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BCCAT News

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President's Message 2012

For 15 years, BCCAT has served as an important facilitator in the development and improvement of the administrative justice system in B.C.

through delivery of educational and training courses to countless tribunals, boards and agencies (both in BC and beyond), through our informative and popular annual conferences, and through provision of important comments on governmental initiatives. As an organi-

zation, we continue to grow and adapt to meet the changing needs of administrative justice in B.C. Our new Board of Directors and executive will continue to ensure that BCCAT meets these needs and challenges.

Website/Database Changes:

The Board has developed a re-designed website and encourage our members to have a look at it at www.bccat.net and provide feedback. We will be adding more features in

the coming year, including a members-only area. In addition, we have developed a new database to allow BCCAT to better communicate with our members and tribunals.

Education:

The education committee chair, Heather MacNaughton, and the various course coordinators continue to deliver top quality programs and training in administrative justice.

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Mediation—Art, Science or Maybe a Bit of Both!

By Debbie Cameron

People often ask me, how do you mediate? What are the attributes and skills of an effective mediator? What

style of mediation do you practise? What secret strategies do you use to move the parties toward mutual agreement? My response is always the same: it's not rocket sci-

ence. It involves problem solving approaches that each of us use in our everyday life. It's kind of like riding a bicycle.

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Mediation—Art, Science or Maybe a Bit of Both! - Continued

Mediation is often defined as assisted negotiation.

Most of us know how to ride a bike; but we may not be able to explain the science behind it. The art is in the execution; the science is the culmination of factors that allow us to move forward on two wheels. Similarly, the practise of mediation is an art, but it is science that allows the mediation process to effectively resolve disputes. Like riding a bicycle, a person can mediate without fully understanding the science of mediation. At the same time, the more one understands the science, the greater the opportunities for improving one's practise of the art of mediation.

Learning something new is often daunting. Remember when you first learned to ride a bike? The first time demanded the most effort. While the fear of falling may have hindered you, the exhilaration of self propelled motion may have spurred you onward. Each time you practised, your brain incorporated the experience. At some point you develop a solid

neural pathway that allows you to recall how to ride the bike, no matter how long it has been since you last did it. So it is with mediation. Trying something new often causes us to fear failure given our limited skills. Natural justice concerns resulting from the shift from the legal paradigm to the mediation paradigm may further reduce interest and tolerance for the activity. However, if we endeavour to understand the mediation process these feelings may be mitigated.

Mediation is often defined as assisted negotiation. The practise of mediation involves identifying, synthesising, and applying the attributes, skills and techniques needed to foster an environment conducive to negotiation. Effective mediators listen to understand, seek information through effective questioning, manage emotions, clarify interests, brainstorm solutions, and assess obstacles to implementation. In applying these skills the mediator must engender trust and rapport with the parties. A medi-

ator who is respected by the parties is more likely to be effective in the art of persuasion. It is this process of building problem solving relationships and creating forward momentum that is often characterized as the art of mediation. We are familiar these skills because we have used them since childhood.

If we know how to mediate, what is holding us back? Is it the desire for success? Is it the fear of failure? What is success in the context of mediation? Blackburn (2003) defines procedural justice as "the element of justice concerned with the application of laws, rather than the content of laws themselves." Cropanzano and Greenberg (1997) define it as "perceived fairness of procedures used to determine outcomes." As a mediator for eighteen years it is my observation that the parties' sense of procedural justice has a significant influence on perceptions of substantive justice outcomes.

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President's Message 2012—Continued

The committee is currently involved in updating our courses, such as

“Administrative Justice for Decision-Makers”, “Decision-writing”, and “Administrative Justice for Decision-Makers in Post Secondary Institutions”. In addition, upon request, we tailor courses for specific organizations, as we have done for the Benchers of the Law Society of B.C., U.B.C., and organizations in the N.W.T. and Alberta. For more information on BCCAT's courses, go to <http://www.bccat.net/Courses/Schedule.asp>.

Annual Conference:

Our Conference Committee is working hard on putting on another quality educa-

tional conference centred primarily on alternative dispute resolution in administrative justice, to be held **October 1, 2012 at the River Rock Hotel, Richmond, B.C. with a possible second day of workshops on October 2, 2012** Mark your calendars now for another excellent event with a faculty of experienced and knowledgeable presenters and speakers.

Conclusion:

BCCAT will be spending this next year on reviewing our organizational structure and needs and invite any feedback that members can give to BCCAT on this. In addition, BCCAT would not be able to operate without the tire-less efforts of volunteers

and if you are interested in serving, we would love to have you on board. Please contact me through registrar@bccat.net.

We thank everyone who we work with and support us in our efforts to improve and enhance our administrative justice system.

To this end, the Board of Directors looks forward to another great year,

Simmi K. Sandhu, President

British Columbia Council of Administrative Tribunals

The 2012 Conference will be held October 1, 2012 at the River Rock Hotel in Richmond, BC.

Mediation—Art, Science or Maybe a Bit of Both! - Continued

This observation is reinforced by Goldberg and Shaw's (2007) survey of 216 advocates in mediation. Their research suggests that the ability to gain the confidence of the parties is more indicative of a successful mediator than any other skill. Confidence building attributes include being friendly, demonstrating empathy, and being respectful. Also im-

portant is the ability to convey honesty and integrity, to respect confidences, be non-judgemental, and the ability to think on one's feet. It is also important to have a working knowledge of contracts and contract law (Goldberg and Shaw, p. 398).

It is only after confidence building that process skills come into play. A mediator talented in these processes

is an obedient listener, patient, persistent, tactful in their questioning and creative while providing useful evaluations and/or “reality checks”.

In a separate study Goldberg and Shaw identify causes of mediator failure. The most drastic demonstrations of a mediator's lack of integrity include inconsistent evaluations, disclosed confidences, bias, failure to demonstrate interest or understanding of the dispute and poor preparation (Goldberg and Shaw, p. 414).

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Mediation—Art, Science or Maybe a Bit of Both! - Continued ▀

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Returning to our bicycle metaphor, if we can ride the bike, how can an understanding of the science improve performance? Newton's laws of motion and gravity tell us that for every action there is an equal but opposite, reaction. Consequently, we learn that standing while you pedal up a hill increases the force on the pedals and therefore the forward momentum of the bike. Similarly, isolated leg workouts assist to develop the muscles used in cycling and stronger muscles equal improved output.

Mediation like many other professions draws on both natural science and the social sciences. Biology and physiology help inform our knowledge of the brain, autonomic nervous system and the role of hormones in conflict. The social sciences help us understand individual psychology, social groups and processes, while social psychology bridges the gap between personality, values and

the mind, with social structure and culture. These two branches of scientific research help us categorize human behaviours as resulting from either nature or nurture. This knowledge enables us to develop and adopt strategies that address identified needs. For example, understanding the psychology of ego allows us to understand the value of listening, not only as a vehicle for information gathering, but also in the promotion of self esteem. In the same way, understanding the tug of war between the amygdala (the feeling part of the brain) and the pre-frontal cortex (the thinking part of the brain) during highly charged situations fosters a mediator's awareness of the importance of emotional intelligence in modelling behaviour, and in mentoring the parties in the skills of emotional management.

In mediation, much like riding bicycle, the blend of art and science assists us to improve our craft. More significantly, applying this knowledge in our efforts to

cultivate the attributes, skills, and techniques that support positive perceptions of procedural justice provide us with incentives and opportunities to become effective mediators.

References

- Cropanzano, R., & Greenberg, J. (1997). Progress in organizational justice: Tunneling through the maze. In C. L. Cooper & I. T. Robertson (Eds.). *International Review of Industrial and Organizational Psychology* (Vol. 12, pp. 317-372). New York: Wiley
- Goldberg, S. & Shaw, M. The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three. *Negotiation Journal*. Volume 23. No 4.: 393-418
- Procedural Justice. (2003). In Simon Blackburn, (Ed.), *The Oxford dictionary of philosophy in religion and philosophy*. UK: Oxford University Press, Inc. Internet Explorer. www.oxfordreference.com (13 June 2003).

Tribunal Independence and Bias—*Bror v. College of Veterinarians of BC*, 2011 BCSC 486

By Lisa Wong

In *Bror v. College of Veterinarians of BC*, 2011 BCSC 486, a number of Indo-Canadian veterinarians alleged that the College of Veterinarians discriminated against them on the basis of race. The hearing before a single member of the Human Rights Tribunal began in September 2007 and occupied some 200 days of hearings. In July 2010, the member advised the parties, by reading a prepared statement into the record, that her appointment was set to expire on July 31 and that despite her requests she would not be reappointed. She said the only possibility for her continued appointment would be a 6-month Chair's appointment under s. 6 of the *Administrative Tribunals Act* (ATA), and that this would not be addressed until a new Chair is appointed in August 2010. The member then adjourned the balance of the hearing dates scheduled for July.

The veterinarians wrote to the Attorney General and to the exiting Tribunal Chair to reappoint the member, calling the failure to reappoint a deep affront to the decision-making independence of this member and to the integrity and independence of the tribunal.

An article in the *Vancouver Sun* the same day quoted one of these veterinarians as saying the failure to reappoint the member was “yet more evidence of discrimination against Indo-Canadian veterinarians”.

The College of Veterinarians took the position that the member didn't have to address her reappointment issue with the parties and that by doing so, she had politicized the situation to the point that it would be impossible for her to continue; it said that as the opposing party (the veterinarians) had advocated for the member's reappointment, the member “will reasonably be perceived by [the College] to be in the [veterinarians'] debt”. On August 12, 2010, the (new) Acting Chair authorized the member to continue with the hearing until its conclusion.

Within a month, the College of Veterinarians filed for judicial review at the B.C. Supreme Court, saying the member should recuse herself on the grounds of reasonable apprehension of bias. The BC Supreme Court relied on the Supreme Court of Canada's finding in *Wewakym Indian Band v. Canada*, 2003 SCC 45, as summarized by the B.C. Court of Appeal in *Taylor Ventures Ltd. (Trustee of) v.*

Taylor, 2005 BCCA 350, for determining whether a reasonable apprehension of bias has been made out:

- i. a judge's impartiality is presumed
- ii. A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified
- iii. The criterion of disqualification is reasonable apprehension of bias
- iv. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude
- v. the test for disqualification is not satisfied unless it is proved that the informed, reasonable, and right-minded person would think that it is more likely than not that the judge (i.e. tribunal member), whether consciously or unconsciously, would not decide fairly
- vi. The test requires demonstration of serious grounds on which to base the apprehension
- vii. Each case must be examined contextually and the inquiry is fact-specific (emphasis in original)

The Court dismissed the petition for judicial review ruling that, given the potential

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Within a month, the College of Veterinarians filed for judicial review at the BC Supreme Court.

Tribunal Independence and Bias—*Bror v. College of Veterinarians of BC*, 2011 BCSC 486—Continued

The Court found the member's statement neutral and concerned with the process

impact on the hearing process, the member was obligated to advise the parties of her non-reappointment. Although it was unfortunate that the member did not mention that the chair could authorize her to continue with the hearing until its conclusion (under section 7 of the ATA), her omission in this regard was not misleading because the written evidence showed that both parties were well aware of this possibility.

The Court found the member's statement neutral and concerned with the process, and concluded that the "entirely inappropriate" interventions by the veterinarians and their "highly improper" statements to the newspapers, which had the potential to suggest the alignment of the member with one side's cause, cannot "serve as a basis for [the member's] removal" when they were not encouraged or accepted by her

Reiterating that the presumption of impartiality applies to the member, the

court strongly rejected the assertion that this presumption of impartiality could be displaced by the actions of the veterinarians. It said "while the actions and words of the [veterinarians] in seeking Member Parracks' re-appointment were entirely inappropriate, I find that when the reasonable apprehension of bias inquiry is properly focussed on the effect of those words and actions upon Member Parrack's state of mind, viewed objectively as required by *Wewakyum*, no reasonable apprehension of bias arises".

Adequacy of Reasons and the Standard of Review—*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62

By Simmi Sandhu

Where a decision of an administrative decision maker significantly impacts on the rights of an affected person, a decision maker is required to give reasons as an element of the duty for procedural fairness (*Baker v. Minister of Citizenship and Immigration* (1999) 2 SCC 817).

In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 (2011), the SCC ruled on the role and adequacy of reasons and the

standard of review and procedural fairness

In the *Newfoundland* decision, the Court reviewed the decision of a labour arbitrator's award regarding the calculation of vacation benefits. In a 12 page decision, the arbitrator outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, interpretive principles, and the decision itself. The standard of review was "reasonableness" and the issue was not only whether the outcome falls within the range of possible outcomes, but also whether the reasons

set out a line of analysis that reasonably supports the conclusion reached. On judicial review, the arbitrator's reasons were found to be insufficient and therefore, unreasonable.

The Supreme Court confirmed that in determining whether a decision is reasonable, the inquiry for a reviewing court is about "justification, transparency and intelligibility" (*Dunsmuir v. New Brunswick*, 2008 SCC 9). In assessing whether the decision is reasonable in light of the outcome and the rea-

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Adequacy of Reasons and the Standard of Review—Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board) 2011 SCC 62—Continued

sons, the Court said the courts must show “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” and in doing so may look to the record.

The Supreme Court held that a decision maker is not required to make an explicit finding on each constituent element, how-

ever subordinate, leading to its final conclusion but that, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. The Court went on to say that it is an unhelpful elaboration to *Baker* to

suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of duty of procedural fairness and that such challenges should be made within the reasonableness analysis. In this case, the reasons showed the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes.

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This 2 day course for new tribunal members on their role and responsibilities covers:

- Administrative law and the principles of Natural Justice
- Conducting fair hearings and evaluating evidence
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For more information on BCCAT education courses please visit www.bccat.net



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Administrative Tribunals**

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BCCAT ANNUAL EDUCATIONAL CONFERENCE

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