



BCCAT NEWS

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Mr. Justice Evans, Margo Priest and Hudson Janisch at BCCAT's Annual Conference, October, 2005

PRESIDENT'S MESSAGE

BCCAT continues to move forward with initiatives to improve the administrative justice system in this province. At the forefront of BCCAT's activities over the years has been the development and delivery of high quality education programming for tribunal members. Last year we commenced a major review of the curriculum for our principle course, AJ1: Practice and Procedure for Decision Makers, and started the process of major revisions to ensure the course remains current and relevant. We were very grateful to receive last October a grant from the Attorney General of \$10,000 to assist with the cost of this project. The Attorney General has recently provided a second grant of \$10,000! This financial assistance together with BCCAT's own contribution to this project will enable the completion of the curriculum revision, the development of new instructor and participant manuals, and the provision of a pilot offering and instructor training in the revised curriculum. We are very grateful for the Attorney General's financial assistance with this project. BCCAT has taken pride over the years in being able to offer quality courses for tribunal members. The Attorney General's willingness to assist financially with the curriculum revision project provides recognition for BCCAT's work as a quality source of training for BC's adjudicators.

In January, BCCAT co-hosted a dialogue on the independence of administrative tribunals at the Law Courts Inn. This event was well attended not only by members of the tribunal community but also by members of the wider legal community with an interest in administrative law.

The McKenzie Petition was heard in BC Supreme Court in January. BCCAT participated as an intervenor and was represented by Frank Falzon of Victoria. A decision is pending. Our participation in this litigation was a significant step for BCCAT into the realm of advocacy. Our role as an advocate for effective administrative justice is not new – we participated in the government's Administrative Justice Project providing submissions with respect to reform and feedback on the proposals in the White Paper – but stepping into the forum of the courts takes BCCAT's advocacy roll to another level. I think our principled and objective intervention in the McKenzie litigation is the natural evolution of our goals of addressing concerns in the administrative justice system and working towards the improvement of the administrative justice system. Regardless of the outcome of the litigation, I think BCCAT made a valuable and principled contribution to the arguments.

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Message

BCCAT was invited by the Law Society of British Columbia to participate in their Access to Justice Consultation Session. A representative from the Board of Directors participated in this consultation in early March. We are excited about future consultations with the LSBC and the Access to Justice Committee. These types of opportunities enable BCCAT to participate in a broader dialogue about justice reform and the roll of administrative tribunals in any reform.

BCCAT continues to evolve as a recognized educator and an advocate for a strong and effective administrative justice system. The Board of Directors met in January to do some planning and prioritizing for the coming year. We want to hear from you as to how BCCAT can meet your needs. Please go to the BCCAT website www.bccat.net to find a survey and take a few minutes to complete it. Your feedback is essential for planning into the future and to ensure BCCAT remains an effective and relevant organization.

Cheryl Vickers, President

MARK YOUR CALENDARS NOW!

BCCAT's 11th ANNUAL EDUCATION CONFERENCE

OCTOBER 23 AND 24, 2006

RICHMOND, BC

LOOK FOR UPCOMING DETAILS FOR
THIS POPULAR AND EDUCATIONAL
CONFERENCE IN OUR NEXT
NEWSLETTER AND ON OUR WEBSITE.

IMPORTANT NOTICE TO ALL MEMBERS

BCCAT wants to hear from you!

How can BCCAT best meet your needs?

Please go to the BCCAT website (<http://www.bccat.net/survey/2006membersurvey.asp>) to find a survey and take a few minutes to complete it and submit no later than June 1, 2006. Your feedback is essential for planning into the future and to ensure BCCAT remains an effective and relevant organization.

ADMINISTRATIVE JUSTICE OFFICE: AN UPDATE

The fall and winter have been busy for the AJO, with a variety of activities in several key areas, notably Tribunal-Ministry Relationships, Networking, Information Sharing, Education and Training, and Research and Policy Analysis.

Tribunal-Ministry Relationships

Recognizing that appropriate tribunal-ministry relationships are of critical importance to the effective delivery of administrative justice, the AJO has worked on various aspects of support to those relationships. With respect to the overall relationship framework, the AJO concluded its work on the model MOU, undertaking to revise it as gaps or other necessary changes are identified by tribunal chairs and ministries. The model MOU is available on the AJO website.

The AJO has been providing resource support to a number of tribunal chairs and ministries as they work to conclude MOU's. The AJO is pleased to report that an MOU has been concluded between the Chair of the Mediation and Arbitration Board (Paul Love) and the Minister of Energy, Mines and Petroleum Resources (the Honourable Richard Neufeld). Several others are reported to be discussing the wording of an MOU.

To support more effective relationships between tribunals and ministries at the staff level, and in response to the often-cited need for ministry staff to be better informed about tribunals' roles, the AJO is co-hosting (with Crown Agencies Secretariat) a cross-ministry workshop on independence and accountability of tribunals and Crown corporations. The workshop is the first of its kind and is directed to ministry staff with responsibilities for financial reporting, communications and policy and legislation issues. As many of the people in

those positions provide support to both tribunals and Crown corporations, the workshop will highlight the similarities and the differences between tribunals and Crown corporations and should improve their understanding of, and appreciation for tribunals and the work they do. The AJO expects this workshop will be a catalyst for further networking and education opportunities, so that ministry staff will be better informed about the issues that tribunals deal with regularly.

The AJO will also inform ministry staff about the administrative tribunal sector, through a presentation at the Regulating Better in BC conference. The April 4 conference, hosted by the Regulatory Reform Office, will be attended by representatives from across government.

Networking

The AJO has been involved in a number of networking activities. In November 2005, the AJO facilitated a second workshop for senior tribunal staff, to exchange ideas about tribunal operations, case management processes and systems, and partnerships with other tribunals to obtain the best use of operational resources. A discussion about staff succession planning strategies and other human resources issues concluded with a request that AJO circulate information about staff vacancies through e mail and the AJO web site.

The AJO has been asked to continue this work and will host a third workshop in May or June, 2006. The AJO may consider a fall workshop that brings together tribunal staff and ministry staff, to problem solve common operational issues and bridge some of the information gaps.

The AJO continues to attend meetings of the Case Management System User Group, which includes
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UPDATE AND SUMMARY OF THE MCKENZIE PETITION

The McKenzie Petition was heard in BC Supreme Court on January 17-20 and 24, 2006 with The Honourable Mr. Justice McEwan presiding. Ms. McKenzie filed the Petition following her termination without cause as a Residential Tenancy Arbitrator just over one year into her five year term purportedly under the authority of section 14.9(3) of the Public Service Employers Act.

The Petitioner's submissions fell under four major headings: 1) the interpretation argument, 2) the constitutional argument, 3) the procedural fairness argument, and 4) the argument regarding the substantive criteria for a judicial review of the Minister's exercise of a discretionary power (also known as the Roncarelli v. Duplessis argument).

1. The Interpretation Submissions:

On the interpretation issue (of s. 14.9(3) of the PSEA), the Petitioner's argument relied heavily on the analysis of the BC Labour Relations Board in the 2004 Farmer Construction case - that is, that the section does not authorize a termination of a tribunal member but was merely intended to limit the compensation payable when a tribunal member is otherwise lawfully terminated mid-term without cause. Under the Farmer analysis, an example of such a mid-term termination would be a termination caused by a bona fide restructuring of a tribunal that resulted in the statutory removal of a number of tribunal positions. The government argued that upon payment of up to a year's salary, section 14.9(3) authorized the dismissal of individual tribunal members without cause for "mere displeasure" and effectively converted all BC tribunal appointments to "at pleasure" appointments. Their position was that the Minister could terminate for any reason after hearing from the affected individual.

2. The Constitutional Submissions:

The constitutional argument sought to extend the unwritten constitutional principle of judicial independence to tribunals whose adjudicative functions place them at the high end of the independence spectrum as that analysis is articulated in the 2003 SCC decision in Bell. The Petitioner distinguished the analysis of the SCC in its 2001 decision in Ocean Port on the basis that the Court's language - used in the context of a case dealing with a licensing body and the exercise of that body's licensing function - could not be interpreted as having been intended to apply to administrative tribunals in general. Relying heavily on the analysis of the SCC in the Provincial Court Judges Reference, and its 2003 decisions in Bell and Ell, the Petitioner argued that the Supreme Court of Canada had left open the possibility that the unwritten constitutional principle could be applied, in an appropriate case, to uphold the rule of law by protecting the independence of tribunals whose functions bore no constitutionally relevant distinctions from the functions of Provincial Courts exercising civil jurisdiction. The position was not that the functions of adjudicative tribunals require the same degree of independence as that of the Courts, but rather, that any meaningful understanding of the rule of law requires that a statutory provision that would reduce the security of tenure of a quasi-judicial adjudicator below the minimal level of a fixed term appointment cannot withstand constitutional scrutiny.

Government counsel argued that the SCC had decided in Ocean Port that the unwritten constitutional requirement

of judicial independence did not apply to any administrative tribunals and contended that the Petitioner's efforts to distinguish that case were ineffective. They took the position that independence of decision-making could be achieved without providing any of the aspects of independence set out in the SCC decision in Valente (security of tenure, financial security, and administrative control).

3. The Procedural Fairness Submissions:

The procedural fairness argument addressed the manner in which the Petitioner's appointment had been terminated. It was common ground that the principles of procedural fairness required the Minister to give tribunal members advance notice that he was considering terminating their appointment and the reasons that were prompting that consideration, an opportunity for members to respond, and written reasons for the termination when the decision was made. Government counsel conceded that the termination of the Petitioner's appointment - without notice or warning, any opportunity to respond, or any reasons - had not conformed to any of these requirements.

4. The Judicial Review Submissions:

The Roncarelli v. Duplessis argument dealt with the questions that arise when a court is asked to review on the merits a Minister's exercise of a statutory discretion to terminate a quasi-judicial tribunal member's appointment mid-term without cause. These included the following: Must the Minister's considerations be confined to those that are relevant to the purposes and objects of the legislation, and, if so, were they in this case? Must the considerations be seen by the court to be "sufficient", and, if so, against what standard of review? It should be noted that after the termination, during the course of months preceding the hearing, the government did advance a series of "reasons" for the termination, through letters from counsel, but did not provide evidence to support those reasons. At the hearing, the government's counsel admitted that the reasons that had been advanced during the course of the proceedings were unfounded. He stated that there were a series of errors made by management and

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Register for Canadian Council of Administrative Tribunal's 22nd Annual Conference

The Integrated Administrative Tribunal: From Concept to Reality

June 11 - 13, 2006

Ottawa Conference Centre

Ottawa, Ontario

This CCAT event will offer a number of workshops and plenary sessions, providing a unique learning opportunity. A wide variety of speakers are invited to make presentations on a variety of administrative law issues.

For conference and registration information visit: <http://www.ccat-ctac.org/en/conferences/>

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representatives from a number of tribunals. The Group discusses issues of common concern, including the possibility of co developing and cost sharing enhancements to case management IT systems.

Information Sharing

As part of its public information mandate, the AJO's web site is updated to provide brief summaries of court cases that discuss the ATA. Many of those cases address the standard of review provisions and, as the AJO noted in a December 2005 Lawyers Weekly article, the courts have commented positively about the new legislated standards, as this issue is now simpler and much easier to resolve.

Information about administrative justice reforms in other jurisdictions is also posted regularly to the AJO web site.

In February, Dianne Flood, the AJO's Executive Director, reported on these recent developments to the CBA Administrative Law Section (Vancouver).

The AJO continues to expand the "Tribunal Toolkit" on its web site, which is intended to reduce tribunals' time and expense in developing documents and forms or researching information that is common to a number of tribunals. Recent additions to the Toolkit include information bulletins about Orders for the Payment of Costs and Enforcing Tribunal Orders Using Court Processes.

Education and Training

The AJO was pleased to participate at another successful BCCAT conference in the Fall, 2005. The conferences are a great way for those involved in the administrative justice system to expand their knowledge about the system and for the AJO to hear, both formally and informally, about issues of importance to BCCAT members.

The AJO also congratulates BCCAT's Education Committee on the progress made on its review and updating of the training course materials. The Ministry of Attorney General is pleased that it has been able to provide significant financial support to this very worthwhile effort.

In May, the AJO will facilitate a one-day Tribunal Appraisal Skills Seminar for tribunal chairs. The seminar will be presented by staff from the UK's Judicial Studies Board and will focus on developing skills and approaches for appraising tribunal members' performance, while ensuring respect for their decision-making independence.

Research and Policy Analysis

The AJO has also been busy with consultations about policy issues related to administrative justice. In particular, government preparations for the Spring 2006 legislative agenda generated a number of legislative proposals from various ministries, which the AJO reviewed to ensure the overarching administrative justice principles of access, transparency and fairness continue to be reflected in any new legislation.

The AJO is also working with the Dispute Resolution Office (DRO) to assemble current information about the processes used by BC administrative tribunals to resolve disputes. Tribunal chairs were asked to complete a questionnaire about their tribunals' dispute resolution processes. The AJO/DRO will use the results to better understand the specific dispute resolution environment within which tribunals operate, inform policy discussions and establish AJO/DRO planning priorities. The information obtained from the responses will also provide a basis for discussions between the AJO/DRO and tribunals, to identify opportunities to assist tribunals in evaluating and expanding or enhancing their dispute resolution processes.

Contacting the AJO

The AJO welcomes questions or concerns related to the Administrative Tribunals Act or the administrative justice system. BCCAT members should not hesitate 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 Web site.

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 web site (www.gov.bc.ca/ajo/).

NOTICE TO MEMBERS OF THE LAW SOCIETY OF B.C.

The Law Society of B.C. requires lawyers to report their continuing education annually though there is no rule that lawyers actually engage in continuing professional development.

Educational courses offered through B.C.C.A.T. and its annual 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. Attendance at this program can be listed as continuing education in completing your Annual Report to the Law Society of BC and the Law Society in no way recommends courses or programs or provides encouragement to lawyers to enroll in them.

If you do wish to use BCCAT courses and conference attendance as part of your continuing education reporting, you can also include the number of hours available for reporting credit. For example, a 9:00 to 4:00 program with coffee breaks would be 7 hours if the program continues through lunch with a speaker. If there is a lunch break, the number of hours would be 5.5 hours if there is a 1.5 hour lunch break.

For more information, please contact the Law Society of B.C. directly.

The BCCAT newsletter will sometimes feature articles on different administrative tribunals throughout the province in order to increase our members' knowledge of the many diverse tribunals throughout the province, and to gain an understanding of their mandate, procedures, and other relevant issues. It is also hoped that, by sharing such information, members may become aware of issues and/or concerns in common with other tribunals, thus opening the door to the possibility of networking or even the sharing of resources. If you are interested in having your tribunal featured in an upcoming edition of the newsletter, please contact us at registrar@bccat.net. In this edition, we focus on the Employment and Assistance Appeal Tribunal.

FEATURE SERIES: TRIBUNALS ACROSS THE PROVINCE

THE EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL

The Employment and Assistance Appeal Tribunal was established on September 30, 2002. The Tribunal's mandate is to hear appeals of most types of decisions made by the Ministry of Employment and Income Assistance (the Ministry) that refuse, reduce or discontinue income assistance or a supplement. The most frequent appeals heard by the Tribunal pertain to Ministry decisions denying applications for the Persons With Disabilities and Persons With Persistent Multiple Barriers designations, followed by decisions pertaining to compliance with an employment plan and refusing requests for health supplements.

The Tribunal has one full-time Tribunal Chair, and currently has one part-time Vice Chair. There are also approximately 250 part-time panel members from all parts of the province. Panel Members are paid pursuant to the Employment and Assistance Regulation on a per appeal basis. The Tribunal has 14 staff and operates out of an office in Victoria. Staff include a Director, a Manager of Appeals, an Executive Administrative Assistant, an Appeal Panel Administrator, 6 Appeal Coordinators, a Finance Clerk and 2 Administrative Assistants. The Tribunal's budget is \$2,019,000.

The Tribunal holds a large number of hearings per year. In the Tribunal's 2004/05 reporting year, 1,678 Notices of Appeal were received, and 1,449 hearings were held. Appeals are heard by 3 member panels, and hearings are located throughout the province, generally in the appellant's community. Hearings may occur orally (in-person or by teleconference) or in writing (with the consent of both parties).

The Tribunal operates under strict and short legislated timeframes. Notices of Appeal must be submitted to the Tribunal within 7 business days of the appellant's receipt of the Ministry's reconsideration decision. Tribunal hearings must then be commenced within 15 business days of receipt of the Notice of Appeal and the parties notified of the date, time and

place of hearing at least 2 business days before the hearing is to commence.

Following the conclusion of the hearing, decisions must be received by the Tribunal from the panel within 5 business days (although this can be extended for a further maximum of 10 business days) or the panel is disbanded and another panel appointed to hear the appeal. Following receipt of the decision from the panel, the Tribunal has 5 business days in which to send the decision to the parties.

Tribunal staff are responsible for screening Notices of Appeal to determine jurisdiction, serving notice on parties, delivering appeal records and submissions to parties, finding hearing locations, answering parties' inquiries, and receiving and delivering panel decisions. With the Tribunal's high volume and short timeframes, clear and precise procedures are a requirement. The Tribunal has developed Practices and Procedures that are publicly available and cover such matters as exchange of documents, service, adjournments, etc. This document can be found on the Tribunal's website at http://www.gov.bc.ca/eaat/popt/practice_and_procedures.htm

To date, the Tribunal has had a small number of judicial reviews proceed to hearing. None have ruled against the Tribunal. One 2005 decision, *McIntyre vs. Employment and Assistance Appeal Tribunal*, confirmed that, pursuant to the Administrative Tribunals Act, the standard of review for the Tribunal is "patently unreasonable".

Current issues for the Tribunal include a review of the Administrative Tribunals Act and its application to the Tribunal, and the ongoing recruitment and appointment of panel members.

If you are interested in learning more about the Employment and Assistance Appeal Tribunal, you can visit the website at <http://www.gov.bc.ca/eaat> or contact 1-866-557-0035.

McKenzie

by counsel in this matter, and asked the Court to state in the reasons for judgment that there was no issue of fault or misconduct on the part of the Petitioner.

On behalf of BCCAT, Frank Falzon submitted that the McKenzie Petition was the most important public law case to come before a BC Court in many years. He provided extensive submissions that complemented those made on behalf of the Petitioner, and advanced additional arguments on issues of statutory interpretation, independence, and the rule of law.

Mr. Justice McEwan reserved his decision.

For background on this case and BCCAT's decision to intervene go to <http://www.bccat.net/message.pdf>

**REGISTER FOR THE NATIONAL ASSOCIATION OF
ADMINISTRATIVE LAW JUDGE'S 32ND ANNUAL MEETING
AND EDUCATIONAL CONFERENCE
SEPTEMBER 6 TO 8, 2006
SEATTLE, WASHINGTON**

**"BUILDING BRIDGES FOR BETTER ADMINISTRATIVE
ADJUDICATION"**

The program centres around the theme of building bridges to more inclusive administrative processes, to a better understanding of the relationship between managers of ALJs and staff ALJs; to other judges, to better technology, and to ALJ career development. The first-rate faculty includes law professors from Seattle University, Pepperdine, University of Washington, and the National Judicial College; state court judges; federal administrative law judges; and state administrative law judges.

For more information and on registration visit:
<http://www.walja.org/2006Conference.htm>

TRIBUNAL POSTINGS

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

The BC Farm Industry Review Board (BCFIRB), located in Victoria, requires the appointments of up to three members. Applications received for the current positions may also be considered for subsequent appointment opportunities.

If you are interested, eminently qualified, and ultimately willing to make the commitment, this is an exciting and demanding opportunity to serve the agri-food industry in British Columbia. These positions are being filled in a dynamic policy context as governance and economic frameworks are being established for the regulated marketing sector. These positions are part-time Lieutenant Governor in Council (Cabinet) appointments.

BCFIRB is a specialized administrative tribunal responsible for the general supervision of commodity boards in the Province. BCFIRB also hears appeals from commodity board decisions and complaints from persons regarding farm practices employed by agricultural and aquacultural operators.

Candidates for appointment as BCFIRB members must have proven leadership skills in gaining the confidence of a wide range of constituents through effective consultative and consensus building processes. You should have experience: in agri-food production, marketing or processing; as a consumer representative; in land use planning; and/or in a regulatory or quasi-judicial environment. Legal experience is a strong preference for one appointee. Candidates must have good writing, analytical, communication and conflict resolution skills. You should not have interests which conflict with the performance of your statutory duties and you must show balanced judgement and possess the ability to make fair, consistent and timely decisions. Ability to travel, a home office and internet and electronic mail access are required.

TO APPLY

You must refer to the complete list of duties and qualifications, located under "Recruitment" on the BCFIRB website at <http://www.firb.gov.bc.ca/recruitment.htm> and complete the application process by sending a resume and covering letter. Please ensure that your application addresses the selection criteria and required competencies for the position.

Applications are to be received by March 31, 2006, and may be sent via e-mail to firb@gov.bc.ca, by fax: 250 356-5131; or mail to:

BCFIRB Appointments
PO Box 9129 Stn Prov Govt
Victoria, BC V8W 9B5
Contact: Jim Collins, 250 356-1817

BCCAT COURSE CALENDAR

REGISTER NOW FOR BCCAT'S NEW PILOT OFFERING OF THE REVISED AJ1 COURSE FOR JUNE 20 AND 21, 2006 AT THE BARGAIN PRICE OF \$300. THE NEXT OFFERING WILL BE OCTOBER 25/26 FOR \$465 (MEMBERS) AND \$495 (NON-MEMBERS)

Course

AJ: Practice & Procedure for Decision Makers (pilot offering with new revised curriculum and reduced fees)

June 20 - 26, 2006 Vancouver, BC

October 25-26, 2006 Vancouver, BC

AJ: Practice & Procedure for Staff Members and Auxiliaries

November 9, 2006 Vancouver, BC

Decision-Writing Workshop

May 11 - 12, 2006 Vancouver, BC

November 2 - 3, 2006 Vancouver, BC

Hearing Skills Workshop (Fees are \$475 for BCCAT members and \$500 for non-members)

May 4 - 5, 2006 Vancouver, BC

November 23 - 24, 2006 Vancouver, BC

If you wish to register for any of these courses, please contact the registration staff of the Provincial Instructor Diploma program at 604.871.7488 or 1-888.332.3212 or visit the Vancouver Community College website at <http://instructordiploma.com/partners.html>.

Reminder to Members: If there are changes to your contact information, don't forget to 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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