



BCCAT NEWS

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PRESIDENT'S MESSAGE

I am pleased to report that judgement in the McKenzie case was rendered on September 8, 2006, and that the positions advocated by the Petitioner and BCCAT were upheld.

You will recall that BCCAT was granted intervener status in the proceedings commenced by Mary McKenzie following her dismissal without cause, purportedly under the authority of section 14.9(3) of the Public Sector Employers Act, less than one year into her five year term as a residential tenancy arbitrator. BCCAT intervened in this litigation in order to advance arguments respecting tribunal and adjudicator independence. A summary of the McKenzie judgement follows in this Newsletter.

The judgement, in my view, represents a significant advancement of the law with respect to the independence of administrative decision makers that can only benefit and strengthen the administrative justice system. I hope that, in the event of an appeal, BCCAT will be able to continue to participate. I'm sure there will be much discussion of this decision and the issues it raises at the upcoming Annual Conference. In other news, BCCAT's flagship course, Administrative Justice for Decision Makers, has undergone significant curriculum revision. The pilot offering was well received by participants last June and further revisions have been incorporated.

The first official launch of the new curriculum is scheduled for October 25 and 26, 2006. This is an excellent program for new adjudicators providing the opportunity to engage with case scenarios to learn concepts of administrative law, wrestle with conduct of hearing issues, develop decision writing skills, and discuss ethical considerations facing adjudicators.

The Board of Directors has initiated discussions with the Law Courts Education Society about partnering in public education with respect to administrative tribunals generally and for participants before administrative tribunals particularly. The Law Courts Education Society does some excellent public education about the legal system, and provides self help clinics and information to self represented litigants in the court system. We are excited about potentially being able to expand this work in to the realm of administrative justice.

I have been pleased to serve as the President of this organization for the last two years. We can be proud of the work and accomplishments of BCCAT in providing quality education for administrative adjudicators and effective and principled input to the development of a strong administrative justice system in this province.

Cheryl Vickers, President

REGISTER NOW!

BCCAT'S 11TH ANNUAL CONFERENCE

OCTOBER 23 & 24, 2006

RICHMOND, B.C.

DIVERSITY & INTEGRITY

Featured speakers include:

- The Honourable Mr. Wally Oppal, the Attorney-General of B.C.
- Honourable Robert (Bob) Rae, P.C., O.C., Q.C
- Professor John Borrows, Faculty of Law, University of Victoria

An in-depth program to bring you updates, analysis and opinions on the most significant issues and developments facing tribunal members, adjudicators, regulators, tribunal staff and administrative lawyers and counsel. You will hear from a learned and well rounded faculty of judges, leading academics, seasoned adjudicators and counsel, with plenty of interaction.

Featured topics include:

- *"Dissecting Diversity: From Awareness to Accommodation to Integration"*
 - *Relationship between tribunals & government; relationship of tribunals with stakeholders; relationships within the tribunal*
 - *Strategies for Successful Equity Recruitment*
 - *Adjudication in the Era of Self-Represented Parties*
 - *LICENSING FOREIGN-TRAINED PROFESSIONALS*
 - *"Implementing Diversity: Testing the Limits"*
 - *Adjudicating Diversity: How to Hear and Be Heard By a Diverse Public*
- Plus many more!

REGISTER NOW AT www.bccat.net AND TAKE ADVANTAGE OF THIS GREAT OPPORTUNITY!

The Law Society of B.C. requires lawyers to report their continuing education annually. Educational sessions offered at the BCCAT annual educational conference can now count toward the Law Society of B.C.'s recommended annual 12 hours of continuing professional development, on the basis of 1 hour of credit for each 1 hour (approximate) of course time.

NOTICE: TREASURER REQUIRED

The Nominating Committee of BCCAT is seeking applicants for the position of Treasurer of BCCAT, effective as of the AGM.

If you are interested in this rewarding volunteer position, please contact Frances (sasra@shaw.ca) or Pinder (pkcheema@shaw.ca).

ATTENTION: BCCAT MEMBERS

NOTICE OF ANNUAL GENERAL MEETING

The Annual General Meeting of BCCAT will be held at its 11th Annual Conference on October 24, 2006 8:30 – 9:30 am at the Airport Executive Plaza, 7311 Westminster Highway, Richmond, B.C.

For more information, visit our website at www.bccat.net.

ADMINISTRATIVE JUSTICE OFFICE: AN UPDATE

During the spring and summer AJO staff were busy working on a range of issues, most significantly, the review of Treasury Board Directive 3/04, various research and policy projects, and developing supports for tribunals and other users.

Compensation Review

The AJO has been an active participant of the Ad Hoc Committee that has been tasked with the review of Treasury Board Directive 3/04 for tribunal member compensation and to make recommendations to Treasury Board for revisions to update the Directive. The intent is that the Directive will promote the professional nature of tribunals' work and enhance public accountability by providing consistency and transparency in the remuneration rates and support attracting and retaining qualified individuals to tribunal work.

To achieve these objectives, the AJO has provided the Committee with current comparative data, including some cross-jurisdictional research. The submissions made by BCCAT and the Circle of Chairs and also by some of the tribunals were helpful in providing the Committee with a good understanding of the issues.

The Committee is finalizing its work, with the goal of its recommendations going forward to Treasury Board for consideration in the very near future.

Research and Policy Analysis

Extending Administrative Tribunals Act (ATA) Powers

Last spring, the AJO posted a series of three papers on its website to prompt discussion about the Inquiry Act powers to summons witnesses, cite for contempt and for immunity protection that are used by more than 45 entities, including various ministers and statutory decision-makers, certain self-governing professional bodies, some local government entities and several Officers of the Legislature. The AJO is now working on developing recommendations respecting each entity, including replacing the Inquiry Act provisions with ATA provisions where appropriate.

Human Rights Jurisdiction

The AJO has been reviewing the issues raised by the Supreme Court of Canada in its recent decision in *Tranchemontagne v. Ontario* (Director, Disability Support Program). In that decision, the SCC held that an administrative tribunal that can decide questions of law cannot decline to hear and decide human rights issues that arise in the context of proceedings before them, unless expressly authorized by statute. This decision may have implications for BC tribunals, and government is considering whether and how to respond. In the meantime, the AJO has provided tribunal chairs with information on the revisions the Ontario Social Benefits Board made to its rules in order to address this issue.

Advice to Government

With the various ministries in government working on an array of legislative and other proposals, the AJO has been busy in reviewing these proposals to ensure key administrative justice principles such as fairness, public accessibility and transparency are considered and reflected as may be appropriate. The goal is to ensure consistency with government's policies as articulated by the ATA, where possible. The AJO is required to keep the specifics of this work confidential, where it relates to potential draft legislation.

Supports for Tribunals and Other Users

Tribunal Dispute Resolution Needs Assessment Project

This project has been undertaken by the AJO and the Dispute Resolution Office in support of government's commitment to enhanced use of innovative dispute resolution processes in civil and administrative justice systems. The first phase, conducted by consultant Craig Darling, a lawyer and public policy mediator, includes an initial assessment of tribunal mandates and the results of a preliminary survey of tribunal chairs on tribunals' current use of dispute resolution processes, the effectiveness, and any barriers to use. The results are set out in a report, posted on the AJO and DRO websites.

Next steps will include verification of the initial research through direct discussions with tribunal chairs and follow-up research on the baseline data. Resource materials and other supports for evaluating dispute resolution processes will also be developed. The goal is to support the efforts of tribunals to promote earlier resolution of disputes by expanding and enhancing dispute resolution processes where possible.

The MOU as an Effective Framework

The AJO's model MOU, developed with the input and advice of many others, has again proved useful, providing the basis for a recent MOU between the Minister Responsible for Housing (the Honourable Rich Coleman) and the Chair of the Safety Standards Appeal Board (Keith Saddlemyer). An MOU can be a framework for a positive and co-operative working relationship, balancing tribunal independence and ministerial accountability, leading to effective administrative justice.

Information Sharing

The AJO has added a summary of court decisions of general interest to the administrative justice sector to its regular web page summaries of current cases about the ATA. These summaries, and the AJO's semi-annual update on administrative justice reforms in other jurisdictions, are intended to provide a quick and easy way to find out about some of the latest developments in administrative justice.

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BCCAT'S SUBMISSIONS TO TREASURY BOARD ON REMUNERATION

Last spring, BCCAT was invited to comment on *TB Directive 3/04, Remuneration Policy for Administrative Tribunals**. What follows is a summary of some of the points raised in the June 2, 2006 submissions by BCCAT President Cheryl Vickers. To date, no response has been received.

Remuneration for Full-Time Tribunal Appointees (Category A or C)

It is BCCAT's position that as Tribunal members should be appointed because they have substantial and relevant experience in relation to the subject matter of the tribunal's mandate, fully funded remuneration at the upper end of the salary ranges should be the norm.

Per Diem Remuneration for Part-Time Appointees (Category D)

The half-day remuneration rate should be based on 3.5 hours, in keeping with the standard 7 hour work day in the public sector, rather than the current 4 hour standard.

Transitional Provisions for Increases

The current directive states that tribunal chairs can only implement remuneration increases subject to the availability of existing funding. Increases are not retroactive and can take effect only from the effective date of changes to the original appointing orders.

It is BCCAT's position that any increase in remuneration rates should be fully funded, and should be retroactive to the effective date of the new rate. Among other things, failure to fully fund increases negatively impacts the objective of retaining skilled and qualified individuals.

General Comments

Rate of increase:

BCCAT noted that in light of recent salary increases in the public sector, remuneration rates for tribunal members should be increased and funded to at least reflect those increases. However, even if a similar increase was granted, the adjusted per diem rates would remain below private sector rates for qualified professionals.

Salary Continuance upon End of Mandate:

Many appointees forgo established practices in order to serve the public on various tribunals. Tribunal members approaching the end of their mandates are, in turn, severely limited in their ability to seek replacement employment in their field, due to conflict of interest rules. BCCAT asked that adequate bridging arrangements be made for the end of a member's mandate.

Professional Dues and Membership Fees:

In order to attract and retain skilled and qualified members, BCCAT asked that tribunal members' relevant professional dues and memberships fees be paid by their respective tribunals, and that these costs be funded.

* The Directive can be found at <http://www.fin.gov.bc.ca/ocg/fmb/manuals/TBDirs/TBD3-04.doc>

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Education and Training

Appraisal Skills Seminar. The AJO hosted a two-day appraisal skills seminar for tribunal chairs, presented by the UK's Judicial Studies Board (JSB), considered the leading experts in this very specialized field. Widely adopted in the UK, the JSB program is based on the premise that a comprehensive appraisal system enhances tribunal independence and public confidence, and is a positive developmental process. In their presentation, the JSB facilitators addressed issues such as how to apply appraisal principles while recognizing and respecting decision-making independence, coaching and mentoring, and preparing an appraisal action plan, using real life examples from their own work.

BCCAT's Revised Course: "Practice and Procedure for Decision-Makers". The AJO congratulates BCCAT's Education Committee for its great work on the course revisions. The AJO's Elizabeth Loughran attended the recent successful course pilot, and an article on the ATA, prepared by Richard Rogers, is to be included in the course materials. The Ministry of the Attorney General is pleased to have provided financial support for this initiative.

Upcoming. The CLE is presenting an Administrative Law Conference, November 23, 2006, with Mr. Justice W. Ian C. Binnie of the SCC as the featured speaker. The AJO will be participating in the session on the ATA. For more information on that program see: <http://www.cle.bc.ca/CLE/Courses/Individual+Courses/2006/Summaries/1074606>

Contacting the AJO

The AJO welcomes questions or concerns related to the ATA or the administrative justice system. BCCAT members are encouraged to let us know about "Tribunal Success Stories" or information about upcoming events related to administrative justice, so that we can add new information to the AJO website.

The AJO can be contacted by calling 250-387 0058 or by e-mailing Dianne.Flood@gov.bc.ca. You may also complete the Feedback form available on the home page of the AJO website (www.gov.bc.ca/ajo/).

DECISION SUMMARIES

There have been several significant decisions issued by our courts recently in the field of administrative law in our province, dealing with issues of independence and the roles and responsibilities of adjudicators. We have summarized some of those decisions, but suggest that you read those decisions in full.

McKenzie v. Minister of Public Safety and Solicitor General, et al, 2006 BCSC 1372

The judgement of McEwan, J. in the *McKenzie* case decides three principle points:

1. that Ms. McKenzie's appointment was rescinded contrary to procedural fairness, both initially and in the purported "reconsideration" process;
2. that section 14.9 of the *Public Sector Employers Act* does not authorize the termination of *Residential Tenancy Act* arbitrators without cause;
3. that any legislation purporting to authorize such terminations would be unconstitutional as violating the rule of law as an unwritten constitutional principle of judicial independence.

Mr. Justice McEwan held that the initial termination of Ms. McKenzie took place without regard to Ms. McKenzie or her concerns, and that when she called them on this, government's response was a "relentless and disgracefully specious personal attack." Mr. Justice McEwan confirmed that despite aspersions cast against Ms. McKenzie by the Respondents, "there was nothing to their assertions that she had ever behaved inappropriately in any context." He described the reconsideration process as a "farce" and that its purpose was "to cover what the Respondents were determined to do, with the appearance of due process"

With respect to the interpretation of section 14.9 of the *Public Service Employer's Act*, Mr. Justice McEwan found that section 14.9(3) "can be read as a general provision limiting compensation where termination occurs without notice, wherever that is possible, but subject to specific provisions in other statutes that would displace it". What this means is that where a tribunal is subject to a provision in its enabling statute, as it was in this case, providing for terminations "for cause", or where a tribunal is subject to section 8 of the *Administrative Tribunals Act* allowing termination "for cause", appointees cannot be terminated without cause. It means that during a term of appointment, tribunal members have security of tenure and protection against arbitrary removal.

On the constitutional issue, McEwan J. found that, as a matter of principle, the unwritten principle of judicial independence cannot be limited to superior and provincial courts. He accepts that as matter of function and principle, there is no constitutionally relevant distinction between the work of courts and the work of many tribunals. McEwan J. wrote:

The power of legislatures to oust the principles of natural justice in the design of administrative tribunals must be rationally connected to the purpose and function of the

tribunal. It cannot be that this power to modify common law principles can be used to offer private disputants a binding arbitral process with no credibility, simply because budgetary or other pressures make it convenient to do so...

If the Respondents are correct, the same function, depending solely on whether it is located in a court or in a tribunal, may require the constitutional protection of a fair and independent arbiter, or may be left to whatever cowed or needy sycophant the government, in its absolute discretion, thrusts into the judgement seat. This is such an affront to the notion of a "fair and public hearing by an independent and impartial tribunal", guaranteed in writing elsewhere in the constitutional firmament, and is so fundamentally illogical and arbitrary, that it cannot be reconciled with the concept of the rule of law itself.

Mr. Justice McEwan found that the functions of *Residential Tenancy Act* arbiters are captured by this principle.

The full text of the decision can be found at: <http://www.courts.gov.bc.ca/jdb-txt/sc/06/13/2006bcsc1372.htm>

Vancouver Board of Variance and Parking Variance Board v. Vancouver (City) [2006] B.C.J. No. 1902 (BC Supreme Court)

The Board of Variance for the City of Vancouver is a tribunal established under sections 572 and 573 of the *Vancouver Charter*, S.B.C. 1953, c.55. It hears appeals for a variance of the zoning regulations that would otherwise apply to a property and it hears appeals from decisions "on a question of zoning by any official charged with the enforcement of a zoning bylaw".

Subsections (2) and (2.1) of section 572 of the *Vancouver Charter* state:

(2) Subject to subsection (2.1), each member of the Board shall hold office for a term of three years or until his successor shall be appointed, but a person may be reappointed for a further term or terms.

(2.1) The Council may rescind an appointment to the Board at any time.

In June, 2006, Vancouver City Council passed a resolution rescinding the appointments of the chair and the other four members of the Board. The rescissions were effective immediately. The members were not afforded an opportunity to be heard by City Council prior to the passage of the resolution.

Subsequently, the ousted members applied for a judicial review of City Council's decision. The petitioners sought an

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Summaries

order quashing the resolution, an order enjoining the City from appointing new Board members until the end of the terms of the existing members, a declaration that the decision of City Council was made without jurisdiction and in bad faith, a declaration that section 572(2.1) of the *Vancouver Charter* was void insofar as it failed to provide secure tenure for Board members or should be read down, and a declaration that the decision of City Council was void as having failed to comply with the principles of natural justice. The petitioners did not raise a constitutional challenge to the validity of section 572(2.1) of the *Vancouver Charter*.

Justice Bauman dismissed the petition.

He found it was clear that the addition by the Legislature in 2003 of subsection (2.1) in section 572 of the *Vancouver Charter* was intended to accord City Council a very broad power to rescind the appointments of members of the Board. While such members were appointed ostensibly to three year terms, the power to rescind those appointments “at any time” made them “at pleasure” appointments. Under subsection (2.1), City Council was not required to articulate any cause for exercising its power to rescind a Board appointment “at any time”. He found that the reasoning by the Supreme Court of Canada in *Ocean Port Hotel Ltd. V. British Columbia (General Manger, Liquor Control and Licensing Branch)*, [2001] 2. S.C.R. 78 was determinative in this case.

Justice Bauman further found that the only constraint on City Council, when it exercised its power to rescind Board appointments, was the requirement that it act in good faith.

Section 148 of the *Vancouver Charter* provides:

A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question at any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

The City led the following evidence to dispel any aura of bad faith: It had concerns about the Board asserting that it and

not City Council employed staff members assigned to the Board; it had concerns about the Board’s management of its budget, in particular its incurrence of substantial legal fees and overtime costs; and it had concerns about the number of complaints which the City had received about various decisions of the Board.

Justice Bauman found there was nothing in the record before him to establish, as the petitioners were required to do, bad faith on the part of City Council. He found that in the legislative scheme which contemplates “at pleasure” appointments to the Board, a concern with decisions by a particular Board can be proper and not an irrelevant consideration for City Council. He then stated “As *Ocean Port* holds, it is the Legislature or Parliament that determines the degree of independence required of the tribunal members, and the Legislature here has spoken in the *Vancouver Charter*, in particular in s.572(2.1)”.

Finally on the issue of whether City Council must give an appointee an opportunity to be heard before his or her appointment is rescinded, Justice Bauman found it did not. He considered this issue in the context of the three factors set out in the Supreme Court of Canada’s decision in *Knight v. Indian Head School Division No. 19*, [1990]1 S.C.R 653. He considered the relationship between City Council and the Board members and the effect of City Council’s decision on members’ rights. He noted that the Board is made up of volunteers who serve part time and the security of their employment and livelihoods are not at stake. He also considered the nature of the decision made by City Council. He found that the dismissal of the entire Board suggested that City Council had a concern with the Board as an institution and this suggests that City Council was motivated by general policy concerns (budgetary, personnel and reputational). Such a motivation suggests it was acting in more of a legislative, policy driven role rather than as an adjudicator determining an individual’s rights to public office. He concluded that the nature of the decision in this case strongly favoured the conclusion that City Council owed no duty of procedural fairness to Board members as did the other *Knight* factors.

The full text of the decision can be found at: <http://www.courts.gov.bc.ca/jdb-txt/sc/06/12/2006besc1260.htm>

Reminder to Members: If there are changes to your contact information, please advise us so that we can keep you fully informed of BCCAT’s events and announcements. Please contact us at registrar@bccat.net.

If you have an announcement or an article to include in our newsletter that would be of interest to all members, please contact us at registrar@bccat.net.



BCCAT NEWS

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