Recent Developments in BC Administrative Law: A Case Law Update

- 2021 BCCAT Education Conference -

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Overview

This presentation will address:

- Decisions not subject to judicial review
- Procedural fairness case studies
- Statutory appeal case studies
- Substantive review on judicial review case studies
- Concluding remarks

Case Law Cheat Sheet

Large number of interesting cases in 2020/21!

BCCAT will be circulating a “Cheat Sheet” with these slides providing recent cases which address, among other things:

- Prematurity/exhaustion of internal remedies
- Delay as a bar to judicial review
- Disclosure in judicial review proceedings
- The record on judicial review
- Interventions and adding parties
- Standard of review since *Vavilov*

Decisions not subject to judicial review

The Redeemed Christian Church of God v. New Westminster (City), 2021 BCSC 1401

- Grace Chapel rented an event room for a Christian youth conference from the City of New Westminster
- A member of the public complained that the conference would be anti-LGBTQ
- The City cancelled the licence agreement for the event room on the basis that one of the speakers represented views that were contrary to the City's
- Grace Chapel sought judicial review

Decisions not subject to judicial review

The Redeemed Christian Church of God v. New Westminster (City), 2021 BCSC 1401

- The City asserted decision not amenable to JR
- The Court considered whether the decision to terminate the contract was subject to section 2 of the *Judicial Review Procedure Act ("JRPA")*
- Section 2(2)(a) - allows a court to grant relief in the nature of mandamus, prohibition or certiorari
- Sections 2(2)(b) - allows a court to issue a declaration or injunction in relation to a statutory power

Decisions not subject to judicial review

The Redeemed Christian Church of God v. New Westminster (City), 2021 BCSC 1401

- Morellato J agreed section 2(2)(b) did not apply because the City was not exercising a statutory power of decision (as defined in *JRPA*)
- A statutory power to contract is not equivalent to a statutory power under an enactment (para. 40)
- This did not end the analysis – section 2(2)(a) considers whether the decision has "sufficient public character"
- Morellato J concluded it did not

Decisions not subject to judicial review

The Redeemed Christian Church of God v. New Westminster (City), 2021 BCSC 1401

- Morellato J considered the "*Air Canada* factors" and determined that the termination of the contract was a private action which does not attract judicial review
- When making contractual decisions a public body may not be exercising a power central to its mandate; rather, it may be exercising a private power (para. 60)
- Morellato J went on to deal with issues under sections 2(a) and (b) of the *Charter* (2(a) declaration granted)

Decisions not subject to judicial review

The Redeemed Christian Church of God v. New Westminster (City), 2021 BCSC 1401

- Takeaway points:
  - Not every decision made by a statutory-body or tribunal is amenable to judicial review
  - Starting with consideration of the order(s) sought can bring clarity to a petition for judicial review and the application of the *JRPA*
  - Keeping common law factors in mind can assist in clarifying upon which basis the tribunal is acting

Procedural fairness case studies

992704 Ontario Limited v. British Columbia (Assessor of Area #8 – Vancouver Sea to Sky), 2021 BCSC 1029

- 992704 Ontario Limited appealed the assessment of its property in Whistler, BC
- Before the Property Assessment Review Panel ("PARP"), asserted institutional bias and valuation issue
- PARP asked 992704 to conclude submissions ≈ 36 minutes
- PARP confirmed valuation
- 992704 filed petition, bypassing Property Assessment Appeal Board

Procedural fairness case studies

992704 Ontario Limited v. British Columbia (Assessor of Area #8 – Vancouver Sea to Sky), 2021 BCSC 1029

- 992704 alleged breach of procedural fairness because prevented from presenting argument
- Respondents argued adequate alternative remedies
- Lyster J held that the procedural fairness issue was one that the Court could hear as the Board would not decide the issue
- Declaration issued because of structure of the *Assessment Act* (appeal outstanding)

Procedural fairness case studies

992704 Ontario Limited v. British Columbia (Assessor of Area #8 – Vancouver Sea to Sky), 2021 BCSC 1029

- Applying the *Baker* factors, Lyster J concluded PARP owed a "moderate" degree of procedural fairness
- Lyster J concluded PARP did not provide the petitioner a fair hearing - it did not consider having the assessor "sworn in" and did not allow sufficient time
- Despite significant institutional constraints, Lyster J held that PARP must be prepared to provide additional time when necessary beyond the 30 minutes allotted

Procedural fairness case studies

992704 Ontario Limited v. British Columbia (Assessor of Area #8 – Vancouver Sea to Sky), 2021 BCSC 1029

- Takeaway points:
  - Policy instruments are not binding on statutory delegates, it may be necessary to deviate from policy where the fairness of the hearing demands it
  - Limited time for a hearing is not, in and of itself, unfair; however, where a party needs extra time to present their case, should consider granting it
  - Addressing major arguments with reasons remains key for the Court when reviewing decisions

Procedural fairness case studies

Patton v. British Columbia Farm Industry Review Board, 2021 BCCA 75, rev'd 2020 BCSC 554

- Appeal from decision of Sharma J – held the Board had breached respondent's procedural fairness rights
- One part of the procedural fairness issue was the disclosure of a document called the "Schedule 15" document
- Sharma J found the respondent, Mr. Patton, did not receive that document
- Standard of review – section 58 of the *ATA*

Procedural fairness case studies

Patton v. British Columbia Farm Industry Review Board, 2021 BCCA 75, rev'd 2020 BCSC 554

- Court observed that the parties agreed that Mr. Patton had in fact received the "Schedule 15"
- Confirmed that for procedural fairness the requirements are "assessed contextually" (para. 100)
- Also confirmed there is "no need for actual prejudice, but only a possibly of prejudice" (para. 102)
- Court concluded that there was no procedural fairness violation – there was no evidence that a document had not been produced (paras. 106-107)

Procedural fairness case studies

Patton v. British Columbia Farm Industry Review Board, 2021 BCCA 75, rev'd 2020 BCSC 554

- Takeaway points:
  - Recent confirmation of the importance of institutional constraints and institutional expertise on tribunal procedures and decision-making
  - The Court considered the role of the alleged error in the FIRB's decision, highlighting that although it is only a "possibility" of prejudice the impact of the alleged error does matter to the analysis

Procedural fairness case studies

Weiss v. Worker's Compensation Appeal Tribunal, 2021 BCSC 231

- Mr. Weiss and ICBC sought judicial review of WCAT decision regarding whether the injury occurred while acting in the course of employment
- The primary challenge on judicial review was that WCAT erred by denying the petitioners an oral hearing
- Branch J remitted the matter to WCAT

Procedural fairness case studies

Weiss v. Worker's Compensation Appeal Tribunal, 2021 BCSC 231

- The petitioners requested WCAT to convene an oral hearing due to inconsistencies in the evidence and credibility concerns needing cross-examination
- WCAT refused to convene an oral hearing
- Initially, no reasons were provided but WCAT later provided rationale that an oral hearing would not assist in resolving the credibility issues or inconsistencies in part because of length of time since accident

Procedural fairness case studies

Weiss v. Worker's Compensation Appeal Tribunal, 2021 BCSC 231

- Branch J undertakes comprehensive review of policy, the relevant statutory provisions and case law
- Preliminary argument about lateness of request was rejected by Branch J
- Branch J concluded that the reasons given by WCAT for refusing an oral hearing were unfair
- More broadly, case law did not support the decision and procedural fairness required oral hearing

Procedural fairness case studies

Weiss v. Worker's Compensation Appeal Tribunal, 2021 BCSC 231

- Takeaway points:
  - Decision whether to hold an oral hearing reviewed on the "fairness" standard under *ATA* (paras. 34-37)
  - When deciding to convene an oral or written hearing, the existence of contradictory evidence or credibility issues will be a driving consideration
  - Highlights the importance of well-reasoned decisions on certain procedural issues

Statutory appeals since *Vavilov*

Whieldon v. British Columbia College of Nurses and Midwives, 2021 BCSC 1648

- Ms. Whieldon appealed decision of the College's disciplinary committee which found she had, among other things, committed professional misconduct
- *Health Professions Act* creates a statutory appeal procedure - new *Vavilov* standards apply
- Ms. Whieldon alleged the committee made errors of fact, breached procedural fairness rules, and made errors of law in rendering its decision

Statutory appeals since *Vavilov*

Whieldon v. British Columbia College of Nurses and Midwives, 2021 BCSC 1648

- Masuhara J reversed one allegation and remitted 3 others
- Decision provides helpful summary of the standards of review, namely correctness for errors of law, including procedural fairness, and palpable and overriding error for questions of fact or mixed fact and law
- Case illustrates the importance of reasons – Masuhara J observed that the committee's reasons did not reference the elements of the citation, as alleged

Statutory appeals since *Vavilov*

Whieldon v. British Columbia College of Nurses and Midwives, 2021 BCSC 1648

- Masuhara J noted the committee did not reference a key piece of undisputed evidence:

> [63] … **If the Panel rejected this key evidence, it was incumbent upon it to note and explain this decision**, particularly given that the Panel explicitly rejected other important testimony provided by the petitioner …. and refrained from making any general findings regarding the petitioner's reliability and credibility ...

Statutory appeals since *Vavilov*

Whieldon v. British Columbia College of Nurses and Midwives, 2021 BCSC 1648

- Masuhara J concluded that the committee's failure to properly construe the wording of the citation was a procedural fairness error
- Concluded reversal was the appropriate remedy given: (i) the unchallenged nature of Ms. Whieldon's testimony regarding actions that satisfy the definition of "escalation of care"; and (ii) the College did not, by challenging the testimony or otherwise, meet the evidentiary burden to prove the allegation as written

Statutory appeals since *Vavilov*

Cassiar Jade Contracting Inc. v. Messmer, 2021 BCSC 1963

- Another example of a statutory appeal under new standard of review
- Petitioner challenged decision of Chief Gold Commissioner on statutory interpretation and factual finding bases
- Standard of review – correctness for questions of law and palpable and overriding error for findings of fact
- Continued importance of the role of the error in the decision ("overriding" - paras. 81-82)

Substantive review since *Vavilov*

Wilson v. Covenant House Vancouver, 2021 BCSC 1876

- Mr. Wilson sought judicial review of a decision of the BC Human Rights Tribunal
- Mr. Wilson was employed by Covenant House Vancouver – alleged discrimination on the grounds of physical and mental disability
- Tribunal dismissed his complaint under section 27(1)(c) of the *Human Rights Code* (no reasonable prospect of success)
- Standard of review – s. 59 of *ATA*

Substantive review since *Vavilov*

Wilson v. Covenant House Vancouver, 2021 BCSC 1876

- Mr. Wilson argued that the exception in section 59(3) – a readily extricable question of fact or law underlying a discretionary decision applied
- McDonald J canvassed authorities on this issue, decided in relation to section 27 of the *HRC*
- Rejected contention that there was a readily extricable question of law – found that the question raised by Mr. Wilson was "inextricably intertwined" with the exercise of discretion

Substantive review since *Vavilov*

Wilson v. Covenant House Vancouver, 2021 BCSC 1876

- McDonald J applied the standard of review of patent unreasonableness
- The Court reviewed each of the alleged errors and concluded that the Tribunal did not err in the manner alleged by Mr. Wilson:
  - Applied correct legal tests
  - Reviewed all the evidence and "explained [their] reasoning" regarding findings of fact and whether credibility issues required a hearing

Substantive review since *Vavilov*

Wilson v. Covenant House Vancouver, 2021 BCSC 1876

- Takeaway points:
  - Important to recall there can be a carve out in section 59
  - Case illustrates the difficulty in identifying a “readily extricable” question, though have been recognized in earlier cases
  - Again, decision highlights the importance of clear and well-articulated reasons

Substantive review since *Vavilov*

Yellow Cab Company Ltd. v. Passenger Transportation Board, 2021 BCSC 86

- Judicial review of decision of the Passenger Transportation Board on transportation network services (commonly referred to as “ride hailing”)
- Standard of review – s. 58 of *ATA*
- Meaning of “patent unreasonableness” at issue
- Wilkinson J observed parties disagreed on the application of *Vavilov* to standard of review
- Canvasses authorities at paras. 25-53

Substantive review since *Vavilov*

Yellow Cab Company Ltd. v. Passenger Transportation Board, 2021 BCSC 86

- Wilkinson J concluded:

  [35] … *Vavilov* has not impacted the meaning of "patent unreasonableness" for the purposes of s. 58 of the ATA as argued by the petitioners. The petitioners appear to argue that Vavilov mandates a heightened scrutiny of all administrative decisions subject to court review. It does not. …. **My reading of *Vavilov* is that it confirms that a statutory standard of review for patent unreasonableness maintains its pre-Vavilov meaning**.

Substantive review since *Vavilov*

Yellow Cab Company Ltd. v. Passenger Transportation Board, 2021 BCSC 86

- Takeaway points:
  - *Vavilov* has not altered the meaning or content of "patent unreasonableness" standard of review
  - Remains a "heavy burden" for a petitioner (para. 36)

Concluding Remarks

- Continued importance of well-articulated reasons
- Pros and cons of appellate standards of review to decision makers that have statutory appeal procedures
- Focus on institutional constraints of tribunals is helpful for decision-makers and those defending decisions
- *Vavilov* continues to provide guidance on areas of challenge for decision-makers but has not fundamentally altered application of the reasonableness standard or patent unreasonableness

Thank you for your time!

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