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The Year in Review: Recent BC Judicial Decisions of Note on a Selection of Administrative Law Topics

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THE YEAR IN REVIEW: RECENT BC JUDICIAL DECISIONS OF NOTE ON A SELECTION OF ADMINISTRATIVE LAW TOPICS[1]

1 This paper is intended as a companion piece to the one presented by Karrie Wolfe for this course. The views expressed are solely the author's and should not be considered to reflect or represent the views of any other person or entity.

I. Introduction

This paper reviews some decisions of the BC Supreme Court and Court of Appeal, issued in the last year, which address a variety of administrative law topics in useful or illuminating ways.

II. Reasonableness

Reasonableness and fairness remain the two watchwords of judicial review (with correctness more and more running a distant third, in those relatively rare instances where a "true" issue of jurisdiction arises or the legislature has mandated a correctness standard of review). In the first decision summarized below, the lingering question of whether the common law reasonableness standard affects the statutory "patent unreasonableness" standard is finally laid to rest. A number of other significant decisions concerning the reasonableness and patent unreasonableness standards of review are then summarized, and finally a significant decision of our Court of Appeal, on which leave has been granted to the Supreme Court of Canada, is noted.

A. Last Word on Whether Dunsmuir Affects "Patent Unreasonableness": PNG

Much judicial ink has been spilled in BC on the question of whether the common law "reasonableness" standard of review established in *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") affects the meaning of the statutory "patent unreasonableness" standard of review established by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"). This question has now been definitively answered by our Court of Appeal in *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 ("*PNG*"). In *PNG*, our Court of Appeal stated (at paras. 43-44):

> The Employer submits this Court has expressed conflicting views as to the meaning of the term "patently unreasonable" in s. 58 of the *ATA* following *Dunsmuir*. In that regard, it refers to *Manz v. Sundher*, 2009 BCCA 92 at para. 36; *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229 at paras. 7 to 10; *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447 at para. 53; *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114 at para. 44; and *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527 at para. 68.
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> I do not accept the Employer's submission that there is conflict in the decisions of this Court as to whether Dunsmuir changed the meaning of the term "patently unreasonable". In my view, the decisions are entirely consistent with the conclusion that the meaning was not changed. In any event, the most recent decision of this Court on this point is clear. In *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2013 BCCA 497, Madam Justice Saunders said the following:
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> > [53] … It is clear that whereas the term "reasonableness" describes a range of decision, "patently unreasonable" is at the high end of the deference spectrum and it retains its pre-Dunsmuir character.

The Court of Appeal in *PNG* further stated (at para. 48):

> When the *ATA* came into effect, the term "patent unreasonableness" had the meaning as set out above in *Law Society of New Brunswick v. Ryan*. There has

> been no change to its meaning since the enactment of the *ATA*, and the meaning set out in *Law Society of New Brunswick v. Ryan* continues to apply. It does not, as asserted by the Employer, have the same meaning as the reasonableness standard adopted in *Dunsmuir*.

Thus, *Dunsmuir* does not affect the meaning of "patent unreasonableness" in the *ATA*. The term retains its pre-*Dunsmuir* meaning as expressed in decisions such as *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, where the Supreme Court of Canada stated that a patently unreasonable decision is one that can be described as "clearly irrational," "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand" (para. 52).

The petitioner/appellant sought leave from the Supreme Court of Canada to appeal *PNG* on this question, and on October 29, 2015, the application for leave to appeal was dismissed with costs: 2015 CanLII 69424 (SCC).

B. Deference to Tribunal's Interpretation of Previous Decisions: Bandic

It is well-established that "patent unreasonableness" is a highly deferential standard of review, requiring courts to defer to decisions of tribunals even where they do not agree with them or believe them to be incorrect. In *Bandic v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 490 ("*Bandic*"), the Workers' Compensation Appeal Tribunal ("WCAT"), the only respondent in the matter, successfully appealed a finding on judicial review that its decision was patently unreasonable.

As noted in the Court of Appeal's decision (at para. 3), the chambers judge had found WCAT's decision patently unreasonable because it had "incorrectly and without jurisdiction" failed to apply previous decisions on the claim, or alternatively because WCAT had failed to properly consider the evidence. The Court of Appeal noted WCAT submitted on appeal that the judge "failed to accord appropriate deference to WCAT's decision," including its consideration of the evidence (para. 4), and "either misunderstood its decision or applied a correctness standard, rather than the standard of 'patent unreasonableness,' to its findings respecting binding conclusions in previous decisions on the claim" (para. 5).

The Court of Appeal in *Bandic* allowed WCAT's appeal, accepting its argument that deference should have been given to WCAT's interpretation of previous decisions and its weighing of the evidence. The Court emphasized that the judge "could only interfere if there was *no evidence* to support WCAT's findings" (para. 31, emphasis in original), and added: "In my view, WCAT was entitled to deference in its interpretation of the previous decisions on Mr. Bandic's claim, and on my view of those decisions, it cannot be said there was no evidence supporting WCAT's findings, or that the decision was openly, clearly or evidently unreasonable" (para. 33). Accordingly, the Court allowed the appeal, set aside the order of the chambers judge, and dismissed the petition (para. 34).

C. Less Deference under Dunsmuir: BC Hydro

The difference between review under the highly deferential "patent unreasonableness" standard and the *Dunsmuir* "reasonableness" standard can arguably be seen by comparing the approach taken by the Court of Appeal in *Bandic* to that taken in *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 363 ("*BC Hydro*").

In *BC Hydro*, the Workers' Compensation Board ("WCB") appealed a finding that it had interpreted the term "employer" in its home statute unreasonably, thereby rendering an unreasonable decision. The parties agreed that the common-law reasonableness standard of review

applied, and "also agree on the hallmarks of a review conducted on the reasonableness standard," the Court of Appeal noted (at para. 32). The Court continued in that paragraph:

> The reviewing court must approach its task from a deferential stance, with respectful attention to the decision and an appreciation of the specialized expertise and experience of the adjudicative body in interpreting its own statute. The review is directed primarily at whether the decision-making process demonstrates justification, transparency, and intelligibility, and whether the result falls within a range of possible, acceptable outcomes that are factually and legally defensible. It is an "organic exercise", in which the reasons must be read together with the outcome to determine if the result falls within that range: *Dunsmuir* at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 14.

The Court of Appeal noted that the petitioner was "an employer in the generic sense that it met the definition of that term in s. 1 of the Act," but that the issue was whether it was an "employer" for purposes of a workplace accident reporting obligation in s. 172(1)(a) of the legislation (para. 42). The Court further noted that the WCB decision-maker "relied on the legislative purpose of s. 172(1)(a) to justify an expansive interpretation of the scope of the reporting obligation" and "found that the objective of providing timely notice of serious injuries to the Board to enable it to fulfill its legislative mandate required that the obligation be imposed on any employer with a significant connection to the worksite and work incident, and in the best position to provide timely notification to the Board" (para. 43).

Under a "patent unreasonableness" standard of review, the question would have been whether this interpretation of the term "employer" in s. 172(1)(a) was "clearly irrational," "evidently not in accordance with reason," or "so flawed that no amount of curial deference can justify letting it stand" (see *PNG, supra*). However, in *BC Hydro*, applying the common law reasonableness standard, the Court of Appeal found the interpretation "unreasonable" on an analysis that arguably looks not dissimilar to a correctness standard (see paras. 44-53). WCB sought to appeal the decision to the Supreme Court of Canada, but on March 19, 2015, the application for leave was dismissed with costs: 2015 CanLII 13581 (SCC).

D. Judicial Review of a Review Tribunal: Dental Surgeons

In *College of Dental Surgeons of British Columbia v. Health Professions Review Board*, 2014 BCSC 1841 ("*Dental Surgeons*"), a patient made a complaint to the petitioner College about the services a member provided, which the College investigated and decided to take no further action. The patient appealed for a review of the College's decision to the respondent Review Board, which found the investigation by the College was inadequate and the disposition unreasonable. On this basis the Review Board remitted the matter back to the College. The College did not challenge the Review Board's decision on the investigation, but it sought judicial review of the Review Board's decision regarding the reasonableness of the College's disposition of the complaint. As Madam Justice Donegan noted in her decision on the matter (at para. 4): "This judicial review is unique in that the court is asked to review the decision of a specialized statutory tribunal that itself reviewed a decision of another specialized statutory tribunal. The standard of review to be applied is very much at issue."

After a detailed analysis (paras. 87-115), Donegan J. concluded that the standard of review applicable to the Review Board's decision was patent unreasonableness. Nonetheless, she found the Review Board took the wrong approach in reviewing the College's decision on the statutorily mandated reasonableness standard. She found it failed to extend sufficient deference to the College

as the first-instance decision-maker, both in terms of the College's interpretation of the legislation and its assessment of the evidence. She found the Review Board "did misunderstand its review role" and failed to apply "its statutorily mandated standard of review," and as a result the Board's decision was "patently unreasonable" (para. 132).

Arguably, the judge's critique of the Board's decision was more in the nature of a correctness analysis than a patent unreasonableness analysis. Her reasons indicate that she felt there was only one possible reasonable interpretation of the statutory requirement that the Review Board review the decision of the College for reasonableness: see especially paras. 127-31. However, it is not readily apparent that the statutory provision at issue was one of those very rare enactments for which there could only possibly be one reasonable interpretation. Rather, the provision appears to be one which could be open to more than one possible reasonable interpretation. If so, the judgment does not explain why the Review Board's interpretation was not merely wrong, in the eyes of the court, but so flawed that no amount of curial deference could justify letting it stand.

E. Interpreting the Scope of Reconsideration: Fraser Health Authority

Fraser Health Authority v. Workers' Compensation Appeal Tribunal, 2014 BCCA 499 ("*Fraser Health Authority*") is a 217-paragraph judgment by a five-member panel of our Court of Appeal. Mr. Justice Chiasson wrote the majority reasons on an administrative law issue that the court itself had raised: whether WCAT had jurisdiction to reconsider one of its own decisions for reasonableness. WCAT had long assumed it had this jurisdiction (which was not disputed by the parties to this appeal). However, Chiasson J.A. for the majority disagreed, stating in part on this issue (at paras. 158-61):

> In my view, the common law power of an administrative tribunal to reopen a proceeding to cure an error of jurisdiction does not extend to a review for reasonableness. It is limited to addressing errors of what today is called "true jurisdiction" to enable the tribunal to undertake fully the task it was mandated to do.
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> …
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> Historically, as expressed in Chandler and in s. 253.1, subject to a power to correct non-substantive mistakes, once an administrative tribunal has done what it was mandated to do, its jurisdiction is spent; it is functus officio. Chandler determined that this concept should be eased to allow a tribunal to reopen its proceeding in order to complete the task it was assigned. It also stands for the proposition that this includes the failure to provide procedural fairness because that results essentially in the tribunal not fulfilling its role. There is no suggestion that this limited ability to revisit the proceeding permits the tribunal essentially to retry the case before it in order to decide whether its decision was unreasonable.
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> I cannot read the words "reopen to cure a jurisdictional defect" as granting a broad review jurisdiction. This would fly in the face of the basic legal principle that the jurisdiction of an administrative tribunal is spent once it decides the issues entrusted to it. At common law, that a tribunal may be wrong substantively is for the courts to determine on judicial review, not for the tribunal itself.

The majority concluded that it was "patently unreasonable" of WCAT to have concluded that the common law authority of administrative tribunals to re-open a decision to cure a jurisdictional defect gave WCAT authority to review its previous decision for patent unreasonableness (para. 172). He therefore concluded the reconsideration decision which had done so in this case was "a nullity" (para. 180).

Madam Justice Newbury, dissenting (concurred in by Madam Justice Bennett) stated in part on this issue (at paras. 66-67):

> As the chambers judge observed in the case at bar, the approach advocated by WCAT has been adopted in various decisions of the Supreme Court of British Columbia and seems to have worked efficiently. Such an approach is consistent with the general purpose of the Act, which as noted in Kovach includes the administration of a no-fault compensation scheme by an independent commission without the need for injured workers to incur the expense and difficulty associated with court proceedings. To do away now with WCAT's established practice of reconsidering its own decisions for patent unreasonableness would increase the necessity for court proceedings, which those involved in the workers' compensation scheme may not be able to afford. Such an interpretation would thus be contrary to the purpose of the Act, and to the principles of administrative law generally, which as my colleague Mr. Justice Chiasson notes include the encouragement of the adjudication of disputes by specialized tribunals without the need to resort to courts.
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> In the result, I see no error in the chambers judge's approach to judicial review set forth in paras. 9-10 of his reasons, quoted above at para. 22. To summarize my conclusions, I find that:
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> 1. WCAT had the jurisdiction to carry out a reconsideration of its own earlier ruling for the purpose of correcting a jurisdictional error;
> 2. "Jurisdictional error" in this context includes an instance of procedural unfairness or the issuance of a decision that is patently unreasonable. It is not limited to questions of "true jurisdiction" in the Dunsmuir sense;
> 3. Where judicial review is sought from a reconsideration decision of WCAT, the judge should decide whether the reconsideration panel was correct in determining whether or not the original decision of the Tribunal was patently unreasonable. Thus in practical terms, both decisions will be before the court. …

WCAT sought leave to appeal *Fraser Health Authority* to the Supreme Court of Canada, and on June 25, 2015, the application for leave to appeal was granted "with the award of costs deferred to the Court hearing the appeal": 2015 CanLII 36779 (SCC). The hearing of that appeal is set for January 14, 2016.

III. Fairness

Even where decisions are protected by a strong privative clause, they remain subject to review for fairness. Following are some notable recent BC decisions addressing various issues that have arisen to do with review for procedural fairness.

A. Doctrine of Legitimate Expectations—Parklane

Parklane Auto & RV Sales Ltd. v. British Columbia (Assessor of Area No. 19 – Kelowna), 2015 BCSC 1482 ("*Parklane*") contains a current and useful overview of the principles of procedural fairness as set out in recent or leading Supreme Court of Canada and BC Court of Appeal decisions such as: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 (standard of review for fairness); *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (deference to procedural rules of tribunals); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (factors for assessing the flexible and variable content of the

duty of fairness); and *Canada (Attorney General) v. Mavi*, 2011 SCC 30 (legislative and administrative context is crucial in determining the content), all of which are referred to in the decision.

The applicant in this case appealed its property assessment to the Property Assessment Appeal Board, but the Board found the assessed value should be increased, not reduced. The applicant relied on the doctrine of legitimate expectations to argue the decision of the Property Assessment Appeal Board was procedurally unfair. It argued it "held a legitimate expectation that the assessed value for the Property would be confirmed, if the Board found that a reduction in the 2013 assessment was not appropriate" (para. 45). The legitimate expectation was said to arise from the fact that, according to Parklane, in past decisions the Board had "consistently confirmed the assessed values of properties when not satisfied a reduction was appropriate, even when the assessor has presented appraisal evidence suggesting a higher market value" (para. 47).

In these circumstances, Madam Justice Fleming found the "critical question here is whether the past decisions of the Board may properly give rise to a legitimate expectation as asserted by Parklane" (para. 50). She noted that "Parklane has provided no authority for this proposition" (para. 51). After considering authorities on legitimate expectations arising from the regular practice of tribunals, the judge concluded that past decisions of the Board did not "provide grounds for a reasonable expectation," given that they would have been "decided on their own merits and according to their own particular circumstances" (para. 55). She found the Board had made no representations to Parklane, and concluded Parklane "did not have a reasonable expectation that the Board would confirm the 2013 assessment of the Property when it came to the conclusion its actual value was higher …" (*ibid.*).

Although Fleming J. found no procedural unfairness, she nonetheless remitted the matter to the Board to consider whether the assessment was "equitable," a question she found the Board was statutorily required to consider. She found the Board was required to consider even though no party had argued the assessment was inequitable, stating on this point: "The fact that neither party previously raised the issue of equity is not a significant concern here given the Board's obligation to ensure the increased assessed value of the Property was also equitable" (para. 94).

B. "Procedural Breach" Versus Procedural Unfairness: Antrobus

In *Antrobus v. Vanvugt*, 2014 BCSC 2345 ("*Antrobus*"), the petitioner was involuntarily transferred from a medium security to a maximum security federal penitentiary following his involvement in an assault on another inmate. He alleged the transfer decision was unreasonable and procedurally unfair. Mr. Justice Voith concluded the decision was reasonable, and rejected two of the petitioner's three complaints about the process. However, the third complaint, that the petitioner had not been told when his hearing would take place so that he could attend and make submissions, was found to establish a denial of procedural fairness. This was further found to render the transfer decision unlawful, and the petition for *habeas corpus* seeking return to a medium security institution was therefore granted. The judge noted there was "no basis" (para. 74) for seeking to be returned to a specific medium security institution, citing *Khela v. Mission Institution (Warden)*, 2011 BCCA 450 (aff'd 2014 SCC 24) at para. 88.

In overturning the decision to transfer on the basis of a finding of procedural fairness, Voith J. noted that the respondent accepted that the transfer of an inmate from a medium to a maximum security institution "constituted a deprivation of his residual liberty" (para. 24), and if a breach of procedural fairness was made out, "the ensuing administrative decision will always be unlawful" (para. 31), citing *Boone v. Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515

at para. 46 ("*Boone*"). However, it should be noted that the Ontario Court of Appeal stated in that paragraph of *Boone*:

> Where there has been a denial of the right to a fair hearing, the administrative decision will always be unlawful. *However, not all procedural breaches will necessarily result in procedural unfairness and the denial of the right to a fair hearing* … (para. 46, emphasis added)

C. No True Issue of Procedural Fairness: HSA

In *Health Sciences Association of British Columbia v. Interior Health Authority*, 2015 BCSC 98 ("*HSA*"), the petitioner sought to have the court quash a decision of the Labour Relations Board on the basis that it was patently unreasonable and procedurally unfair. Mr. Justice Butler noted that the petitioner "did not actively pursue" the argument that the Board's decision was patently unreasonable (para. 32) and instead focused on its argument that "the Board has applied its policy inconsistently" and "the inconsistent application of law or policy has created a significant procedural unfairness" (para. 34). Although the petitioner characterized its arguments as being about the process rather than the substance of the Board's decision, the judge found the petitioner was "unable to identify any procedural unfairness or breach of natural justice in the process leading up to either the Original Decision or the Reconsideration" (para. 37). He further found the "reason that HSA has been unable to point to any procedural unfairness is that its complaints are in reality complaints about substance" (para. 39).

Butler J. further stated:

> HSA takes issue with the Board's policy and the application of the policy to the circumstances of these applications. In that sense, this matter has some similarity to the judicial review application in *International Forest Products Limited v. British Columbia (Labour Relations Board)*, 2014 BCSC 956. Madam Justice Baker noted, at paras. 7-9, that the applicant, Interfor, did not point to any unfairness in the procedure but argued that the Board should be found to have "perpetuated an unfairness" because it failed to conclude that an arbitrator acted unfairly in the manner they addressed an agreed statement of facts. Baker J. concluded that this argument "… is really a submission that it is open to this Court to review the Board's decision for correctness; and an indirect attack on the correctness of the Arbitration Award." Similarly, *HSA's argument attempts to attack the policy of the Board, not its procedure. In doing so it is attempting to have this Court review the Reconsideration and the Original Decision on a standard of correctness, not patent unreasonableness as mandated by statute*. (para. 39, emphasis added)

The judge found that as there had been no procedural unfairness (and no patent unreasonableness) the petition for judicial review must be dismissed.

D. Fairness, Reasonableness, and Implicit Decisions: Local 1611

Construction and Specialized Workers Union, Local 1611 v. British Columbia (Information and Privacy Commissioner), 2015 BCSC 1471 ("*Local 1611*") involved a somewhat complex underlying factual and administrative matrix, but a primary question addressed in this judicial review decision was whether the Office of the Information and Privacy Commissioner ("OIPC") had breached procedural fairness or acted unreasonably in giving notice to only four of 13 trade unions potentially affected by a decision. In addressing this question, Madam Justice Maisonville noted that the requirement to give notice is "a fundamental element of the duty of fairness at common law" (para. 77), but that "the requirements of procedural fairness depend on the context of each

case, and a lack of formal notice may not amount to a failure of procedural fairness where a party has actual notice" (para. 78). She further noted that where the giving of notice is a matter of discretion, as it was in this case, and a party does not receive notice, "this is treated as an implicit decision not to notify that party and that decision will be granted deference so long as it is reasonable" (para. 83).

Maisonville J. noted that the four unions who had been given notice had previously applied for and been granted standing by OIPC, whereas the remaining nine unions had not sought standing. It was argued to her that this was a reasonable basis for the implicit decision not to give notice to those unions; however, she did not accept this argument:

> … the only factor differentiating the Notified Unions from the other sponsoring unions is that the Notified Unions applied for standing; however, that alone, in my view, does not amount to a reasonable basis. OIPC has been delegated the discretionary power to send notifications to those that it considers appropriate. In this context, instances will undoubtedly arise where an appropriate party will not be immediately obvious, and the process leading up to the Standing Decision in this case demonstrates that OIPC has put procedures in place to address those instances. This case is not about those processes. This case is about what the Adjudicator is to do next in light of the fact that he or she determined that one group had been missed and that it would be appropriate to send s. 54 notifications to at least some members of that group. In those circumstances, it cannot be reasonable to differentiate between similarly placed individuals within the group merely on the basis that some applied for standing and others did not. That basis alone would be arbitrary and something more is required. That something more will be shown deference but must be reasonable in the circumstances of the case and must be apparent in the reasons of the Adjudicator or on the record before the Adjudicator. (para. 95)

After considering submissions as to why the implicit decision was reasonable in the circumstances, the judge concluded that she was "not satisfied that the Record or the circumstances of this case reveals a reasonable basis to distinguish" between the unions who were given notice and standing and those who were not, and accordingly the decision to exclude them was "arbitrary and so unreasonable" (para. 127). The implicit decision not to grant nine of the 13 unions notice and standing having been found unreasonable, OIPC's subsequent decision to release certain information was therefore found to have been "decided on an incomplete record" and it "should be set aside" (para. 129). The matter was then referred back to OIPC to re-decide the release application, with direction that, in doing so, "it should re-direct its mind to the appropriate recipients of s. 54 notice in light of its Standing Decision [to grant the four unions standing] and the direction provided in these reasons" (*ibid.*).

IV. Procedural Issues

A variety of procedural issues can arise in the course of hearing applications raising administrative law issues (typically, but not always, petitions for judicial review of the decisions of statutory decision-makers). The following recent BC decisions highlight that a number of these issues.

A. Striking Petition for Inadequate Pleadings: Mayden

Mayden v. British Columbia (Workers' Compensation Appeal Tribunal), 2015 BCSC 692 ("*Mayden*") provides guidance on when petitions may be struck for inadequate pleadings. The petitioner, who was self-represented, sought judicial review of several decisions of WCAT and

WCB. WCB brought a preliminary application for an order pursuant to Rule 9-5(1) of the Rules of Court that the pleadings in their entirety be struck and the petition dismissed.

In addressing the application to strike the petition, Madam Justice Harris noted that, under Rule 9-5(1)(a), the facts pled in the petition must be taken as proven. Assuming the facts pled are true, a claim will only be struck if it is plain and obvious the pleadings disclose no reasonable cause of action or the claim has no reasonable prospect of success. She further noted the purpose of Rule 9-5(1)(a) is "to ensure that the parties and the court have a clear understanding of the nature of the claims advanced" and that a "statement that fails to satisfy the basic purposes of pleadings will be struck" (para. 63). Further, the pleadings "must clearly define the issues of fact and law to be determined by the court" (para. 64).

Harris J. then noted that, as this was an application for judicial review, the requirements of the *Judicial Review Procedure Act* "must also be considered," including s. 14 which requires a petition to set out "the ground on which relief is sought and the nature of the relief sought" (para. 65). She found that, in the case before her, the petition did not state grounds upon which judicial review was sought—"the petition does not identify a specific jurisdictional error or error of law" (para. 67). The petition was also "difficult to follow" (para. 68) and did not state "the nature of relief sought, as required under section 14 of the *Judicial Review Procedure Act*" (para. 69).

The judge added that the "the failure to state the grounds upon which relief is sought and the failure to state the grounds upon which the claim is based are fatal to the petition" (para. 72). She states she agreed with counsel for WCB that "even accepting the facts pled as true, the petition is substantively deficient, does not disclose a reasonable claim, and has no reasonable prospect of success" (para. 74). She further decided not to allow an opportunity to re-draft the petition as it had "already been amended twice and, more significantly, his current petition makes essentially the same allegations as in his 2001 petition" (para. 75). She further noted that it was apparent the petitioner's complaint was "not directed to errors committed by the Appeal Division or WCAT but rather to the decision not to allow his claim for compensation" and that he did not appear to appreciate "the nature of judicial review as is evident by his focus on the merits of his claim for compensation, which is not the issue before me" (*ibid.*).

Although she therefore granted the preliminary application to strike the petition, the judge went on in the alternative to find the petition would have to be dismissed on its merits in any event.

B. Striking Petition as an Abuse of Process: Mount Pleasant

In *The Residents Association Mount Pleasant v. Vancouver (City)*, 2015 BCSC 551 ("*Mount Pleasant*"), the self-represented petitioner community association sought judicial review of a municipal decision to rezone a parcel of land. The land developer brought an application to be added as a respondent, which was granted summarily on the basis that it was a person whose direct interests might be affected by the granting of the relief sought. After being added as a respondent, the developer then sought dismissal of the petition "on the basis of action estoppel or on the basis that the petition is an abuse of process" (para. 6). Madam Justice Fenlon allowed the preliminary application on the basis that the petition was in substance identical to an earlier petition the petitioner (then represented) had filed which had been dismissed on its merits. The petitioner narrowly avoided an award of costs against it.

C. Dismissing Petition for Delay: Archibald

In *Archibald v. Averbukh*, 2014 BCSC 1793 ("*Archibald*"), the petitioner and the respondent were unrepresented individuals on either side of a petition for judicial review of an order given under the *Residential Tenancy Act*. The order had been issued in 2011 and the petition was not filed until 2013, long after the 60-day time limit that was applicable by virtue of the applicability of s. 57(1) of the *ATA*. Mr. Justice Voith noted the three statutory requirements for the exercise of discretion in s. 57(2) of the *ATA* to extend the 60-day time limit, and found none were met in this case. Accordingly, he declined to grant an extension and dismissed the petition.

D. Dismissal for Failure to Exhaust Internal Remedies: Spence

In *Spence v. British Columbia (Superintendent of Motor Vehicles*), 2015 BCSC 32 ("*Spence*"), the petition was dismissed on the well-established ground of failure to exhaust internal remedies. Mr. Justice Sewell explained (at paras. 27-31):

> In this case, I accept the Attorney General's submission that Mr. Spence's failure to exhaust his internal remedy of seeking a review is fatal to his application for judicial review. The law is well settled that, except in extraordinary circumstances, a superior court will not grant any remedy to a person who has not exhausted all adequate remedial processes in the administrative process of which he or she complains.
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> This principle has been stated in numerous authorities. It was succinctly summarized by Stratas J.A. in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at para. 30:
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> > [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.
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> The current review procedure in the *MVA* has been found to provide a constitutionally appropriate remedy to persons affected by a driving prohibition: *Bro v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 1682.
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> In this case the petitioner has not shown that any extraordinary circumstances exist that would make it appropriate for the court to intervene. In fact, *Murray* demonstrates that the petitioner would have had an adequate remedy by way of review before the Superintendent if the Superintendent acted in accordance with the principles set out in that decision.
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> Accordingly the petition is dismissed.

E. Limits of Judicial Review: Yaletown

In *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227 ("*Yaletown*"), the Court of Appeal granted an appeal from an order quashing a zoning bylaw and development permit issued to a developer by a municipality. The petition for the order had been brought by a community group and had been granted on the basis that the municipality had conducted a flawed public hearing process. The Court of Appeal disagreed that the public hearing process had been flawed. Its reasons for overturning the order were lengthy, but were pithily summed up in the penultimate paragraph of Chief Justice Bauman's reasons for judgment on behalf of the Court of Appeal (para. 153):

> When the City is considering rezoning a property, local residents have two important rights. They have the right to be given information sufficient to enable them to come to an informed, thoughtful and rational opinion about the merits of the rezoning. They also have the right to express this opinion to the City at a public hearing. When citizens feel they have been denied one or both of these rights, they may seek a remedy in the courts by petitioning for judicial review. *However, judicial review has well defined limits. Citizens who disagree with the City's view of the public interest must seek change through the political process rather than the courts*. (emphasis added)

F. Judicial Review and Class Action Proceedings: Lockyer-Kash

In *Lockyer-Kash v. Workers' Compensation Board of British Columbia*, 2015 BCCA 70 ("*Lockyer-Cash*"), the Court of Appeal grappled with the interaction between judicial review and class action proceedings. In setting aside the lower court's decision to certify a class proceeding, the Court of Appeal noted that the result would be to override otherwise applicable time limits and requirements to exhaust internal remedies before seeking judicial review. With respect to the argument that the class proceeding would provide access to justice for a group of claimants, the Court commented (at para. 54):

> There can be no doubt that access to justice is a factor to consider when determining whether a class proceeding would be the preferable procedure. … However, it is only one of the factors to be considered, and it does not predominate over the other factors. … On this point, I adopt the comments made by Mr. Justice Orsborn in *Brown v. Newfoundland and Labrador (Workplace Health, Safety and Compensation Commission)*, 2009 NLTD 106:
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> > 21 But here, simply bringing a proceeding as a class proceeding and characterizing it as an access to justice issue is not a sufficient basis on which to circumvent either the internal review provisions provided for in the governing statute, or the limitation that a Commission decision as to compensation benefits can only be challenged in court by engaging the limited judicial review jurisdiction of the court.

G. No De Novo Hearing on Judicial Review: Albu

Albu v. The University of British Columbia, 2015 BCCA 41 ("*Albu*") decided an appeal of a lower court decision rejecting a petition for judicial review. The petitioner/appellant sought to introduce material obtained through a civil action discovery process and freedom of information requests that was not before the body whose decision had been under judicial review. In refusing to admit the material, the Court of Appeal emphasized that the role of the court on judicial review is "supervisory … [which] means that judicial review proceedings are to be conducted on the record"

(para. 35). Citing *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272, the Court noted that the reviewing court "usurps the role" of the tribunal where it receives new evidence that was not before the tribunal and conducts a *de novo* hearing, rather than reviewing the tribunal's decision based on the record that was before the tribunal. It noted that such an approach "is not appropriate on judicial review or on appeal from a judicial review decision" (para. 36).

H. Review of Treatment of Expert Evidence: Maddock

In *British Columbia (Ministry of Justice) v. Maddock*, 2015 BCSC 746 ("*Maddock*"), the petitioner argued a delegate of the Office of the Information and Privacy Commissioner erred in not accepting the affidavit of an individual as expert evidence. The petitioner argued this error rendered the decision of the delegate unreasonable. In considering this argument, Mr. Justice B.D. MacKenzie recognized that some aspects of the delegate's reasoning with respect to the expert evidence issue was imperfect, using words such as "unfortunate" (para. 41) and "clouded" (para. 42) to describe her analysis. However, the judge noted the deference that must be given to administrative decision-making (paras. 45-46) and (at para. 47) that judicial review is an "organic exercise" and not a "line-by-line treasure hunt for error," citing *Communications, Energy and Paperworkers Union, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para. 54. Ultimately, he concluded the decision taken as a whole was not unreasonable, and therefore he dismissed the petition. In so doing, he exercised his discretion to order no costs.

I. No Judicial Review Where No Rights Affected: Heather Hills

In *Heather Hills Farm Society v. Agricultural Land Commission*, 2015 BCSC 1108 ("*Heather Hills*"), the petitioner built a nine-hole public golf course on part of their farm, allowing sheep to graze on the fairways. They sought a declaration from the respondent Commission that this combined golf course/sheep pasture was a permitted "agri-tourism" use of farm land under regulations to the *Agricultural Land Commission Act*. The Commission took the position the question was academic because the operation of the golf course had been prohibited by a court order made in a different proceeding. It also said the matter was not subject to judicial review because it had made no decision or order on the question of whether the golf course constituted agri-tourism, although its deputy chief executive officer ("CEO") had told the petitioners that it did not.

On the latter question, Mr. Justice N. Smith accepted that the "expression of views by staff of a tribunal is not ordinarily subject to judicial review, particularly if the communication is purely 'administrative' or 'informational'" (para. 30), and that where "no decision has yet been made and the statutory process is in its preliminary stages, the court should not entertain an application for judicial review" (para. 31). The judge found the statement by the CEO was more than merely an expression of an opinion, and it was "at least arguable that such a statement could, in some circumstances, be a decision about property owners' legal rights, duties or liabilities" (para. 37). However, because the "legal rights and liabilities in respect of the golf course had already been conclusively determined by the court order", the letter could not affect those rights and liabilities and "the letter therefore cannot be characterized as the exercise of a statutory power of decision" (para. 38). He went on to find that, in any event, even if the CEO's statement was reviewable, the petitioner had failed to demonstrate it was unreasonable.

V. Role of Tribunal

Very recently, on September 25, 2015, the Supreme Court of Canada issued a decision on the role of the tribunal which will undoubtedly become the new leading authority on the issue: *Ontario (Energy Board) v. Ontario Power General Inc.*, 2015 SCC 44 ("*Ontario Energy*").

In *Ontario Energy*, Mr. Justice Rothstein for the Court (Madam Justice Abella dissented on the result of the appeal but not on this issue) confirmed that a discretionary approach to the role of the tribunal in judicial review proceedings was appropriate, stating in part (at para. 57):

> I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

The discretionary approach is consistent with the approach advocated by Chief Justice Bauman for our Court of Appeal as discussed next.

A. The Discretionary Approach is Adopted in BC: Thibeau

In *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 ("*Thibeau*"), Chief Justice Bauman for the Court of Appeal began by noting that the "law on the standing of a tribunal to appear on judicial review of one of its decisions has been evolving since the Supreme Court of Canada's decision in *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 …" (para. 38). After reviewing that evolution (paras. 39-50), he stated (at para. 51):

> I consider that *Children's Lawyer* is persuasive. Whether a tribunal has standing to defend the merits of the decision under review is a matter for the reviewing court's discretion. The court must strike an appropriate balance between the two fundamental values, the need to maintain tribunal impartiality and the need to facilitate fully informed adjudication on review. While I stress this balancing exercise is discretionary in nature, it is appropriate to provide some general guidance. The following potentially relevant factors are in no way intended to be exhaustive. It is not possible to give examples of all of the relevant factors to consider as to the appropriate level of tribunal participation on judicial review (*Leon's Furniture* at para. 29).

Bauman C.J.B.C. added that the "need to maintain tribunal impartiality will generally be more important, and it will be less likely to be appropriate for a tribunal to argue the merits," if the tribunal is "strictly adjudicative in function, rather than also inquisitorial or investigative,, the matter could be referred back to the tribunal for reconsideration, or "the tribunal seeks to make arguments on review which are not grounded in, or which are inconsistent with, the published reasons for its decision" (para. 52). Conversely, "the need to facilitate fully informed adjudication will generally be more important, and it will be more likely to be appropriate for a tribunal to argue the merits" if there is "no other respondent able and willing to defend the merits," there is a challenge to the legality of the tribunal's procedural policies or guidelines, or "a detailed analysis of matters within the specialized expertise of the tribunal is necessary and the court is unlikely to be able to comprehend or analyze those matters without the assistance of counsel for the tribunal" (para. 53). He added with respect to the latter circumstance that in "today's more deferential context, it will less often be necessary to hear from tribunals on technical matters" (para. 54).

VI. Costs

The normal rule that costs "follow the event"— that is, the successful party is entitled to costs—is routinely applied as between petitioners and respondents who are non-tribunal respondents in judicial review proceedings: *Anderson v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2015 BCSC 1443 at para. 25. With respect to tribunal respondents, the general rule is that they do not pay or receive costs on judicial review. This general rule is subject to exceptions, as is discussed in the first case below and illustrated in the second. The third and fourth cases below discuss circumstances in which special costs or costs on a higher scale will be considered in the context of a judicial review proceeding.

A. Exposure of a Tribunal to Costs: Thibeau

Thibeau is notable for its reasoning on the standing of the tribunal on judicial review. However, this decision also addressed exposure of a tribunal to costs on judicial review. On this issue the Court of Appeal observed that traditionally the tribunal did not pay costs on judicial review except where it had engaged in misconduct. The question was whether a finding that the tribunal had breached its duty of procedural fairness in the proceedings under review would constitute misconduct justifying an award of costs against the tribunal on judicial review.

On this issue, the Court of Appeal stated in part (at para. 69):

> As noted, all costs awards are discretionary. I do not mean to suggest that a finding of a breach of natural justice or procedural fairness will automatically result in an award of costs against the respondent tribunal. The context of the particular case must be considered. However, it seems fair to say that the closer the case is to one of a significant breach of the rules of procedural fairness in a case where those rules clearly apply, the stronger will be the case for a costs award.

B. Certain Tribunals Can be Awarded Costs: Feil

In *Feil v. Certified General Accountants Association of British Columbia*, 2015 BCSC 489 ("*Feil*"), the only respondent was the professional regulatory body, which successfully repelled a judicial review of one of its disciplinary decisions by the petitioner, and sought costs. The petitioner argued that as an administrative tribunal it was not entitled to costs, but Mr. Justice Jenkins followed an earlier BC authority to distinguish disciplinary tribunals from other kinds of administrative tribunals. In BC there is precedent for professional disciplinary tribunals being awarded costs where they successfully resist application for judicial review of their decisions (see paras. 26-27 of *Feil*).

C. Special Costs and Costs on a Higher Scale: Pioneer

In *Pioneer Distributors Ltd. v. Orr*, 2015 BCSC 1237 ("*Pioneer*"), Madam Justice Hyslop considered an application by the successful party in a judicial review proceeding for special costs or alternatively "party and party" costs (costs on a higher scale). The judge found the conduct of the unsuccessful party did not merit an award of special costs but did merit costs on a higher scale. She stated (at paras. 26-27)

> … This judicial review took two days and lengthy written submissions were made. This case should not have been complex, but was made complex because of the legal principles that were debated by Pioneer. …
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> All these legal arguments required legal analysis. Their denial by Pioneer made this judicial review occupy two days of hearings and made the arguments complex.

> It contributed to the expense of the litigation. Further, Pioneer conceded nothing when there were times they ought to have. As a result, I order costs at Scale C.

D. Unjustified Bias Allegations and Costs: Western Stevedoring

International Longshore and Warehouse Union (Local 500) v. Western Stevedoring Ltd., 2015 BCSC 507 ("*Western Stevedoring*") involved a petition for judicial review of a remedy decision made by a labour arbitrator under the *Canada Labour Code*. Among the grounds for review alleged by the petitioner was reasonable apprehension of bias, an allegation which the court rejected.

The respondents sought special costs, arguing the bias allegation was completely unsupported by evidence and should not have been made. Madam Justice Koenigsberg noted that "[u]nfounded allegations of bias have previously formed the basis for special costs awards" (para. 69). She found the bias allegations before her were "baseless" and the making of such allegations "could rise to the level of reprehensible conduct", but that "an award for special costs is highly discretionary and despite its seriousness, two connected but unfounded allegations without other indecorous conduct may not rise to the label reprehensible" (para. 75).

The judge further noted that there had been "no allegation of actual bias" and concluded that while the allegation of an apprehension of bias was not reasonable in this case, it was not "so reprehensible that this Court must send a rebuke or reproof by an award of special costs" (para. 76). Regular costs were awarded instead.

VII. Conclusion

The decisions reviewed above show that administrative law issues continued to give rise to interesting and notable decisions from BC courts in the last year. Some will be reviewed further by the Supreme Court of Canada, while other decisions by our Court of Appeal are the last word on the particular issue. Legal practitioners in the administrative law arena who appear before the courts in this Province will want to keep abreast of both new developments in the law and the latest authorities on established principles; it is hoped this paper is useful in that regard.