Spring 2008
Volume 6, Issue 2

BCCAT NEWS

PRESIDENT'S MESSAGE

Annual Board of Director's Retreat

The BOD met on January 19, 2008 and set the following goals for the coming year: put together a quality annual conference; raise BCCAT's profile; and increase membership.

Update on McKenzie case

On October 19, 2007, the BC Court of Appeal dismissed the Crown's appeal of the BC Supreme Court decision on the basis the appeal was moot as new law repealed the provisions under which the decision was made to terminate McKenzie's appointment. It also found the Supreme Court decision had no precedential value. McKenzie has made an application to the Supreme Court of Canada for leave to appeal the BCCA Judgement. BCCAT's lawyers advised the Court registry on January 9, 2008 that although BCCAT has decided not to participate in the leave application, it reserves its right to participate as an intervenor should leave to appeal be granted.

Adjudicator Manual

BCCAT has engaged Gwen Taylor to produce the training manual by August 31, 2008.

Administrative Law Website Project

This project involving the Law Courts Education Society, BCCAT and the Administrative Justice Office has evolved to the point where scripts have been developed and filming should begin shortly. Once filming is done, work will commence on the website design. The LCES is seeking additional funding to proceed with the other languages segment of the website and to develop self-help resources that would be added to the website to assist parties to understand how to address an administrative law matter.

Funding from the Ministry of Attorney General and the Administrative Justice Office

In February of this year BCCAT received a cheque in the amount of $16,000.00 for "Train the Trainers" workshops and in March BCCAT received a cheque in the amount of $25,000.00 to assist BCCAT in undertaking a Model Rules project.

BCCAT and the AJO to participate in Law Day

Once again, BCCAT and the AJO will jointly host information tables in Victoria and Vancouver as part of the Law Day celebrations on Saturday, April 19, 2008. For more information on this event, which is organized by the Canadian Bar Association please see http://www.cba.org/BC/Public_Media/main/law_week.aspx.

Annual Conference

BCCAT's annual conference is scheduled for October 20, 2008 at Dunsmuir Lodge, which is located just outside Victoria, BC.

MARK YOUR CALENDARS!

Go to www.bccat.net for more details and registration.

BCCAT's Annual Educational Conference and Annual General Meeting

October 20, 2008
Dunsmuir Lodge, near Sidney, B.C.

"The World According to Dunsmuir: Re-examining the Tools of Administrative Justice"

An in-depth program to bring you valuable workshops, 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 workshops include:

- Sufficiency of reasons
- Credibility and reliability of evidence in written submissions and oral hearings
- Alternative Dispute resolution
- Hearing skills for unrepresented litigants
- Conducting investigations
- Administrative law update

Plus many more!

THE CANADIAN NUCLEAR SAFETY COMMITTEE AND THE ISSUE OF INDEPENDENCE

By Kurt Neuenfeldt

The recent dispute, between Ms. Linda Keen, former President of the Canadian Nuclear Safety Committee ("CNSC"), and the Federal Government, raises fundamental issues around the role and degree of independence of quasi-judicial boards and tribunals.

A unique feature of the dispute has been its very public nature, as captured in an exchange of correspondence between Ms. Keen and the Minister of the Environment, the Honourable Gary Lunn, that has been posted on the internet.

On January 8, 2008, Ms. Keen's replied publicly to a December 27, 2008 letter from Minister Lunn, concerning her tenure as president of the CNSC. Her letter is set out at: http://www.nuclearsafety.gc.ca/eng/newsroom/issues/corr_letter_cnsc_min.pdf

In her letter, Ms. Keen calls into question the relationship of government to regulatory bodies

According to the CNSC website, a week after her letter, Ms. Keen was dismissed from her position as president of the Committee, by Order in Council, on January 15, 2008, but remained a member of the CNSC.

A number of media websites indicate that Ms. Keen has filed an application for judicial review of the decision to remove her from her position. The Federal Court website indicates that , Ms. Keen filed a s. 18.1 "Application for Judicial Review", action number T-246-08, on February 14, 2008.

THE ADMINISTRATIVE JUSTICE OFFICE: AN UPDATE

The AJO continues to support BC citizens' access to earlier solutions and faster justice in the administrative justice sector, reflecting the Ministry of Attorney General's five key strategies for justice transformation through its work on various projects, including collaborative efforts with and grant funding to BCCAT.

Prevention – minimizing conflicts, avoiding disputes

Education and training on administrative justice principles in order to minimize conflicts and avoid disputes were given high priority by the AJO, by hosting various events and through its grant funding.

Recognizing the need to broaden the access within government to high quality and consistent information about administrative law principles, the AJO, with the support of BCCAT, has expanded delivery of the *Administrative Justice for Decision Makers* course by BCCAT-trained Ministry of Attorney General Legal Services Branch (LSB) lawyers beyond government decision-makers to also include the various other government staff who work with government's wide range of administrative programs.

The first course, delivered in January, 2008, highlighted the value of such training. On word-of-mouth only, the May, 2008 offering is already fully subscribed, and registrations are well underway for a Fall, 2008 offering.

Delivery of these courses would not be possible without BCCAT's co-operation, and the AJO was pleased to provide a $16,000 grant for BCCAT to provide "Train the Trainer" courses (in addition to similar funding in 2007), for senior BCCAT members to deliver training to tribunal appointees, and for the Ministry of Attorney General's LSB lawyers to deliver the *Administrative Justice for Decision Makers* course to government staff. (Thanks to BCCAT instructors, Cheryl Vickers and Jessie Horner for providing an excellent learning experience for the LSB lawyers).

The AJO and the Dispute Resolution Office (DRO) are currently working on a system design initiative that will enable tribunals to analyze and enhance their dispute resolution programs. We are developing a generic case streaming toolkit through pilot programs with the Farm Industry Review Board (FIRB) and the Safety Standards Board and are currently developing a generic evaluation toolkit, through pilot programs with the FIRB and the Human Rights Tribunal. The AJO and DRO also commissioned the UBC Program on Dispute Resolution to examine tribunals' ability to use ADR processes to resolve disputes about entitlements to statutory rights and benefits.

ADR in Entitlement Tribunals – A Policy Choice concludes that ADR processes can be used to resolve these kinds of disputes with the decision on when and how to do so being a policy choice. The report recommends that government and tribunals work together to optimize tribunal dispute resolution programs, taking into account the tribunal's unique organizational culture, people, technology and mission and that the Ministry of Attorney General consider implementing dispute resolution by working with tribunals (and their ministries) individually, using a structured organizational assessment and system design approach to create a responsive, accessible, and efficient dispute resolution system.

Integration and sharing resources

In February, 2008, the AJO hosted another workshop for Senior Tribunal Staff. Discussion topics, requested by the participants, included how to better protect parties' personal information, dispute resolution processes, administrative requirements for processing tribunal appointments, and government's climate change programs and goals. With 15 participants representing 17 tribunals, this workshop provided another excellent opportunity for the exchange of information and creative problem solving. The AJO has been asked to plan a fall workshop, and suggestions for speakers and discussion topics are welcomed.

The AJO hosted a highly successful workshop, January, 2008, on our Design Guide to Review Administrative Decisions with 29 policy analysts and others, representing 11 government ministries. Participants engaged in a highly interactive process, on the application of the full range of policy, legal and practical factors on designing decision reviews. The AJO is currently planning additional offerings of the Guide Workshop.

The AJO continues its work with various ministries and tribunals to find opportunities for collocation and sharing of registry services. A recent cross appointment was that of the Property Assessment Appeal Board (PAAB) Chair, Cheryl Vickers, to the Chair of the Mediation Arbitration Board (MAB), June, 2007, providing PAAB's full-time registry staff and other resources to the MAB.

Information – better and more accessible information for citizens

The AJO continues to provide current, relevant information about the administrative justice sector on its website (www.gov.bc.ca/ajo/), with a total of 70,000 visits in the

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AJO Cont'd

last year and almost 100,000 visits since we began tracking our website's statistics, late in 2006. The AJO was thrilled when the UK's Council on Tribunals, recently recommended the AJO website to its newsletter readers. The AJO will continue to provide high quality information on our website to benefit readers, both locally and internationally.

In another collaborative effort, the AJO continues to provide advice to the BCCAT, Law Courts Education Society (LCES) steering committee for their joint "AdminLaw BC" project to develop a public education, multi-media, multi-lingual administrative law website to provide easy access to information, advice and guidance on the administrative justice system.

And the AJO and BCCAT are currently working together on public information materials for Law Week information tables at the Vancouver and Victoria April 19 celebrations, part of the annual nation-wide event, organized by the CBA. We look forward to another fun and interesting day, and the opportunity to meet members of the public, share information and learn about their interests and concerns related to administrative justice.

Simplification – faster, proportional procedures

The recent AJO and Ministry of Attorney General $25,000 grant to BCCAT to develop tribunal model rules will help make tribunal and other decision-makers' procedures faster, proportional and more user friendly. Best practises for tribunal case management and dispute resolution processes will be considered and tribunals will want to review the model rules for new ideas.

The AJO continues to consult across government ministries on policy issues and in preparation for the Spring, 2008 legislative agenda, advising on draft legislation to ensure provisions for administrative decision making are consistent with government's goals of earlier and faster solutions.

Resolution – actively encouraging problem solving

The 2007 amendments to the *Administrative Tribunals Act,* brought into force effective October 18, 2007, enhance tribunal operations by improving flexibility for temporary appointment of tribunal members, and clarify tribunals' jurisdiction and discretion to decide *Human Rights Code* issues.

The very recent change to the common law standard of review, articulated in the March 2008 Supreme Court of Canada decision in *Dunsmuir v. New Brunswick, 2008 SCC 9*, is under review.

AJO Staff Changes

After 3 years working as Director of Legislation and Law Reform, Richard Rogers has moved on to new challenges as Deputy Registrar, BC Registry Services, Ministry of Finance. The AJO greatly appreciates Richard's excellent work during his time with us and wish him all the best while also welcoming Troy Taillefer who takes up this position, who most recently worked for the Ministry of Forests and Range Compliance and Enforcement Branch on administrative justice issues.

Contacting the AJO

The AJO welcomes questions or concerns related to the *Administrative Tribunals Act* or the administrative justice system and encourages BCCAT members to contact us about upcoming events and information related to administrative justice and recent "Tribunal Success Stories" for the AJO website. (Check out the What's New page periodically for further information on these and other issues.) The AJO continues to look for further opportunities to work with tribunals, other ministries and community partners within the administrative justice system to provide earlier resolution of issues.

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

DUNSMUIR – A QUESTION OF STANDARDS

By Iain Macdonald,
Vice-President, BCCAT

The Supreme Court of Canada recently issued its decision in David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick.[1]

"Patently unreasonable" and "reasonableness simpliciter" will now be collapsed into one standard. The analysis by the Supreme Court of Canada illustrated the absurdity of maintaining a standard that appeared to call for the overturn of an obviously irrational decision, yet would decline to interfere with a mildly irrational decision. The standard of review will now be "reasonableness". The SCC explained:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. …

The SCC hastened to add that creating a single standard of reasonableness did not "pave the way for a more intrusive review by the courts". Deference on the part of the court requires "respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system". As before, however, the court maintained the right to apply the standard of correctness, "…in respect of jurisdictional and some other questions of law".

To assist the lower courts in dealing with judicial reviews under the new standard, the SCC attempted to streamline the process:

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

Where an analysis must be conducted, the SCC has determined that consideration of the following factors would lead to the conclusion that the decision maker should be given deference and a "reasonableness" test (rather than a "correctness" test) applied:

> [63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
>
> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

Indeed, the SCC said that:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

With regard to questions of law the SCC said:

> [54] Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157,

See *Dunsmuir* on Page 6

[1] http://scc.lexum.umontreal.ca/en/2008/2008scc9/2008scc9.html

CCAT'S 24TH ANNUAL CONFERENCE "SERVING A DIVERSE POPULATION"

June 25 to 27, 2008
Gatineau, Quebec

The Council of Canadian Administrative Tribunals (CCAT) is hosting its 24th Annual Conference from June 25 to 27, 2008 at the Conference Centre of the Hilton Lac Leamy in Gatineau, Quebec.

The theme of this year's conference is Serving a Diverse Population. The program brings together speakers from many different perspectives and backgrounds.

Whatever your role in the field of administrative justice, this conference offers you a unique learning opportunity. The conference is a perfect venue to hear about and discuss current issues of importance in administrative law and to extend your professional contacts. You will both enhance the program by your attendance and benefit from doing so.

Furthermore, the conference will be preceded on Wednesday, June 25th, by an optional Advanced Hand-on Alternative Dispute Resolution (ADR) Workshop, organized by CCAT's Professional Development Committee.

Please visit the following pages of CCAT's website for further information about the program, how to register and how to make hotel reservations at the Hilton Lac Leamy, Gatineau, Quebec, the site of the conference.

Program: http://www.ccat-ctac.org/conferences/program.php
Registration: http://www.ccat-ctac.org/en/conferences/registration.php
Logistics: http://www.ccat-ctac.org/en/conferences/logistics.php

Dunsmuir cont'd

> at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

Where an analysis must be done to ascertain the appropriate standard for questions of law the following factors must be considered:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

Since we don't conduct judicial reviews ourselves, what does this signal for us as administrative law decision makers? The SCC gave us big hint when it said:

> [47] … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to *the process of articulating the reasons* and to outcomes. In judicial

See *Dunsmuir* on Page 7

Dunsmuir cont'd

> review, *reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process*. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (emphasis added)

It tells us that, with the collapse of the "patently unreasonable" standard of review, the court may be more focused on the clarity and intelligibility of the articulated reasons and thus perhaps less deferential to our decisions. While the court recognizes that tribunals may reach a number of decisions that fall within the range of acceptable and rational solutions, the court will now more closely examine the qualities that make the decision reasonable. This means that our decisions must not only be clear in their outcome, they must also be well reasoned, and reflect rational consideration and disposition of the relevant evidence and arguments. For the most part, this shift in the position of the court will not likely affect the way we do our jobs, since, as BCCAT members, we all strive to meet these objectives in any event.

An interesting question arises (not the only one, I'm sure), but this one involves the Administrative Tribunals Act (ATA). As you are aware, section 58(1) of the ATA states that if a tribunal's enabling Act contains a privative clause, then, relative to the courts, the tribunal must be considered to be an expert tribunal. Section 58(2)(a) addresses judicial review and mandates that "a finding of fact or law or an exercise of discretion by an expert tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". Section 59(3) of the ATA concerns tribunals without a privative clause in their enabling legislation, and states that "a court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable". At first glance, it would appear that there is an impasse between the express provisions of the ATA and the direction from the SCC in *Dunsmuir*. The Legislature has mandated a test in the ATA that, according to the SCC should no longer be applied. It will be interesting, I think, to read the judicial review decisions issued in British Columbia over the next short while.

The impact of *Dunsmuir* does not end with a revised standard of review. Like the famous Russian matroyshka nesting dolls, *Dunsmuir* contains a message within the message. When the cloaking issue of standard of review is removed, there remains the core issue of dismissal from office of an Order-in-Council appointee, serving at pleasure. The Supreme Court of Canada unanimously concluded that Mr. Dunsmuir's dismissal was a matter of contract law, and that he was owed no duty of fairness, under public law. His remedy lay in the law of contract, which was satisfied by the severance pay he received. In reaching this decision, the SCC recognized the important place of a general duty of fairness in administrative law; however, the effects of a contract of employment on such a duty had to be analyzed. The SCC rejected the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute. It also dismissed the notion of a distinction between office holders and contractual employees for procedural fairness purposes. In the view of the SCC, "…what matters is the nature of the employment relationship between the public employee and the public employer", and:

> [81] … Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

This conclusion meant that, in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law. The distinction between office holder and contractual employee was done away with. The SCC said that in determining the nature of the employment relationship with a public authority, it is assumed that most employment relationships are contractual. Consequently,

> [113] … A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

The SCC, however, said that there might be occasions where a public law duty of fairness will still apply:

> [115] … We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. *New Brunswick Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)).

See *Dunsmuir* on Page 8

Dunsmuir cont'd

> Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

Many of you will recall the recent case involving Mary McKenzie, in which BCCAT acted as intervenor. [2]

Ms. McKenzie's appointment to office as a residential tenancy arbitrator was rescinded, without cause, in the middle of a five-year term. The Government, in dismissing Ms. McKenzie, relied on section 14.9(3) of the Public Service Employers Act (PSEA), which states:

> (3) The appointment of a person referred to in subsection (1) may be terminated without notice before the end of the term of their appointment on payment of the lesser of
>
> (a) 12 months' compensation, or
>
> (b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term.

Subsection (3) applies to "a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal". Mary McKenzie, at the time, was such a person.

Ms. McKenzie contested her dismissal on a number of grounds, including the Government's failure to treat her fairly. She also raised the constitutional question of independence of the decision maker and the incompatibility of section 14.9(3) of the PSEA with that independence.

The Government agreed that Ms. McKenzie had not been fairly treated and the court determined that the Ministerial Order dismissing Ms. McKenzie from her office as a residential tenancy arbitrator should be set aside, for lack of procedural fairness.

More to the point, the court agreed that Ms. McKenzie's summary dismissal without cause raised the fundamental issue of independence of the decision maker, which in turn posed a constitutional question. The court in addressing the constitutional question determined that, while not all tribunals performed a function similar to that of a court, "courts" might very well include "…a class of tribunals that were court-like, or courts in all but name." He elaborated further by stating:

> [150] Tribunals that are assigned responsibilities lifted straight from the courts' jurisdiction are obviously different. 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 judgment 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.

In the court's view, a tribunal, constituted to try issues of law, yet equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the *PEI Reference* and in *Ell.* The work of residential tenancy arbitrators was, in that sense, a judicial function. This led the court to state:

> [153] Section 14.9(3) of the ***PSEA***, as interpreted by the Respondents, violates that principle. So would any provision with the same purpose, no matter how clearly expressed. Section 14.9(3) is accordingly invalid and of no force and effect against the Petitioner in her function as a residential tenancy arbitrator, as infringing on the constitutional requirement of independence attaching to the function of that office.

In addition to quashing the Ministerial Order rescinding Ms. McKenzie's appointment, the court decided that:

> [157] The Petitioner is further entitled to a declaration, and I so declare, that in any event, section 14.9(3) is of no force and effect in relation the Petitioner's office as a residential tenancy arbitrator as violating the constitutionally protected principle of independence required in the circumstances.

The Government appealed; not with respect to the finding that the Ministerial Order rescinding Ms. McKenzie's appointment should be quashed (after all, they had agreed with this during the trial), but rather with respect to the invalidation of section 14.9(3) of the PSEA. The British Columbia Court of Appeal determined that Ms. McKenzie had received her remedy for unfair dismissal, and that nobody was arguing otherwise. On that basis, the BCCA, regrettably in my view, found that the balance of the Supreme Court's decision addressing the constitutional question was simply *obiter dictum*, and therefore moot. The appeal was dismissed, but not before the BCCA made it clear that the portion of the

See *Dunsmuir* on page 9

[2] http://www.courts.gov.bc.ca/jdb-txt/sc/06/13/2006bcsc1372.htm

Dunsmuir cont'd

Supreme Court's judgment striking down section 14.9(3) of the PSEA had no effect, and was of no precedential value.[3] According to the SCC, Ms. McKenzie would not generally be owed a duty of fairness in the matter of her dismissal. This development in *Dunsmuir* may challenge the underpinnings of the decision of the BC Supreme Court in *McKenzie*, since the judge relied on precedents that the SCC no longer considers useful or valid. Thus, *Dunsmuir* may have removed the initial underpinning of the reasons of the BC Supreme Court for determining that Ms. McKenzie was owed a public law duty of fairness in the matter of her summary dismissal. The downstream effect may also be to remove the underpinnings for the BCCA finding that the judgment of the Chambers' Judge on the remaining issues was obiter and that the appeal was moot.

The terms of section 14.9(3) the ATA, which are to be read into the contracts of employment for tribunal members in British Columbia, however, provide for summary dismissal in which case, as the SCC said in *Dunsmuir*, the office holders may be deemed to hold office "at pleasure"; therefore, the decision that Ms. McKenzie was owed a public law duty of fairness in the matter of her dismissal was also correct. In other words, the presence of section 14.9(3) of the PSEA could be seen to save the decision that Ms. McKenzie was owed a public law duty of fairness that, according to *Dunsmuir*, would not otherwise have existed. However, Ms. McKenzie, with BCCAT as intervenor, sought to have section 14.9(3) of the PSEA declared unconstitutional because of the blatant challenge it represents to the independence of decision makers in the administrative justice system.

How will this matter ultimately be resolved? Stay tuned. Ms. McKenzie is currently seeking leave to appeal the BCCA decision to the SCC.

[3] http://www.courts.gov.bc.ca/jdb-txt/ca/07/05/2007bcca0507.htm

UNIQUE ALTERNATE DISPUTE RESOLUTION TECHNIQUES:

Rulings on Pending Motions, Physicians Choice of Arizona, Inc. v. Miller, Case No. CV2003-020242, Super. Ct., Maricopa County, AZ, July 21, 2006:

The plaintiff's lawyer asked the defendant's lawyer to go to lunch to discuss some pending issues. Defense counsel refused, so the plaintiff filed a "Motion to Compel Acceptance of Lunch Invitation." Judge Pendelton Gaines, Superior Court of Maricopa County, Arizona, said this in granting the unusual motion:

> "Conversation has been called "the socializing instrument par excellence" (Jose Ortega y Gasset, Invertebrate Spain) and "one of the greatest pleasures in life" (Somerset Maugham, The Moon and Sixpence). John Dryden referred to "Sweet discourse, the banquet of the mind" (The Flower and the Leaf).
>
> Plaintiff's counsel extended a lunch invitation to Defendant's counsel "to have a discussion regarding discovery and other matters ." Plaintiff's counsel offered to "pay for lunch." Defendant's counsel failed to respond until the motion was filed.
>
> Defendant's counsel distrusts Plaintiff's counsel's motives and fears that Plaintiff's counsel's purpose is to persuade Defendant's counsel of the lack of merit in the defense case. The Court has no doubt of Defendant's counsel's ability to withstand Plaintiff's counsel's blandishments and to respond sally for sally and barb for barb. Defendant's counsel now makes what may be an illusory acceptance of Plaintiff's counsel's invitation by saying, "We would love to have lunch at Ruth's Chris with/on . . ." Plaintiff's counsel.[fn1]
>
> [fn1] Everyone knows that Ruth's Chris, while open for dinner, is not open for lunch. This is a matter of which the Court may take judicial notice.
>
> Plaintiff's counsel replies somewhat petulantly, criticizing Defendant's counsel's acceptance of the lunch invitation on the grounds that Defendant's counsel is "now attempting to choose the location" and saying that he "will oblige," but Defendant's counsel "will pay for its own meal."
>
> There are a number of fine restaurants within easy driving distance of both counsel's offices, e.g., [court lists fine restaurants in the Phoenix area]. Counsel may select their own venue or, if unable to agree, shall select from this list in order….

See *Techniques* on Page 10

Techniques cont'd

> Each side may be represented by no more than two (2) lawyers of its own choosing, but the principal counsel on the pending motions must personally appear.
>
> The cost of the lunch will be paid as follows: Total cost will be calculated by the amount of the bill including appetizers, salads, entrees and one non-alcoholic beverage per participant.[fn3]
>
> Alcoholic beverages may be consumed, but at the personal expense of the consumer. A twenty percent (20%) tip will be added to the bill (which will include tax). Each side will pay its pro rata share according to number of participants. The Court may reapportion the cost on application for good cause or may treat it as a taxable cost under ARS § 12-331(5).
>
> During lunch, counsel will confer regarding [various matters in the case].[fn4]
>
> The Court suggests that serious discussion occur after counsel have eaten. The temperaments of the Court's children always improved after a meal."

BCCAT Course Schedule

AJ1: Practice & Procedure for Decision Makers
June 11-12, 2008, Vancouver
October 28-29, 2008, Vancouver

AJ: Practice & Procedure for Decision Makers in Professional Regulatory Agencies
TBA

AJ: Practice & Procedure for Staff Members and Auxiliaries
TBA

Decision-Writing Workshop
May 8-9, 2008, Vancouver
November 6 - 7, 2008, Vancouver

Hearing Skills Workshop
May 15 & 16, 2008 , Vancouver
November 27 & 28, 2008 , Vancouver

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 their website at Vancouver Community College.

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