Supplemental Submissions on:

"The Standard of Review Applicable to Tribunal Decisions in British Columbia –

The Implications of *Dunsmuir v. New Brunswick*; A Discussion Paper"

Presented by the British Columbia Council of Administrative Tribunals

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[1] In its original submissions, BCCAT reviewed a number of decisions from the British Columbia Supreme Court on the impact of *Dunsmuir v. New Brunswick*, 2008 SCC 9, to the application of ss. 58 and 59 of the *Administrative Tribunals Act*, R.S.B.C. 2004, c. 45. BCCAT noted that the jurisprudence was unsettled.

[2] In its submissions, BCCAT stated:

> The trend at this point seems to be that *Dunsmuir* does not impact the standards of review as legislated by the *ATA*. Unless the courts settle this matter, then surely the legislature must. One question is how long do we wait and a related question is whether it is prudent to give the court a bit more time to settle the law in BC. [Para. 36]

[3] Since November 2008, the British Columbia Supreme Court has released two further decisions addressing the *ATA* and *Dunsmuir* that BCCAT would like to briefly note.

[4] In *Tallarico v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 49, released January 22, 2009, the Court stated that it intended to follow the reason in *Brown v. Residential Tenancy Act*, 2008 BCSC 1538, to the effect that the three standards of review set out in the *ATA* continued to apply to judicial review proceedings governed by the *ATA*. (Those three standards ranging from "correctness", through "reasonableness", to "patent unreasonableness.)

[5] The Court concluded that *Dunsmuir* did not impose a new definition of "patent unreasonableness" on its review of the decision in question. The Court held that under "patent unreasonableness", the court must show the highest degree of dereference to a tribunal.

[6] In *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 62, released January 23, 2009, the Court again reviewed the case law addressing the application of *Dunsmuir* to the *ATA*. It stated, at para. 41:

> I construe *Bolster* [*British Columbia v. Bolster*, 2007 BCCA 65, 63 B.C.L.R. (4th) 263] as directing the court to consider the standard of review using the pragmatic and functional approach described in *Dr. Q*. [*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226], or what is now referred to in *Dunsmuir* as the "standard of review analysis", where the common law is applicable. However, in all other cases, the provisions of the *ATA* will govern the

> applicable standard of review. It is open to the province of British Columbia to determine the standard of review applicable. The question for the court is therefore the nature of the error it has been asked to review, whether an error of law, fact or an exercise of discretion, or a matter of fairness. Once that is determined, the court must apply the standard of review as set out in the *ATA*. [Emphasis added]

[7] It is also important to note that in *Asquini*, the petitioner argued that ss. 58 and 59 of the *ATA* encroached:

> … on the inherent jurisdiction of superior court justices appointed pursuant to s. 96 of the *Constitution Act*, 1867 (U.K.) 30 and 31 Victoria, c. 3., and that *Dunsmuir* establishes the appropriate standards of judicial review as correctness and reasonableness.

[8] Following on this argument, the petitioner sought a declaration that the two sections of the *ATA* were *ultra vires* the province of British Columbia. However, the Court found that the petitioner had failed to establish that the sections were outside the province's legislative authority.

[9] In light of these recent decisions, BCCAT submits that the British Columbia Supreme Court has clearly moved in the direction of a standard and consistent approach the interpretation ss. 58 and 59 of the *ATA*, post *Dunsmuir*. The result may well be that it is no longer necessary for the legislature to clarify the relevant provisions of the *ATA* in light of *Dunsmuir*.