

PRESENTED BY:  
ALANDRA HARLINGTON  
KAITLYN CHEWKA

LOVETT WESTMACOTT

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# Great(er) Expectations: Administrative Law Update, 2024



# Overview

- Duty to assist self-represented individuals
- Procedural fairness
  - Identifying issues and notice
  - Expert evidence
  - Mode of hearing
  - Reasonable apprehension of bias
- Policies and Administrative Guidance
  - Legislative decision-making
  - Challenges to policies and guidelines
  - Legitimate expectations
- Adequacy of reasons – justifiable and justified
- Statutory appeals and judicial review
- *Charter* values

# Duty to Assist

CASES INVOLVING  
SELF-REPRESENTED  
INDIVIDUALS

# Duty to Assist

## Cases involving self-represented individuals

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### *Leung v. Alam*, 2024 BCSC 1188

- Judicial review of RTB decision regarding notice to end tenancy - \$43,300 at issue
- Self-represented parties – transcript revealed petitioner struggled with English
- At RTB hearing, respondent produced second disclosure package late which RTB accepted
- The Court remarked on the following concerns regarding hearing process:
  - How late-filed evidence was handled;
  - Strict adherence to 1-hour hearing (see also: *Sanchez v. Bao*, 2024 BCSC 1482); and
  - Advising that no new evidence would be admitted during hearing.

# Duty to Assist

## Cases involving self-represented individuals

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### *Leung v. Alam*, 2024 BCSC 1188

- The Court recognized the RTB is “designed to assist lay people” in resolving disputes
- High level of procedural fairness owed and not met
- RTB ought to have taken time to explain what was needed and adjourned hearing to allow parties to address key issue
- Blind compliance with procedural rules is not a complete answer to question of whether procedural fairness was met
- Petitioner’s procedural fairness rights were breached
- Petition allowed (see also: *Athwal v. Johnson*, 2023 BCCA 460, *Niroei v. Bushell*, 2024 BCSC 1935)

# Duty to Assist

## Cases involving self-represented individuals

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### *Moon v. Vizi*, 2024 BCSC 1068

- Judicial review of RTB decision regarding notice to end tenancy
- Parties were self-represented before the RTB arbitrator
- The Court found Canadian Judicial Council's *Statement of Principles on Self-Represented Litigants and Accused Persons* applied in disputes before administrative bodies
- RTB was required to determine the actual dispute between parties – RTB was not limited to language used in notice of dispute (*Residential Tenancy Act* (“RTA”), s. 64(2))
- Fairness required RTB to analyze the evidence and positions of parties and not take a rigid or technical approach when identifying issues

# Procedural Fairness

IDENTIFYING ISSUES  
AND NOTICE

# Procedural Fairness

## Identifying issues and notice

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### *Victoria Teleport Corporation v. Office of the Chief Gold Commissioner, 2024 BCSC 511*

- Procedural fairness issue due to a new issue arising in the decision not anticipated by the parties
- The Court confirmed that procedural fairness is engaged where a decision maker decides an issue on which a party has not made any representations or submissions because the party was not aware that it was in dispute (para. 60)
- In this case, the petitioner expressed confusion about the issues and sought guidance
- The Court found a breach of procedural fairness, remitted the matter



# Procedural Fairness

## Identifying issues and notice

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### *British Columbia (Superintendent of Motor Vehicles) v. Datta, 2023 BCCA 440*

- Appeal by Superintendent of decision which allowed a petition challenging a decision of the Superintendent's delegate
- Key issue was whether the delegate was required to consider an issue not explicitly raised by the applicant but that was part of the test to be applied to his case
- The Court held delegates are compelled to “identify and protect against obvious errors, even where they are not alleged by an applicant” (para. 43)
- Appeal allowed

# Procedural Fairness

EXPERT EVIDENCE

# Procedural Fairness

## Expert evidence

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### *J.T. v British Columbia (Workers' Compensation Appeal Tribunal), 2024 BCSC 994*

- Petition challenging decision of WCAT denying claim for compensation
- Applicant alleged mental disorder on the basis of bullying and harassment in the workplace
- WCB requested an expert opinion and provided a summary of 11 incidents reported by the applicant to the expert
- After WCB denied his claim, applicant challenged expert report and listed 89 occurrences that he said ought to have been considered by the expert

# Procedural Fairness

## Expert evidence

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### *J.T. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2024 BCSC 994

- Applicant requested a new expert report or that the prior expert be asked to consider all 89 occurrences, but WCAT denied the request and relied on the report
- The Court held it was “clearly irrational” or “evidently not in accordance with reason” to accept a psychologist’s opinion on causation of a mental disorder where psychologist not provided with complete information
- Alternatively, a breach of the duty of fairness to fail to ensure it had a psychological assessment of causation based on complete and accurate record
- Petition allowed

# Procedural Fairness

## Expert evidence

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### *Amimer v. Mills*, 2024 BCSC 1897

- Judicial review of a decision of the CRT – private dispute over drywall repairs
- Key issue was CRT's reliance on respondents' expert over applicant's expert
- Respondents did not allow applicant's expert into their home to inspect the work for their report
- The petitioner (applicant) argued it was procedurally unfair for CRT not to require respondents to allow petitioner's expert to inspect the work
- CRT has authority to make an inspection order, but petitioner did not ask them to exercise that authority

# Procedural Fairness

## Expert evidence

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### *Amimer v. Mills*, 2024 BCSC 1897

- The Court was not satisfied it was procedurally unfair for CRT to not exercise its authority to order an inspection on its own motion
- Rather, the Court found the expert report the CRT relied on was objective and neutral and sufficient for the case
- Petition dismissed

# Procedural Fairness

MODE OF HEARING

# Procedural Fairness

## Mode of hearing

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*1028677 B.C. Ltd. v. The Owners, Strata Plan LMS 1083, 2024 BCSC 578*

- Procedural fairness argument raised regarding the mode of hearing before the CRT
- The petitioner raised a “central issue” of credibility - whether a letter was forged
- The Court again remarked on the sensitivity and safeguards needed when dealing with self-represented persons
- The Court held that the issues in this case were such that an entirely digital hearing was not sufficient to resolve the evidentiary issues raised
- CRT did not demonstrate that it had considered that issue or that they engaged in the requisite weighting in determining what procedure to employ



# Procedural Fairness

REASONABLE  
APPREHENSION OF  
BIAS

# Procedural Fairness

## Reasonable apprehension of bias

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*District Director, Metro Vancouver v. Environmental Appeal Board, 2024 BCSC 1064*

- Recent example of high bar imposed for allegations of bias
- District Director argued EAB engaged in conduct during a lengthy contested hearing that gave rise to a reasonable apprehension of bias
- 15 volumes of transcripts were provided to support allegation
- The Court reviewed transcripts and rulings and held the test for bias was met
  - *A “reasonable and right-minded person, applying themselves to the question and obtaining the required information, conclude that the decision maker, whether consciously or unconsciously, would not decide the matter fairly”*

# Procedural Fairness

## Reasonable apprehension of bias

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### *District Director, Metro Vancouver v. Environmental Appeal Board, 2024 BCSC 1064*

- Finding of bias was cumulative and based on what the Court found to be a “systemic” reasonable apprehension of bias throughout the hearing:

*[52] ...The Chair appeared to assist GFL, unduly intervened in the direct examinations conducted by the District Director, subjected the District Director’s witnesses to aggressive questioning, including challenges to their credibility and the appearance of skepticism with the answers given by the District Director’s witnesses. Taken as a whole, the conduct of the Panel during the hearing of the evidence was not even handed and it .. entered the fray and adopted positions inimical to the interests of the District Director and the Resident Appellants.*

- Of note, the Court also held that in cases where the reasonable apprehension of bias is said to arise from the conduct of the decision-maker during the hearing, the doctrine of waiver may not apply (in this case, it did not)
- Appeal pending

# Procedural Fairness

## Reasonable apprehension of bias

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- Various other cases rendered this year deal with allegations of bias
- Trend remains the same as in prior years – most allegations are dismissed due to lack of evidence and the presumption of regularity
- See, for example, the following (among others):
  - *Macdonald v. The Owners, EPS 522*, 2024 BCCA 52 at paras. 45-46
  - *Cran v. British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 1130 at paras. 84-89
  - *Li v. British Columbia (Residential Tenancy Director)*, 2024 BCCA 202 at paras. 47-55
  - *Cimolai v. British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 948 at paras. 54-67

# Policies and Administrative Guidance

RECENT  
CHALLENGES AND  
COMMENTARY

# Policies and Administrative Guidance

## Legislative decision-making

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*FS Insurance Brokers, Inc. v. Insurance Council of British Columbia, 2024 BCSC 1218*

- Recent articulation of the considerations applied when a party challenges a policy document
- FS Insurance Brokers challenged the enactment of a rule by the Insurance Council of British Columbia
- Claimed the rule was *ultra vires* and otherwise was enacted in a procedurally unfair manner as it targeted their business model specifically
- The Court concluded the rule in question, although it singularly impacted the petitioner, was a legislative decision and the duty of fairness was not triggered

# Policies and Administrative Guidance

## Challenges to policy documents

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### *Blueleader Enterprises Ltd. v. Director of Commercial Vehicle Safety, 2024 BCSC 850*

- Blueleader Enterprises Ltd. applied for judicial review of two information bulletins issued by the Commercial Vehicle Safety and Enforcement Branch
- The petitioner alleged the bulletins were *ultra vires*, regulatory in nature and otherwise unreasonable
- The Court held the bulletins were mandatory in nature and, in essence, an attempt to regulate in an area that was not supported by the enabling legislation
- Recent articulation of the principle that administrative bodies may not regulate through the use of “soft law” (e.g., policies, bulletins, etc.) where not expressly permitted

# Policies and Administrative Guidance

## Legitimate expectations

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*1068246 BC Ltd. v. Whistler (Resort Municipality), 2024 BCSC 1571*

- Competing cannabis retailers applied for an operating permit in Whistler
- Petitioner was unsuccessful and challenged the process used and decision
- On judicial review, the petitioner alleged it had a legitimate expectation that certain decisions would be made and procedures used
- The Court accepted that one policy document created legitimate expectations and this modified the level of procedural fairness owed (low to moderate)
- However, the Court held the process used was fair and dismissed the petition



# Policies and Administrative Guidance

## Legitimate expectations

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*Teksavvy Solutions Inc. v. Bell Canada*, 2024 FCA 121

- A recent Federal Court of Appeal decision also addresses legitimate expectations
- FCA held that where a decision-maker exercises a discretionary power in the public interest it may have to take legitimate expectations into account but “does not necessarily have to fulfil them” (para. 45)

# Adequacy of Reasons

JUSTIFIABLE AND  
JUSTIFIED

# Adequacy of reasons

Justifiable and justified

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*Sandhu v. Gill*, 2024 BCSC 412

- Judicial review of RTB decision upholding a two-month notice of tenancy
- Section 49(3) of *RTA* allows a landlord to end a tenancy if landlord or close family member intends *in good faith* to occupy the rental unit
- Petitioner raised several issues which, according to the petitioner, ought to have given rise to an inference the landlord was acting in bad faith
- While RTB was not required to *recite* every piece of evidence, the Court held they were required to *address the fundamental issues* in dispute, as raised by the evidence
- Petition granted

# Adequacy of reasons

Justifiable and justified

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*Banni v. Coast Foundation Society, 2024 BCSC 777*

- Judicial review of RTB decision considering whether “transitional housing” was excluded from the operation of *RTA* (s. 4(f))
- Petitioner argued RTB provided “no valid reason” for finding the arrangement to fall within the definition of “transitional housing”
- The Court agreed finding that the RTB erred in stating both parties described a living situation that resembled transitional housing when the petitioner never made such a submission – the only evidence the petitioner provided on that issue was to the opposite effect
- The Court held RTB had failed to resolve the conflict in an intelligible way
- Petition granted

# Adequacy of reasons

Justifiable and justified

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*Jousaki v. Ward, 2024 BCSC 989*

- Judicial review of RTB decision finding that the petitioner had infringed the respondent's right to freedom from unreasonable disturbance under the *RTA*
- At issue was whether the RTB's reasons were inadequate to the level of patent unreasonableness
- The Court agreed with the petitioner finding the parties were left to guess as to how RTB reached its decision
- While it was open to RTB to reject evidence or give it less weight, the arbitrator was required to explain *how* the evidence was treated
- Petition granted

# Adequacy of reasons

Justifiable and justified

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*Neiser v. Perivouliotis*, 2024 BCSC 573

- Judicial review of RTB decision where petitioner argued RTB failed to look at the substance of the evidence which left a “gap” in the analysis
- The Court summarized that reasons will be adequate when they set out the legal test to be met, the findings of fact and evidence on which those findings were made, and an application of those findings to the legal test
- Key issue was whether reasons regarding relevant findings of fact were sufficient
- The Court held that while the reasons could have been expressed more clearly, the reasons allowed the Court to understand how and why decision was made
- Petition dismissed (see also: *Natland v. Miller*, 2024 BCSC 1406)

# Adequacy of reasons

Justifiable and justified

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*Unite Here, Local 40 v. Civeo Premium Services, 2024 BCSC 178*

- Judicial review of LRB reconsideration decision on grounds of alleged procedural unfairness
- Petitioner argued LRB failed to address particular remedies sought at reconsideration – not a question of *adequacy* but *existence* of reasons
- The Court held LRB was not required to consider and comment on every issue raised by the parties to demonstrate it had “grappled with the substance of the matter”
- Once LRB decided to dismiss the application, it was not obligated to address every remedy sought *if* reconsideration had been granted
- Petition dismissed

# Procedural Issues

STATUTORY APPEALS  
AND JUDICIAL  
REVIEW



# Procedural issues

## Statutory appeals and judicial review

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### *Yatar v. TD Insurance Meloche Monnex, 2024 SCC 8*

- Confirms a right of appeal does not preclude judicial review for questions not dealt with in the appeal (e.g., a statutory right of appeal limited to questions of law does not preclude a judicial review challenging findings of fact or mixed fact and law)
- It is a matter of discretion whether the reviewing court engages in the judicial review applying *Strickland v. Canada (Attorney General), 2015 SCC 37*
- For those tribunals whose enabling legislation provides a statutory right of appeal limited to questions of law, this decision may result in combined statutory appeal / judicial reviews being filed which challenge decisions on questions of fact, mixed fact and law, and law (e.g., *Whalen v. British Columbia, 2024 BCSC 1015*)

# *Charter values*

EVOLVING AND  
UNCERTAIN  
EXPECTATIONS

# Charter values

## Clarification of the test?

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*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories*, 2023 SCC 31

- SCC considered s. 23 of *Charter* which imposes a positive obligation on government to fund minority language education for children of rights holders where numbers warrant
- CSF and individual parents sought judicial review of decisions of the Minister of Education denying applications of non-s.23 rights holder parents to enrol their children in a French first language education program
- Minister decided that the applicants did not meet the conditions established by a ministerial directive on enrolment in the program, and she declined to exercise her residual discretion to approve their enrolment

# Charter values

Clarification of the test?

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*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories*,  
2023 SCC 31

- SCC held statutory decision-makers must consider the *Charter* **values** relevant to the exercise of discretion and the *Charter* **rights**
- *Charter* values framework applies even where a decision *engages* a value underlying one or more *Charter* rights – even in the absence of a limitation on the right and even in the absence of an individual right-holder
- *Charter* values framework applies even where a party does not raise the *Charter* value or right for consideration by the statutory decision-maker

# Charter values

Clarification of the test?

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*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories*,  
2023 SCC 31

- SCC explained that “in practice” it will “often be evident” that a *Charter* value must be considered, including because of:
  - The nature of the governing statutory scheme,
  - The parties raised the value before the decision-maker, or
  - The link between the value and the matter under consideration.

# Charter values

## Clarification of the test?

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- Many questions left to be answered post-CSF
- In two recent decisions, the Federal Court of Appeal expressed concerns regarding the lack of clarity as to what constitutes a *Charter* values:

*[66] ... [Charter values] do not change, supplement or override the written text of the rights and freedoms in the Charter, the written justification provision in s. 1 of the Charter, or the cases decided under the Charter during the past forty-three years. Nor are they putty to be used to fill unwanted gaps in the Charter. Still less can they strike down or change legislation governing an administrator's decision, or authorize an administrative decision not authorized by the governing legislation. Lastly, if "Charter values" are to be matters of constitutional import, they must be substantial, well-founded and well-sourced, not just a litigant's musings about the vibe of the thing. ...*

*Singh Brar v. Canada, 2024 FCA 114 and Sullivan v. Canada, 2024 FCA 7 at para. 11*

Questions/comments?

Thank you!

