[11] In October 2018, Ms. Sibbio complained about Sunray to the Better Business Bureau. This complaint was brought to Mr. O'Bertos' attention and the following month, Sunray agreed to deliver a loaner hot tub to the Purchasers on the condition that the Purchasers remove their online review of Sunray and pay the balance owed for their custom hot tub. The Purchasers requested a refund but were told that was not possible.

[12] The Purchasers did pay the balance owed, and Sunray delivered the loaner hot tub to their residence.

[13] A year passed, and despite ongoing phone calls from the Purchasers, Sunray still did not deliver their hot tub. The Purchasers again requested a refund, but Sunray refused, citing the provision in the Purchase Agreement prohibiting refunds. In various phone calls, Sunray advised the Purchasers that: Sunray's manufacturing facility was not operational or was moving, that their hot tub was at the top of the list, that their hot tub would be delivered in October 2019, and finally, that the hot tub was not ready, and that Sunray did not know when it would be ready.

[14] In August 2018, the building in which Sunray's operating facility was located had been sold, forcing Sunray to move to a new facility on Wagner Road on 30 days' notice. The move itself took nine weeks, during which the manufacturing equipment was not functioning, and another five months after the move before the manufacturing equipment operational again. In September 2020, Sunray moved again from Wagner Road to 17th Street, causing the manufacturing equipment to be non-operational again for the same length of time. There was a third move which occurred in 2021.

[15] In November 2019, Ms. Sibbio made a complaint to Service Alberta. The CIU commenced an investigation. Ms. Sibbio was interviewed by an investigator, Julian Smith.

[16] Mr. Smith also made a cold call to Mr. O'Bertos posing as a potential customer. Mr. O'Bertos advised Mr. Smith that a custom hot tub would take 2 to 3 months to deliver. Mr. O'Bertos also advised that Sunray's equipment was down, and the business was planning on moving.

[17] Mr. Smith wrote to Sunray in December 2019, advising of the complaint and investigation and requesting an interview with Mr. Roberts. Mr. Smith received no response.

[18] On March 12, 2020, Mr. Smith prepared his Recommendation for Administrative Action. In it, he concluded that Sunray had breached the *CPA* by engaging in unfair practices.

[19] On April 9, 2021, the Director wrote to Sunray, to the attention of Mr. Roberts, advising that he was considering issuing an Order against Sunray pursuant to s 157 of the *CPA* (the "Order"). Mr. Roberts contacted the Director to advise Sunray had no record of a customer named Sibbio. The Director followed up, providing the names of both Purchasers, but Sunray did not respond. In May 2021, the Director personally delivered a copy of the Purchase Agreement to Mr. Roberts for his reference.

[20] Sunray requested two weeks to review the matter but ultimately provided no further response.

[21] The Director issued an Order against Sunray on June 10, 2021. The Order explained that Sunray had contravened four sections of the *CPA*, being ss 6(2)(c), 6(3)(c) and (d) and 6(4)(n). The Order further stated that:

> "Sunray Manufacturing Inc., and any employee, representative, or agent of Sunray Manufacturing Inc. must immediately:
>
> > Cease to use any exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;
> >
> > Cease to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided;

> Cease to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.

[22] On July 12, 2021, Mr. Roberts wrote to Service Alberta appealing the Order. An Appeal Board was constituted under the *CPA*, and the Appeal proceeded virtually on November 3, 2021. Sunray and the Director were represented by legal counsel, and Mr. Roberts was present and testified.

[23] The Appeal Board Decision was issued on January 6, 2022. The majority upheld the Order.

[24] Sunray filed its Notice of Appeal with the Court of King's Bench on February 4, 2022.

III. Statutory Framework

[25] The *CPA* is the successor statute to Alberta's *Fair Trading Act*, RSA 2000 c F-2. The *CPA* broadens certain protections for consumers and includes a mandate for the creation of a Consumer Bill of Rights. The preamble to the *CPA* includes the statement that "…all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed".

[26] Section 6 of the *CPA* enumerates the specific acts which constitute "unfair practice".

[27] Section 5 of the *CPA* defines its application. The relevant portion states:

> 5 This Act applies to the following unfair practices:
>
> …
>
> (b) an unfair practice involving a consumer transaction in which the offer or acceptance is made in or is sent from Alberta

[28] The term "consumer transaction is defined in s 1(c) of the *CPA* as follows:

> (c) "consumer transaction" means, subject to the regulations under subsection (2),
>
> (i) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement, or
>
> (ii) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement

[29] Under s 173 of the *CPA*, the Minister of Service Alberta is authorized to appoint the Director, who in turn is authorized to appoint inspectors to investigate allegations of unfair practises. An inspector has broad-ranging powers to gather information, conduct interviews and enter premises to determine if there is compliance with the *CPA* and its *Regulations*.

[30] If, after an investigation, the Director is of the opinion that there has been noncompliance with the *CPA*, the Director may take certain steps including issuing an Order under s 157. The Order may direct the cessation of unfair practices or take certain measures to bring a party into compliance.

[31] A person who is in receipt of an Order may appeal the Order pursuant to s 179 of the *CPA*. Under s 179(8), an Appeal is a "new trial of the issues that resulted in the decision, order or administrative penalty being appealed". Upon receipt of an appeal, the Minister must refer the appeal to an Appeal Board appointed under the *Regulations*. An Appeal Board may confirm, vary or quash the decision, order or administrative penalty that is being appealed.

[32] An Appeal Board has broad discretion as to how the appeal is to be heard. Section 13 of the *Appeal Board Regulation*, A/R 195/1999 (the "*Regulation*") provides that the Appeal Board is not bound by the rules of evidence and evidence may be given before it in a manner that it considers appropriate.

[33] A decision of an Appeal Board may be appealed to the Court of King's Bench pursuant to s 181 of the *CPA*:

> 181 The Director or a person whose appeal is heard by an appeal board may appeal the decision of the appeal board by filing an application with the Court of King's Bench within 30 days after being notified in writing of the decision, and the Court may make any order that an appeal board may make under section 179(6).

IV. Standard of Review

[34] The parties agree that s 181 of the *CPA* grants a statutory right of appeal to this Court without any privative clause. As such, the presumption of a reasonableness standard of review as provided for in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 (CanLII) is rebutted. Instead, the appellate standard of review would generally apply to questions of law, mixed fact and law, and fact.

[35] Questions of law (including questions of statutory interpretation) are reviewed on a standard of correctness in accordance with ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235, at para 8. Questions of fact or questions of mixed fact and law, where no there is no extricable legal question or principle, are reviewed for palpable and overriding error: see ***Housen*** at paras 10, 19 and 26-37.

[36] I accept counsel's submissions on this point but wish to briefly address decisions reached in three earlier cases decided by this Court: ***Furst v Alberta Motor Vehicle Industry Council***, 2008 ABQB 530, ("***Furst No. 1***") the later decision of ***Furst v Alberta Motor Vehicle Industry Council***, 2009 ABQB 122, ("***Furst No. 2***") and finally, ***Ahmad v Alberta Motor Vehicle Industry Council***, 2010 ABQB 293. All three decisions consider s 181, the statutory appeal provision contained within the *Fair Trading Act*, the precursor to s 181 of the *CPA*. Both statutory provisions contain exactly the same language. All three decisions concluded that the appropriate standard of review for this Court to apply in appeals of a decision of an Appeal Board constituted under the *CPA* was reasonableness, relying upon the contextual analysis set out in ***Dunsmuir v New Brunswick***, 2008 SCC 9 (CanLII).

[37] ***Dunsmuir*** was reconsidered in ***Vavilov***, which set out a revised framework to determine the standard of review when a Court reviews the merits of an administrative decision.

[38] ***Vavilov*** states that the revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. It is no longer necessary for Courts to engage in a contextual inquiry to identify the appropriate standard, as was done in ***Furst No. 1***, ***Furst No. 2*** and ***Ahmad***. That presumption, however, may be rebutted in certain circumstances: first, where the legislature has indicated that it intends a different standard to apply, and second, by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision.

[39] The second circumstance applies in this case; s 181 of the *CPA* clearly provides for a statutory appeal mechanism. As stated in ***Vavilov***:

> Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review.

[40] ***Furst No 1*** and the two cases following have been overridden by the statements of the Supreme Court in ***Vavilov***, and their contextual inquiries leading to the application of a reasonableness standard of review is no longer applicable.

[41] Based upon their written submissions, the parties appear to differ in their opinions of the standard of review with respect to two of the five issues raised on this appeal; first, the issue of whether the Director had jurisdiction to issue the Order, and second, whether the appeal before the Appeal Board was procedurally fair.

[42] The parties agree that the remaining three issues, involving questions of whether there were breaches of s 6 of the *CPA*, are questions of mixed fact and law, attracting a review of palpable and overriding error.

V. Issues to be Determined

[43] Sunray raises five issues on appeal:

A. Did the Appeal Board majority err in determining that the Respondents have jurisdiction over this matter?

B. Did the Appeal Board majority err in determining that Sunray engaged in an unfair practice contrary to s 6(2)(c) of the *CPA*?

C. Did the Appeal Board majority err in determining that Sunray engaged in an unfair practice contrary to s 6(3)(c) of the *CPA*?

D. Did the Appeal Board majority err in determining that Sunray engaged in unfair practices contrary to s 6(3)(d) and 6(4)(n) of the *CPA*?

E. Did the Appeal Board majority err in determining that procedural fairness was afforded to Sunray during the hearing of November 3, 2021?

VI. Analysis

A. Did the Director have Authority to Issue the Order?

[44] The Director argues that a correctness standard applies to the issue of the Director's jurisdiction to issue the Order, as it is a question of law involving the interpretation of s 5(b) of the *CPA*. Sunray, however, argues in its written submissions that a reasonableness standard applies to issues of jurisdiction, citing paras 65 and 67 of ***Vavilov***.

[45] Those paras state as follows:

> We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in ***Dunsmuir*** held that it was "without question" (para 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see ***Dunsmuir***, at para 59; ***Quebec (Attorney General) v Guérin***, 2017 SCC 42, [2017] 2 S.C.R. 3, at para 32. Since ***Dunsmuir***, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": ***McLean***, at para 25, referring to ***Alberta Teachers***, at para 34; ***Edmonton East***, at para 26; ***Guérin***, at paras 32-36; ***CHRC***, at paras 31-41.
>
> …
>
> In ***CHRC***, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[46] It is clear from this passage that jurisdictional questions are no longer a separate category in themselves. In making this statement, ***Vavilov*** says that jurisdictional questions must not be assessed differently from the other issues raised and are subject to the overall applicable standard of review. If the presumptive standard is one of reasonableness, then jurisdictional questions are to be assessed using the reasonableness standard.

[47] But the reasonableness standard may be rebutted in certain circumstances, such as in this case where the enabling legislation specifically provides for an appeal to this Court. What happens to jurisdictional questions when the presumptive standard of reasonableness is rebutted? In other words, what if there is a statutory right of appeal and the appellate standards of review are determined to apply? The Appellant says that the reasonableness standard would still apply to questions of jurisdiction. I have concluded that this is incorrect.

[48] Post-***Vavilov*** jurisprudence provides some guidance. For example, in ***Al-Ghamdi v College of Physicians and Surgeons of Alberta***, 2020 ABCA 71, the Court states at para 9, "The standards of review on a statutory appeal from an administrative tribunal are the same as those on other appeals"(citing ***Vavilov*** at para 49), and goes onto say, "conclusions on issues of law are reviewed for correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para 8, [2002] 2 SCR 235. That includes questions of statutory interpretation, including interpretation of the tribunal's "home statute" (emphasis added).

[49] ***Law Society of Saskatchewan v Abrametz***, 2022 SCC 29 at paras 27 and 28 states:

> In ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply: paras 33 and 36-52. While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. Thus, where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review.
>
> …
>
> … As our Court has stated in ***Vavilov***, at para 36, "[w]here a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. (emphasis added)

[50] Paragraphs 65 and 67 of ***Vavilov*** are referring to situations where the presumptive reasonableness standard has not been rebutted. In this case, it has been rebutted. The question of jurisdiction is a legal question of statutory interpretation within the overall context of a statutory appeal. Thus, I must apply a correctness standard of review to the Appeal Board's decision that the Director had jurisdiction to issue the Order.

[51] Sunray argues that it is not subject to the *CPA* because the hot tub does not fall within the definition of "goods or services" as required in s 5(b). The hot tub in question was a fixture, and thus an improvement to land, not a good or service.

[52] Sunray says the terms of the Purchase Agreement confirm that the hot tub is a fixture and an improvement to land:

> "The customer warrants that he is the owner of the property where the goods and services are being delivered and received and agrees that the goods and services are an improvement to the land and are subject to the provisions of the *Builders Lien Act* of Alberta." (emphasis added)

[53] The *CPA*'s s 1(1)(e) defines "goods" as: "(i) any personal property that is used or ordinarily used primarily for personal, family or household purposes, (ii) a voucher, or (iii) a new residential dwelling whether or not the dwelling is affixed to land". Sunray says the hot tub does not fall into any of these categories: it is not "personal property" as it is a fixture (i.e., an "improvement to the land"), it is not a voucher nor is it a new residential dwelling. Sunray argues that "fixtures" are explicitly excluded from the *CPA*.

[54] Sunray cites authorities in support of this argument, including ***Alberta v Hansen***, 1998 ABQB 1103, which states that objects, even if slightly attached to the land, are presumably fixtures. Objects not attached to the land other than by their own weight are presumably chattels. Sunray also cites ***Micucci v Brunet***, 2019 CanLII 93982, a decision from the Ontario Superior Court of Justice (Small Claims Court), in which the Court concluded that the hot tub in question in that case was a fixture for the purposes of an Agreement of Purchase and Sale for real property. The Court's analysis on this point is at para 60 and is limited to the following:

> I find that this was a fixture (see ***Kee v Chong***, 1910 CarswellBC 74), Pursuant to the APS, the tub was to be "in good working order… on completion". An improperly insulated smelly hot tub in a porch cannot be described as such. It was not appropriate to have pulled the insulation out and to have left that for the plaintiffs to repair. The tub would not retain its heat in winter without foam.

[55] Sunray concludes by stating:

> "A hot tub is attached to land, so presumably it is a fixture."

[56] On the other hand, the Director argues that the *CPA* is broad in scope, and a common sense reading of the statute would lead to the conclusion that the supply of a hot tub at a consumer's home would fall within the scope of the legislation, as it would involve the supply of goods (the hot tub itself), and the provision of a service (delivery and installation), involving the addition to or alteration of a residential dwelling. Whether or not the hot tub is categorized as a "fixture" is irrelevant as there is no explicit exclusion for fixtures.

[57] I do not agree with Sunray's argument that the hot tub in this case is not a "good" but a fixture, and as such is excluded from the jurisdiction of the *CPA*.

[58] There is no explanation as to why the hot tub in ***Micucci*** was deemed to be a fixture. I have difficulty concluding that ***Micucci*** is a reliable authority for the proposition that all hot tubs are fixtures, and I distinguish that decision on that basis.

[59] In this case, there was no evidence before the Appeal Board to demonstrate that the hot tub in this case was a fixture. There was nothing that established that the hot tub in question was "attached to land" by something other than its own weight. Without such evidence, I cannot conclude that the Purchaser's hot tub was a fixture, and not a "good".

[60] Further, I conclude that Sunray's efforts to describe the hot tub as an "improvement to the land" within the Purchase Agreement does not take the hot tub out of the definition of "goods" for the purposes of the *CPA*. This provision was included in the Purchase Agreement solely in an attempt to reap the benefits of the *Builders Lien Act* (now the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4) which permits liens to be placed upon an estate or interest of an owner in land in respect of which an improvement is being made. It does not waive any rights available to the Purchasers under the *CPA*. This point is emphasized when one

considers the fact that the applicable provision in the Purchase Agreement itself describes the hot tub as "goods and services" before stating they are an "improvement to land".

[61] Finally, I agree with the Director that even if the hot tub was a fixture, this does not mean it is excluded under the *CPA*. There is no such exclusionary language in s 5, and to do so would exclude a vast category of consumer goods and services which might otherwise be subject to the *CPA*. Large pieces of furniture attached to walls, appliances, etc. are some examples. Given the *CPA's* broad application, this cannot have been the intention of the Legislature in drafting this statute.

[62] I am mindful of s 2.1 of the *CPA* which states:

> Application of Act
>
> 2.1 In determining whether this Act applies to an entity, a representation or a transaction, a court or an appeal board must consider the real substance of the entity, the representation or the transaction and in doing so may disregard the outward form.

[63] The "real substance" of the hot tub is one of a good provided to the Purchasers. There is no evidence to demonstrate that it is anything other than a piece of recreational equipment that would be used by the Purchasers for their personal, family or household purposes, sold to them pursuant to a consumer transaction with Sunray.

[64] I conclude that the Appeal Board's conclusion that the Director had jurisdiction to issue the Order to Sunray was correct, and that the hot tub and the Purchase Agreement are subject to the provisions of the *CPA*. This ground of appeal is dismissed.

B. Did the Appeal Board Majority Err in determining that Sunray engaged in an unfair practice contrary to s 6(2)(c), 6(3)(c), 6(3)(d) and 6(4)(n) of the *CPA*?

[65] These are issues of mixed fact and law and as such, Sunray must demonstrate a palpable and overriding error in the Appeal Board's decision.

[66] "Palpable and overriding error" has been explained in ***Benhaim v St-Germain***, 2016 SCC 48 at paras 38 and 39, as to what constitutes palpable and overriding error:

> It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in ***South Yukon Forest Corp. v R.***, 2012 FCA 165, 4 B.L.R. (5th) 31 (F.C.A.), at para 46:
>
> > Palpable and overriding error is a highly deferential standard of review .... "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[67] Palpable and overriding error has also been explained in ***Super Save Disposal (Alberta) Ltd v Shenwei Enterprises Ltd***, 2017 ABQB 803 at para 3, referencing the decision of ***Kieller v Sentinel Self-Storage Corp***, 2008 ABQB 783:

> A palpable and overriding error occurs where the trial judge makes a manifest error, ignores conclusive or relevant evidence, misunderstands the evidence or draws erroneous conclusions from it (***Toneguzzo-Novell (Guardian ad litem of) v Burnaby Hospital***, 1994 CanLII 106 (SCC), [1994] 1 SCR 114 at para 13, 110 DLR (4th) 289, cited in ***MacCabe v Westlock Roman Catholic Separate School District***, 2001 ABCA 257 (CanLII) at para 21, 293 AR 41).

[68] However, the tribunal's weighing of the evidence before it, findings of fact and inferences of fact are immune from appellate scrutiny: ***Gray v McNeill***, 2017 ABCA 376 at para 12.

1. Exaggeration, innuendo or ambiguity

[69] The *CPA*'s s 6(2)(c) states:

> (2) It is an unfair practice for a supplier, in a consumer transaction or a proposed consumer transaction,
>
> > (c) to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction

[70] "Material fact" is defined in the *CPA* at s 6(1):

> 6(1) In this section, "material fact" means any information that would reasonably be expected to affect the decision of a consumer to enter into a consumer transaction.

[71] The Appeal Board found that Sunray's treatment of the Purchasers was unreasonable. As of the date of the Decision, the Purchasers still had not received their hot tub despite the delivery date estimated by Sunray of 10 – 12 weeks. The Appeal Board found that Sunray had exaggerated the delivery dates and was vague and misleading when questioned by the Purchasers.

[72] Sunray argues that as the Purchasers' complaints regarding Sunray's representations as to delivery dates and where the hot tub was in the manufacturing process all occurred after the Purchase Agreement was signed, and these representations were not "material facts" within the meaning of s 6(1). In other words, these representations did not affect the Purchasers' decision to enter into the Purchase Agreement. The Appeal Board's failure to address this issue constitutes palpable and overriding error.

[73] Further, Sunray argues that while there were there were "unforeseen delays", the Appeal Board failed to consider that the information Sunray provided to the Purchasers was accurate at the time the representations were made.

[74] With one exception, Sunray is correct when it says that the representations made regarding the dates of delivery were made after the Purchase Agreement was signed. As such, any representations made after May 31, 2018, cannot be a "material fact" for the purposes of s 6(2)(c) because they did not affect the Purchasers' decision to sign the Purchase Agreement. Had the Appeal Board considered this issue, it would have concluded that Sunray's estimates as to delivery dates given after May 31, 2018 could not fall within s 6(2)(c).

[75] The Appeal Board's failure to consider whether the representations in question fit within the definition of "material fact" constitutes palpable and overriding error.

[76] The one exception is the discussion that the Purchasers had with Mr. O'Bertos on May 31, 2018, at the time the Purchase Agreement was negotiated.

[77] Ms. Sibbio's evidence was that when she and Mr. Boyechko were discussing the delivery date with Mr. O'Bertos, it was initially proposed that the hot tub be delivered within 8 – 10 weeks. As the Purchasers would be on holidays at that time, it was agreed that the estimated delivery time would instead be 10 – 12 weeks. The Purchasers were satisfied with that.

[78] That estimate was affected by Sunray's move. The evidence before the Appeal Board as to when Sunray first knew of the move from their facility was that their building had been sold in the summer of 2018, and that in August of that year they had been given 30 days to relocate. Prior to being given their notice everything was operating normally, although there was some suggestion from a statement by Mr. O'Bertos (and clarified by Mr. Roberts) that there had been some issues relating to a surge in demand.

[79] The Appeal Board goes on to say that as an experienced businessman, Mr. Roberts should have foreseen the potential difficulties that could arise because of leasing space with only a 30-day termination clause, implying that Mr. Roberts ought to have foreseen the possibility of delays caused by a forced move and taken steps to mitigate that possibility.

[80] The Appeal Board's statement in this regard is speculative. There was no evidence before it to support any conclusion that a 30-day notice provision in Sunray's industry was unreasonable. It may be that Sunray required a very specific type of premises, and it may be that a 30-day notice provision was the best option available.

[81] In short, there was no evidence before the Board to support its conclusion that the delivery date estimation of 10 – 12 weeks given to the Purchasers in May 2018, was an exaggeration, innuendo or an ambiguity such that it constituted an unfair practice. The only evidence before the Appeal Board was that on May 31, 2018, the manufacturing facility was operating normally, and that Sunray's sales staff generally knew how long it was taking for customers to receive their orders.

[82] As such, the Appeal Board's decision on this issue contained palpable and overriding error for reaching a conclusion based on speculation, and not the evidence before it.

[83] The Appeal Board's conclusion that Sunray breached s 6(2)(c) of the *CPA* is therefore quashed.

2. Harsh, Oppressive or Excessively One-Sided Conditions

[84] The *CPA*'s s 6(3)(c) states:

> 3) It is an unfair practice for a supplier
>
> > (c) to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided

[85] The Appeal Board found that the Purchase Agreement's open-ended delivery date with no possibility of a refund was an unfair practice as it would allow Sunray to keep a Purchaser's money in perpetuity without delivering a hot tub. This places all the risk upon the consumer and only benefits Sunray.

[86] In addition, the Appeal Board found that the inclusion of the term subjecting the Purchase Agreement to the *Builders Lien Act* grants Sunray the benefit of all the rights and remedies under that legislation without ensuing that the consumer understood that their rights are affected.

[87] Sunray argues that the Purchase Agreement warns customers that the delivery date was dependent upon several factors and that no refunds are permitted. Manufacturing involves uncertainties, and warning about these uncertainties does not make a contract harsh, oppressive or one-sided. Further, the estimate provided is no guarantee of delivery. Sunray faced unforeseen delays through no fault of their own, and not permitting refunds for custom-built products is a common business practice.

[88] Sunray does not agree with the Appeal Board's conclusions on this point but there is no palpable and overriding error here. Sunray provided no independent evidence as to what constitutes common business practice (either in the hot tub industry as a whole or in industry generally) in terms of prohibiting refunds for custom orders. Determining whether the terms of the Purchase Agreement constitute "harsh, oppressive or excessively one-sided" required the Appeal Board to interpret its home statute, something which the Appeal Board is fully qualified to do. Their conclusion that the impugned provisions of the Purchase Agreement fall within s 6(3)(c) of the *CPA* is a finding of fact and it is not open to me to disturb their conclusion in that regard.

[89] The Appeal Board's decision that Sunray breached s 6(3)(c) of the *CPA* is upheld.

3. A Representation that the Consumer Transaction Involves or Does Not Involve Rights, Remedies or Obligations that is Different from the Fact

[90] The *CPA*'s s 6(3)(d) states:

> (3) It is an unfair practice for a supplier
>
> > (d) to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.

[91] The *CPA*'s s 6(4)(n) states:

> (4) Without limiting subsections (2) and (3), the following are unfair practices if they are directed at one or more consumers or potential consumers:
>
> > (n) a supplier's representation that goods or services will be supplied within a stated period if the supplier knows or ought to know that they will not

[92] The Appeal Board concluded that Sunray's representations as to the estimated delivery date was a representation that differed from the fact as to when the hot tub would be delivered, and that Sunray knew that this representation would not be met. The Appeal Board also concluded that the provision barring refunds, and Sunray's representations to the Purchasers that refunds were not allowed was inconsistent with the Purchasers' rights and remedies under the common law doctrine of frustration and the Alberta *Frustrated Contracts Act*, RSA 2000 F-27.

[93] Sunray argues that the Appeal Board failed to recognize that Sunray's representations did not include any reference that the Purchase Agreement involved or did not involve any rights,

remedies or obligations that were different from fact. The Purchase Agreement did not provide any obligation to deliver the hot tub by a specific time. It only provided an estimated delivery date along with a statement confirming that the estimate was not a warranty and was subject to many factors.

[94] Further, a supplier providing an estimate as to delivery when it believed it could fulfill that commitment is not an unfair practice. There was no way for Sunray to know that it would experience the production issues it did, and at all times, Sunray's advice to the Purchasers as to an estimated delivery date were accurate at the time they were made.

[95] As noted above, the evidence before the Appeal Board regarding Sunray's representations on May 31, 2018, regarding an estimated delivery date was that Sunray had no reason to believe at that point that they would not be able to meet that expectation.

[96] However, s 6(4)(n) does not contain the requirement that the representation be made with respect to a "material fact" as is required by s 6(2)(c). As such, s 6(4)(n) is not limited to representations made at or before the execution of the Purchase Agreement.

[97] The Appeal Board found as a fact that once Sunray was given notice of their impending move in August 2018, and again in September 2021, and given Mr. Roberts' knowledge as to how long it would take to make the manufacturing equipment operational again, the representations made in the fall of 2018 that the hot tub would be available that October, and further, representations made thereafter were in breach of s 6(4)(n) because Sunray knew, or ought to have known, that they could not deliver the hot tub by those dates, given the ongoing difficulties with their premises.

[98] I conclude that there is no palpable and overriding error in the Appeal Board's finding that Sunray's representations as to delivery dates after August 2018, constituted a breach of the *CPA* at s 6(4)(n).

[99] Similarly, there is no palpable and overriding error in the Appeal Board's finding that Sunray's representations as to delivery dates after August 2018, constituted a breach of the *CPA* at s 6(3)(d). The Appeal Board's findings that Sunray's obligations as to the estimated delivery dates differed from the fact that Sunray knew, or ought to have known, that they could not comply with those estimated dates are entitled to deference.

[100] The Appeal Board's decision that Sunray breached ss 6(3)(d) and 6(4)(n) is upheld.

C. Did the Appeal Board Meet its Obligations to Ensure Procedural Fairness?

[101] Sunray argues that when questions of procedural fairness are dealt with in the context of a statutory appeal, those questions are subject to an appellate standard of review. This is sometimes described as a "correctness" review in the sense that the reviewing court will not give deference to the decision below, citing ***Park v The Election Commissioner of Alberta***, 2023 ABKB 351 at para 27.

[102] In ***Alta Link Management Ltd v Alberta Utilities Commission***, 2023 ABCA 325, the Court states at paras 35-38:

> In a statutory administrative appeal, whether or not procedural fairness has been breached raises a question of law, reviewable for correctness. The duty to be fair is relevant at all stages of administrative proceedings and is thus not restricted to the evaluation of any ultimate decision made that is targeted for review: see ***Law***

Society of Saskatchewan v Abrametz, 2022 SCC 29 at paras 26-30, 470 DLR (4th) 328.

> There may be factual findings for which deference may apply, and there may be statutes or regulations which enable exercises of discretion which influence the proper interpretation of what happened at any stage. Accordingly, the evaluation of the fairness of what happened in each situation may turn on the manner in which a discretion is exercised, even if that discretion is exercised within the legal margin of appreciation which applies. Essentially, the concept of procedural fairness (including such topics as reasonable apprehension of bias) does not involve deference by the reviewing Court. Having discretion does not mean being able to grade your own homework.
>
> In service of the rule of law, the Court must be satisfied that what happened in the procedural sense was substantively fair and occasioned no actual prejudice: compare ***WCSB Power Alberta Limited Partnership v Alberta Utilities Commission***, 2022 ABCA 177 at paras 26-28, 56-79, [2023] 6 WWR 655. Unfairness might also be the product of error of law and correctness will be part of the analysis on that. Unfairness, however, is not merely a matter of 'outcome'.
>
> Put another way, the standard of review for the 'Fairness Issue' is whether, having regard to the context, what was at stake for the parties, the reasonable expectations of the parties in the procedural context, and all the relevant circumstances, the Commission satisfied the appropriate level of due process or fairness required by the statute or the common law: ***Al-Ghamdi v. College of Physicians and Surgeons of Alberta***, 2020 ABCA 71 at para 9(d), 68 Admin LR (6th) 290, citing ***Vavilov*** at para 77.

[103] The issue of assessing procedural fairness was addressed by Bokenfohr J in ***Schwab v Alberta (Director of SafeRoads),*** 2022 ABQB 244 at paras 16- 17 where she states:

> …The content of procedural fairness goes to the manner in which the adjudicator went about making the decision, whereas the standard of review is applied to the end product of the adjudicator's deliberations: ***Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)***, 2003 SCC 29 at para 102. Evaluating whether procedural fairness has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation: ***Moreau-Berube v New Brunswick (Judicial Counsel)***, 2002 SCC 11 at paras 74 and 75. There is a clear distinction between a review on the merits of a decision and a review related to a breach of natural justice and/or the duty of procedural fairness. This remains unchanged by the Supreme Court of Canada's decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 (***Vavilov***).
>
> When assessing a breach of natural justice and/or the duty of procedural fairness, a reviewing court is required to determine whether the particular administrative decision-making context gives rise to a duty of procedural fairness and if so, the specific procedural requirements imposed by that duty in the circumstances of that particular case. The question for the reviewing court is whether the duty of procedural fairness was breached or not. A court will intervene if it finds that

the administrative process was unfair considering all of the circumstances: ***Vavilov*** at para 77.

[104] I agree that the Appeal Board, as an administrative tribunal, is subject to a duty of procedural fairness. The specific requirements imposed by that duty arise in part from the Appeal Board's enabling legislation.

[105] The hearing before the Appeal Board is close to a judicial process, and therefore, protections closer to those provided for in trial are required: ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 SCC 699 at para 23. Further, decisions of an Appeal Board have the potential to significantly impact parties, both through putting constraints on how they do business and through a potential loss of reputation.

[106] The *Regulation* grants the Appeal Board broad discretion as to how to conduct its hearings. For example, the Appeal Board is not bound by the rules of evidence in judicial proceedings (s 14(1)) and evidence may be given in any manner that the Appeal Board considers appropriate (s 14(2)). An appeal may be held in person, by electronic means, or by a combination of the two modes (s 5.1).

[107] Further, the Appeal Board has many of the authorities granted to a trial judge and an appeal has many characteristics in common with a trial. For example, the *CPA* s 182 grants an Appeal Board authority to compel witnesses and to compel the production of records.

[108] The remedies that an Appeal Board may grant also speak to its broad discretion and the importance an outcome of an appeal may have to an affected business. A hearing before it is considered a "new trial of the issues" and pursuant to s 179(6) of the *CPA*, an Appeal Board may confirm, vary or quash the decision, order or administrative penalty issued by the Director. In turn, the Director has authority to make orders compelling compliance with the *CPA* and to issue penalties. These decisions may be made publicly available.

[109] Sunray argues that a high degree of procedural fairness is owed in this case, even though the Appeal Board has a broad discretion as to how an appeal hearing is to be conducted and how evidence is received. I agree that this is the case, given how close hearings are procedurally to trials.

[110] I conclude that the purpose of the participatory rights contained within the enabling legislation is to ensure that the Appeal Board's decisions are made using a fair and open procedure, appropriate to the decision being made while giving an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered. This is in accordance with the clear expectations of the parties that they are not penalized without having their positions considered in a fair way.

[111] Sunray raises five examples where it says the Board failed in its duty of procedural fairness.

1. *Audi Alteram Partem*

[112] *Audi Alteram Partem* is a principle of natural justice and means that a person has a "right to be heard" and includes the right "to respond to the issues raised": ***Mental Health and Addiction Services v SB***, 2021 SKCA 18 at para 72. Sunray argues that:

- Mr. Roberts was subjected to aggressive and argumentative questioning by one Board member which at times amounted to cross-examination;

- The Appeal Board Chair asked questions of Mr. Roberts but then interrupted his answers in an argumentative way without allowing him to complete his answers;
- Throughout the appeal, the Appeal Board Chair's internet connection cut out and when Mr. Roberts raised the issue, the Chair implied that he was not being truthful.

2. The Right to Cross Examination and Disclosure

[113] Sunray argues that Ms. Sibbio's evidence was put before the Appeal Board in the form of a transcript from her interview with Mr. Smith and a letter that had not been produced by the Director. This prevented Sunray from cross examining Ms. Sibbio on her allegations.

3. Allowing Expert Opinion Evidence from Mr. Smith

[114] Sunray argues that Mr. Smith was not properly qualified as an expert and did not produce a curriculum vitae or an expert's report. Despite that, the Appeal Board referred to Mr. Smith as an "expert" in the law relating to the *CPA* and permitted him to give opinion evidence as to whether the provisions of the *CPA* were breached.

4. Unfair Questioning

[115] Sunray argues that the Respondent's lawyer asked leading questions and included argument in his questions of his own witness.

5. Unclear Reasoning

[116] Sunray argues that the Decision is "confusing, disjointed and difficult to follow" and does not comply with the Board's obligation to provide a clear written decision.

[117] Upon a review of the transcript of the proceedings before the Appeal Board, I am satisfied that although there may be some room for criticism as to the tactics and language used by Board members, when viewed as a whole, the proceedings before the Appeal Board were fair.

[118] Most of the issues raised by Sunray relate to procedure that is well within the Board's discretion to determine.

[119] Sunray was given sufficient opportunity to be heard and to respond to the issues raised, even if there were interruptions and argumentative questions from Board members. Sunray was given notice of the particulars of the allegations against it by Mr. Smith and the Director. Sunray was given opportunities to respond at those early stages and yet did not. At the hearing proper, Sunray had the opportunity to question the Director's witness and call its own witnesses. Both parties were given the opportunity to provide fulsome written submissions, which provided Sunray an additional opportunity to put its case forward without interruption.

[120] With regards to the malfunctioning Zoom connection, Sunray was not prejudiced by this event. The Board continued to have every opportunity to receive Sunray's evidence, and, in any event, a transcript was available should any Board member feel something was missed.

[121] Sunray has not pointed to any actual prejudice it suffered because of interruptions or argumentative questioning by Board members or potentially improper forms of questions posed by opposing counsel.

[122] Both parties agree that the Appeal Board has broad discretion as to how hearings before it are conducted. Thus, the Appeal Board is entitled to decide if a particular witnesses' evidence

should be put before it via a transcript or via *viva voce* testimony. Unless a party can demonstrate actual prejudice because they were not able to cross examine a witness, the Appeal Board's decision to proceed in that fashion should not be interfered with. In this case, Sunray has merely complained about the inability to cross examine without demonstrating what more would have been gained through such a procedure. Similarly, Sunray has not demonstrated any prejudice arising because of not being able to respond to the late disclosure of a letter.

[123] With respect to the evidence of Mr. Smith, although the Director's counsel indicated during questioning that he was "relying on Mr. Smith's expertise, and operational knowledge"[1] I note that at no time during Mr. Smith's testimony did counsel for Sunray object to Mr. Smith giving evidence on the basis that he was not qualified to do so as an expert. A further review of the Decision suggests that despite the Director stating that he was relying upon Mr. Smith's "expertise", the Appeal Board does not actually accept his evidence as an expert opinion on the law of the *CPA*. As such, even if the Appeal Board was required to comply with the requirements of the *Rules of Court* regarding the qualification and testimony of expert witnesses, that was not necessary here as Mr. Smith was treated as a fact witness.

[124] Finally, Sunray's allegation that the Decision is "confusing, disjointed and difficult to follow" is an issue of sufficiency of reasons. When reviewing the Decision as a whole and considering all of the evidence before the Appeal Board, in my view this allegation must also fail.

[125] The Appeal Board is required to provide written reasons for its decisions: *Regulation* s 15(3).

[126] In ***Stubicar v Calgary (Subdivision and Development Appeal Board)***, 2022 ABCA 299 (CanLII) at para 62, the Court of Appeal states:

> Reasons which are "skeletal" or "conclusory" may be inadequate: ***Fraser v Edmonton (City)***, 2021 ABCA 195 at para 35. However, reasons should not be assessed in isolation, and instead considered in the context of the parties' representations at the SDAB hearing, the nature of the issues before the SDAB, and the record of the proceedings: ***Lor-al Springs Ltd v Ponoka County Subdivision and Development Appeal Board***, 2000 ABCA 299 at para 13. One must consider whether "a reasonably intelligent reader", after reviewing an SDAB decision and the record before the SDAB, could understand why the SDAB decided what it did: ***Springfield Capital Inc v Grande Prairie (City)***, 2017 ABCA 12 at para 67. This contextual analysis means that the sufficiency of reasons is not a standalone ground of appeal: ***Deer Trail Development Inc v Calgary (Subdivision and Development Appeal Board)***, 2022 ABCA 141 at para 33.

[127] The Decision is the exact opposite of "skeletal" or "conclusory". While the Appeal Board could have been more succinct or organized in thought, the Decision is not to be assessed against the standard of perfection: ***Vavilov*** at para 101. The Appeal Board reviewed the background of the matter and addressed the evidence and submissions before it in detail. It considered the applicable legislation. A "reasonably intelligent reader" would read the Decision and understand why the Appeal Board reached the conclusions it did. The reasons are justifiable, transparent and intelligible enough to enable meaningful appellate review.

[1] Transcript of proceedings, Record of Proceedings p 365

VII. Conclusions

[128] Sunray's sale of hot tubs and the Purchase Agreement falls within the scope of the *CPA* and the Director has jurisdiction to issue the Order in question. This ground of appeal is dismissed.

[129] The Appeal Board's finding that Sunray breached s 6(2)(c) of the *CPA* is quashed on the basis that it constitutes palpable and overriding error.

[130] When a decision cannot be upheld, it is most often appropriate to remit the matter back to the decision-maker to have it reconsidered with the benefit of the Court's reasons (***Vavilov*** at para 141). There are some limited circumstances in which remitting the matter would stymie the timely and effective resolution of matters. There should not be "an endless merry-go-round of judicial reviews and subsequent reconsiderations". Declining to remit a matter to the decision-maker may be appropriate where it becomes evident to the Court during its review that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (***Vavilov*** at para 142). Given my conclusions on this ground of appeal, I find that remitting it back to the Appeal Board for reconsideration would serve no purpose and I decline to do so.

[131] The Appeal Board's findings that Sunray breached ss 6(3)(c) and (d) and 6(4)(n) are upheld. These grounds of appeal are dismissed.

[132] The hearing before the Appeal Board complied with the Appeal Board's duty of procedural fairness. This ground of appeal is dismissed.

[133] If the parties cannot agree on costs, they may make written submissions to me on that issue within 30 days.

Heard on the 14th day of December, 2023.
Dated at the City of Edmonton, Alberta

L.K. Harris
J.C.K.B.A.

Appearances:

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Brad Natrass
Alberta Justice
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