COURT OF APPEAL FILE NO. CA43825

COURT OF APPEAL

ON APPEAL FROM the order of Mr. Justice B. D. Mackenzie of the Supreme Court of British Columbia pronounced on the 5th day of July 2016

BETWEEN:

STACEY DENTON

APPELLANT
(Petitioner)

AND:

WORKERS' COMPENSATION APPEAL TRIBUNAL
WORKERS' COMPENSATION BOARD
PROVINCIAL HEALTH SERVICES AUTHORITY
ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS
(Respondents)

AND:

COMMUNITY LEGAL ASSISTANCE SOCIETY
AND WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENOR

FACTUM OF THE INTERVENOR, THE COALITION OF THE COMMUNITY LEGAL ASSISTANCE SOCIETY AND THE WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

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CHRONOLOGY

Date	Event
December 8, 2016	The coalition of the Community Legal Assistance Society and the West Coast Women's Legal Education and Action Fund were granted leave to intervene by Justice Harris in Chambers.
	The intervenor otherwise relies on the chronology set out in the appellant's factum.

OPENING STATEMENT

Superior Courts must exercise their jurisdiction contextually and flexibly to serve core constitutional values, such as the rule of law and access to justice. An individual must not be foreclosed from pursuing relief under the *Canadian Charter of Rights and Freedoms* solely because she did not navigate the WCB system to perfection.

Access to justice concerns are especially apposite in the context of this particular administrative regime and other like regimes wherein the senior administrative review body lacks jurisdiction to grant *Charter* relief, the jurisdictional competence of the various review and appeal bodies within the administrative regime is extraordinarily complex, the administrative regime itself erects or exacerbates systemic barriers to accessing justice, and claimants are routinely self-represented throughout the process.

The rule of law concerns are no less important. Superior courts have a constitutional duty to promote and maintain the rule of law. If people cannot challenge laws in court, the development of positive laws is hampered. If laws and policies are not properly subjected to review, the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them becomes skewed.

Courts cannot refuse to act where individuals have no meaningful opportunity to vindicate their *Charter* rights. Meaningful access to justice is more than simply an opportunity to appear before a decision-maker with *Charter* jurisdiction. When deciding whether to exercise their discretion, courts must look closely at the context of the particular administrative regime in question, the barriers it creates to accessing justice, and the realistic prospect of it being navigated by those it is intended to assist.

PART 1 - STATEMENT OF FACTS

1. The Community Legal Assistance Society ("CLAS") and the West Coast Women's Legal Education and Action Fund ("West Coast LEAF") (CLAS and West Coast LEAF collectively, the "Intervenor Coalition") were granted leave to intervene in this appeal and to file a factum of no more than 15 pages by order of Harris J.A., dated December 8, 2016. The Court also granted the Intervenor Coalition leave to apply to the panel hearing the appeal for permission to make oral submissions.

2. The Intervenor Coalition relies on the facts as stated in the appellant's factum.

PART 2 - ISSUES ON APPEAL

3. The appellant's factum identifies errors in the chambers judge's decision regarding the application of section 57(2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*") and the dismissal of the appellant's applications for declaratory relief regarding s. 5.1(1)(c) of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the "*WCA*"). The Intervenor Coalition's submissions are directed at the second of the errors identified by the appellant.

4. In response to the issue of whether an individual is foreclosed from pursuing *Charter* claims on judicial review that were not raised in administrative proceedings below, the Intervenor Coalition makes the following submissions:

a. The superior courts must exercise inherent jurisdiction to promote core constitutional values, including the rule of law and access to justice;

b. Access to justice must be assessed in the real-world context of the WCB appeal system; and

c. Flexibility must be maintained to address the unique circumstances of other administrative benefits regimes that may be at issue in future cases.

PART 3 - ARGUMENT

5. There is no dispute between the parties that the WCB Review Division has assumed jurisdiction over constitutional claims, including *Charter* claims, and that *Charter* jurisdiction has been statutorily removed from the senior administrative appeal body, the Workers Compensation Appeal Tribunal (the "WCAT").[1] Consequently, superior courts and the WCB Review Division share concurrent jurisdiction over constitutional issues that arise in the context of the WCB system.

6. However, the fact that an administrative body shares jurisdiction with respect to issues raised under the *Canadian Charter of Rights and Freedoms*[2] does not absolve superior courts of their duty to promote the rule of law and access to justice. This is especially so where (a) the vindication of constitutionally-enshrined rights and freedoms is at stake, and (b) an individual's ability to adjudicate those rights is compromised by systemic barriers in the administrative regime itself.

A. Superior courts must exercise inherent jurisdiction to promote core constitutional values, such as the rule of law and access to justice

7. Section 96 of the *Constitution Act, 1867*[3] constitutionally protects the core, inherent jurisdiction of the provincial superior courts.[4] The Constitution "confers a special and inalienable status" on these courts, such that "the jurisdiction which forms this core cannot be removed from the superior courts" without constitutional amendment.[5] It is beyond

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[1] *WCA,* s. 245.1; *ATA*, s. 45.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*").

[3] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3.

[4] Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 ("TLABC") .Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59

[5] MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725 ("MacMillan Bloedel") at 15, 52; TLABC at 29.

question that the core jurisdiction of the provincial superior courts embraces those powers "essential to the administration of justice and the maintenance of the rule of law."[6]

8. The inherent jurisdiction of s. 96 courts has been regarded by the Supreme Court of Canada as "a residual source of powers" which may be drawn upon "as necessary whenever it is just or equitable to do so."[7] Even where jurisdiction over constitutional rights is shared with administrative decision-makers, section 96 courts should not shy away from exercising their jurisdiction to enhance and promote core constitutional values such as the rule of law and access to justice. The exercise of their jurisdiction is particularly important where it is unreasonable to expect that individuals will have a meaningful opportunity to vindicate their *Charter* rights within the administrative system.

9. Much has been written about the nature of the rule of law: it has been described by the Supreme Court of Canada as "a foundational principle"[8] and "a fundamental postulate of our constitutional structure."[9] Equally, much has been said about access to justice and the legal system's challenges in ensuring that litigants have meaningful opportunities to seek adjudication of rights and obligations in the courts.[10] The Supreme Court of Canada has articulated the essential connection between access to justice, the rule of law and the s. 96 judicial function:

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[6] MacMillan Bloedel at 38; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 at 88.

[7] Ontario v. Criminal Lawyers Association of Ontario, 2013 SCC 43 at 20, citing to I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr. Legal Probs. 23; see also, Endean v. British Columbia, 2016 SCC 42 at 23.

[8] *Christie v. British Columbia (Attorney General)*, 2007 SCC 21 ("*Christie*") at 19.

[9] *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142.

[10] See, e.g., *Hryniak v. Mauldin*, 2014 SCC 7; *Reference re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 ("*BCGEU*").

> The very rationale for [s. 96] is said to be the "maintenance of the rule of law through the protection of the judicial role" [citation omitted]. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.[11]

However, the interplay between the rule of law, access to justice and superior courts' inherent jurisdiction has not yet come before the courts in the context of an administrative scheme such as the one at issue in this appeal.

10. The rights and obligations that flow from laws, including – and especially – the fundamental rights and freedoms enshrined in the *Charter***,** are rendered hollow unless an adequate process is available to ensure that these rights can be accessed and exercised meaningfully by all the individuals who hold them. The Supreme Court of Canada has recognized that access to justice in the form of access to superior courts is indispensable to promoting and maintaining the rule of law.[12] Access to justice flows by necessary implication from the three principles underlying the rule of law as articulated by the Supreme Court of Canada: (1) supremacy of the law over governments and individuals; (2) an actual order of positive laws; and (3) the regulation of the relationship between the state and the individual by these laws.[13]

11. The Supreme Court of Canada recently clarified the scope of s. 96 of the *Constitution Act, 1867*, highlighting both the connection between s. 96 and access to justice and reiterating the clear connection between access to justice and the rule of law.[14] Clearly, access to justice is a core constitutional value; now, courts must act to ensure that access to justice is *meaningful* in the circumstances lest these jurisprudential statements become

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[11] *TLABC* at 39.

[12] *TLABC* at 32-40; *Christie* at 19-20; *BCGEU* at 24-25.

[13] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 59-62; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 70-72; *British Columbia v. Imperial Tobacco Ltd.*, 2005 SCC 49 at 58; *Christie* at 19-20.

[14] *TLABC* at 38-39.

but empty words, meaningless to the ordinary litigant seeking resolution of her rights and entitlements through administrative tribunals and the courts.

12. The words of Chief Justice Dickson in *BCGEU,* speaking in the context of a picket line barring access to the courts, are apt:

> Of what value are the rights and freedoms guaranteed by the *Charter* if a person is delayed or denied access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become illusory, the entire *Charter* undermined.
>
> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.[15]

These questions are relevant in the context of this case. If the very structure of the WCB appeal system makes it unreasonable to expect that workers can vindicate their *Charter* rights within that system, but the courts will not exercise their jurisdiction to hear those claims, the state will effectively achieve indirectly what it cannot do directly: insulate unlawful legislation and policy from scrutiny by superior courts.

13. The mere right to appear before an administrative decision-maker who has been granted or has assumed *Charter* jurisdiction is not enough to achieve access to justice or satisfy the rule of law. Courts should not refuse to exercise their jurisdiction simply on the basis that an administrative decision-maker has assumed jurisdiction, and certainly not without a searching look at the reality of that regime. A right to appear is a *meaningless* right of access given the structural barriers to raising *Charter* challenges within the WCB system.

14. When deciding whether to exercise inherent jurisdiction, courts must consider what impact an inadequate forum for adjudicating *Charter* claims will have on their own duty to ensure that government exercises its powers in conformity with the rule of law. *TLABC* foretells the price of mistaking an anemic, formalistic right of access for meaningful, substantive access to justice:

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[15] *BCGEU* at 24-25.

> If people cannot challenge government actions in court, individuals cannot hold the state to account – the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.[16]

15. Without a contextual and flexible approach to exercising inherent jurisdiction, section 96 courts may fail to maintain the rule of law for those among us most in need of *Charter* protections. Moreover, while an adequate forum for the adjudication of disputes is of profound interest to the litigant him or herself, there is a broader public interest in the adjudication of *Charter* claims by the courts, and the benefits of such adjudication accrue to society as a whole.

B. Access to justice must be assessed in the real-world context of the WCB appeal system

16. It is against this backdrop that the Court must consider the conditions for s. 96 courts to exercise their inherent jurisdiction to achieve meaningful access to justice. Meaningful access to justice in this case requires going beyond a formalistic jurisdictional analysis to looking carefully at the procedures, processes and institutional structures of the administrative regime and the realistic prospects that those structures can be navigated by the very people for whom they are intended to serve as an expedient, accessible and economic forum.

17. The convoluted nature of the WCB system creates a genuine risk that workers will be accused of circumventing the administrative review process when, in reality, systemic barriers prevent workers from raising challenges to legislation or policy within that system.

i. *Charter* issue may not be apparent until after the WCB Review Division issues a decision.

18. Workers may not be able to identify the *Charter* issue in their case based on the initial decision from the WCB, even using reasonable diligence. There are several reasons

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[16] *TLABC* at 40 [internal citation omitted].

why a *Charter* issue may only become apparent after the WCB Review Division has issued a decision, at which point the chambers decision suggests the worker will have lost his or her opportunity to assert *Charter* rights altogether:

a. Some initial WCB decisions are not supported by any written reasons.[17] In fact, some initial WCB decisions are communicated orally.[18]

b. The WCB officer conducting the review has full substitutional authority, and the basis for his or her decision may be different than the basis for the initial WCB decision.[19]

c. The WCB Review Division may, in certain circumstances, address issues that were not explicitly addressed in the initial WCB decision.[20]

19. In this context, an inflexible rule foreclosing workers from pursuing *Charter* challenges that were not raised at the WCB Review Division could work serious injustice, particularly where the worker could not reasonably have identified a *Charter* issue based on the WCB's initial decision on his or her claim for compensation.

ii. Convoluted procedures for challenging WCB legislation or policy

20. Aspects of the WCB have been described by the courts as "labyrinthine"[21], "bizarre"[22], "convoluted"[23], "unwieldy"[24], "inefficient"[25] and "cumbersome"[26]. Even assuming

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[17] Item A1.1, Review Division – Practices and Procedures, Appellant's Appeal Book Vol. I at p. 312.

[18] Item A2.1.5, Review Division – Practices and Procedures, Appellant's Appeal Book Vol. I at p. 315.

[19] Item A4.1, Review Division – Practices and Procedures, Appellant's Appeal Book Vol. I at p. 348.

[20] Item A3.6.2, Review Division – Practices and Procedures, Appellant's Appeal Book Vol. I at p. 339.

[21] *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174 ("Jozipovic") at 6.

[22] *Jozipovic* at 56.

a worker is able to identify the need to challenge legislation or policy on the basis of the WCB's initial decision, understanding when, where and how to raise that challenge is no simple task.

21. Importantly, the *Charter* is just one of several different grounds upon which WCB legislation and policy may be challenged. The following summarizes the variable jurisdiction of the WCB Review Division and the WCAT that a worker must currently decipher depending on the basis for his or her challenge:

a. If a challenge is brought to the legislation or policy alleging a violation of the *Charter*, then the WCB Review Division claims jurisdiction, but the WCAT does not have jurisdiction.[27]

b. If a constitutional challenge is brought to legislation or policy on non-*Charter* grounds (for example, a challenge based on division of powers), then the WCB Review Division claims jurisdiction. The WCAT, however, must refer any non-*Charter* constitutional questions to the Supreme Court of British Columbia as a stated case at the request of the Attorney General. If the Attorney General does not so request, then the WCAT claims jurisdiction to either: (a) address the non-*Charter* constitutional question itself; or (b) refer the non-*Charter* constitutional question to the BCSC as a stated case on its own motion or at the request of another party.[28]

c. If a challenge is brought alleging that a policy unlawfully interprets the *WCA*, then the WCB Review Division has no jurisdiction, but the WCAT does have jurisdiction. However, the WCAT cannot simply strike the policy down. The WCAT panel may only

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[23] *Jozipovic* at 56.

[24] *Shamji v. Workers Compensation Appeal Tribunal*, 2016 BCSC 1352 ("*Shamji*") at 109.

[25] *Shamji* at 109.

[26] *Shamji* at 109.

[27] *WCA*, s. 245.1; *ATA*, s. 45.

[28] *WCA*, s. 245.1; *ATA*, s. 45.

refer the policy to the Chair of the WCAT, who in turn may only refer the policy to the Board of Directors of the WCB. The Board of Directors then decides whether the WCAT must apply the policy or not, and the WCAT is bound by the Board of Directors' decision.[29]

d. If a challenge alleges that the legislation or policy is contrary to the *Human Rights Code*, [RSBC 1996] c. 210, then the WCB Review Division claims jurisdiction, but the WCAT does not have jurisdiction.[30]

22. Adding to the confusion is the fact that simply because the WCB Review Division has presumptive constitutional jurisdiction does not necessarily mean that it has jurisdiction to provide the particular constitutional remedy a claimant may be seeking, such as *Charter* damages, costs awards or declarations of invalidity.[31]

23. Workers should not lose the ability to assert their rights simply because they fail to navigate this convoluted system to perfection. This is particularly so given that approximately 4,500 reviews are decided each year in cases where the worker has no representation at all.[32] The challenges of navigating this system without representation will only be exacerbated by markers of historic disadvantage such as a worker's disability status.

24. In light of the superior courts' responsibility to promote and maintain the rule of law and access to justice, it is important for courts to look at the overall labyrinth a worker must navigate rather than examining a discrete process or procedure in isolation. As the Court

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[29] *WCA*, s. 251.

[30] *WCA*, s. 245.1; *ATA*, s. 46.3.

[31] *Starz (Re)*, 2015 ONCA 318at ¶¶94-111; *R. v. Conway*, 2010 SCC 22 ("*Conway*") at 81-82.

[32] Letter, Deanna Hamberg (Freedom of Information Officer) to Monique Pongracic-Speier, November 26, 2015, Appellant's Appeal Book, Vol. I at p. 363.

recognized in *Shamji*, one particular aspect of the WCB decision-making system may appear rational when viewed in isolation, but the overall scheme remains unwieldy.[33]

25. The task for workers in determining when, where, and how to dispute WCB legislation or policy becomes even more difficult if the challenge is brought on multiple grounds because the jurisdiction of each level of review – the WCB Review Division and the WCAT – may be divided. For instance, in the present appeal, the appellant challenged legislation and policy under the *Charter* and under section 251 of the WCA. The *Charter* challenge may have been raised at the WCB Review Division, but could not have been adjudicated at the WCAT, whereas the challenge under section 251 of the WCA could have been brought at the WCAT, but not at the WCB Review Division.

iii. Access to justice is not served by engaging in parallel proceedings

26. Mounting a *Charter* challenge within the WCB system may result in a multiplicity of potentially unnecessary parallel proceedings that further impede access to justice. The proceedings will necessary become bifurcated because the appeal on benefit entitlement under the *WCA* would proceed to the WCAT, while the *Charter* challenge would presumably go directly from the WCB Review Division to the BC Supreme Court on judicial review because the WCAT has no jurisdiction to apply the *Charter*. If the worker also challenges policy under section 251 of the *WCA*, as was attempted in the present case, a third parallel proceeding could result because that challenge would go to the Chair of the WCAT and then potentially to the Board of Directors of the WCB.

27. The Supreme Court of Canada cited the desire to avoid bifurcated proceedings as a rationale for providing broad jurisdiction to administrative tribunals to consider *Charter* issues.[34] However, this rationale was premised on the notion that the administrative tribunal in question would actually have the jurisdiction necessary to address all issues raised in a particular case. In the WCB system, the WCAT's lack of competence over *Charter* issues

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[33] *Shamji* at 109.C

[34] *Conway* at 79; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at 29.

means that seeking to vindicate *Charter* rights within the system creates, rather than prevents, the bifurcated and parallel proceedings the Court was seeking to avoid.

28. Courts have already expressed concerns about the multiplicity of proceedings that occur all too often in WCB cases. The Court in *Shamji*, under the heading "Matter of Concern", expressed frustration with the multiple decisions and appeals to which the worker in that case was subjected. The Court noted that the matter could have been even worse had a challenge to WCB policy been made:

> … In this case, it took the petitioner eight years and 12 hearings to arrive at this point. He had to separately establish his injury, the degree of his impairment, his eligibility to an LOE pension, and the assessment of that pension. Each stage required multiple hearings.
>
> At one point, counsel for the respondent erroneously believed that the petitioner might be challenging Policy #40. I was told that if that had been the case, the petitioner would have had to follow a different path and engage in a different set of hearings before different decision-makers. It would, I was told, have required four separate levels of hearing or application before the petitioner could seek judicial review of the ultimate decision that would have ensued from that process. …
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> While these separate inquiries may be logical, the fact remains that, in combination, the overall scheme is unwieldy, inefficient, and cumbersome. This is particularly so when one considers that the *Act* is intended to serve injured workers. Still further, an overarching purpose and expectation that is to be served by specialized tribunals is the application of an increased level of expertise with a concomitant expectation that this will lead to increased efficiency and cost effectiveness; [citations omitted].
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> There is much discussion and concern in the current case law about access to justice, judicial efficiency, proportionality, and like issues; [citations omitted]. These important objects should apply with equal force to administrative bodies. Accordingly, they apply to the *Act* and to the decision-making process under the *Act*. Those decision-making processes and, in particular, the structure that is presently relied on in s. 23 decision-making appear to do little to advance these various objects.[35]

29. The Intervenor Coalition takes no issue with the proposition that administrative tribunals are often a more accessible and efficient forum than courts in which persons of

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[35] *Shamji* at 107-110.

low- or modest-means may raise constitutional issues. In fact, administrative tribunals will very often be the first and only fora where an overwhelming majority of people will go to seek vindication of their fundamental rights and entitlements. However, courts cannot simply assume that an administrative tribunal will be more accessible without looking at the actual structure of the tribunal in question and the administrative appeal system more generally.

30. The structure of the particular administrative regime at issue is highly relevant to whether superior courts ought to exercise inherent jurisdiction to see justice done in the circumstances. Given the structure of the WCB decision-making system, a flexible approach to the superior courts' jurisdiction to entertain challenges to legislation and policy is necessary to reduce parallel proceedings and to promote true access to justice.

C. Flexibility must be maintained to address similar concerns arising in other administrative benefits regimes

31. The need for a flexible approach to the superior courts' jurisdiction is additionally reinforced by the fact that other social benefit schemes in British Columbia share review and appeal structures where *Charter* jurisdiction is removed from the senior tribunal in the system, but not from the first level internal review body. The Intervenor Coalition is concerned that a rigid requirement that *Charter* issues be raised within an administrative regime at the first decision-making body with *Charter* jurisdiction will have serious and unintended consequences for other social benefit schemes outside the WCB. Flexibility in the court's approach is necessary to ensure that future cases concerning other benefit schemes may be properly and contextually considered to account for the unique features of those schemes.

32. An example is the appeal system for income and disability benefits pursuant to the *Employment and Assistance Act*, S.B.C. 2002, c. 40 (the "*EAA*") and the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 (the "*EAPDA*") (collectively, "welfare benefits"). As with the WCB appeal system, a claimant who is dissatisfied with a decision concerning welfare benefits must first seek internal reconsideration of the decision by the administrator of the system, being the Minister of Social Development and Social Innovation (the "MSDSI"). After an internal review, claimants then have a right of appeal to

the external Employment and Assistance Appeal Tribunal (the "EAAT").[36] Jurisdiction over constitutional issues is expressly removed from the EAAT, but the legislation is silent with respect to the jurisdiction of the MSDSI in this regard.37

33. Despite similarities in the overall appeal structure, welfare benefits are administered in a substantially different context. For instance, a claimant disputing a decision concerning welfare benefits must request internal reconsideration of the decision from MSDSI within 20 business days.[38] MSDMI must then render a reconsideration decision within 10 business days, with the maximum possible extension being a further 10 business days.[39] These timelines would make it exceedingly difficult, if not impossible, to raise, let alone decide a *Charter* challenge. Moreover, future cases will have to consider additional barriers that may prevent welfare benefits claimants from asserting their *Charter* rights within this regime, including the impacts of socio-economic status, disability, sex and other markers of historic disadvantage.

34. The Court's framework for assessing whether a claimant should be foreclosed from asserting *Charter* rights on judicial review that were not raised within the administrative appeal system must be alive to the context of the administrative regime under consideration.

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[36] *EAA*, ss. 17 and 19; *EAPDA*, s. 16.

[37] *EAA*. S. 19.1; *ATA*, s. 44.

[38] *Employment and Assistance Regulations*, B.C. Reg. 263/2002 (the "*EAR*"), s. 79(2); *Employment and Assistance for Persons with Disabilities Regulations*, B.C. Reg. 265/2002 (the "*EAPDR*"), s. 71(2).

[39] *EAR*, s. 80; *EAPDR*, s. 72.

PART 4 - NATURE OF ORDER SOUGHT

35. The Intervenor Coalition takes no position on the outcome of this appeal.

36. The Intervenor Coalition seeks an order that there shall be no costs of this appeal awarded for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 21st day of December 21, 2016

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APPENDIX: ENACTMENTS

Administrative Tribunals Act, S.B.C. 2004 c.45

Tribunal without jurisdiction over constitutional questions

44 (1) The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues

45 (1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

(1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

(2) If a constitutional question, other than one relating to the *Canadian Charter of Rights and Freedoms*, is raised by a party in a tribunal proceeding

(a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or

(b) on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(3) The stated case must

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) include a statement of the facts and relevant evidence.

(4) Subject to the direction of the court, the tribunal must

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion.

(5) A stated case must be brought on for hearing as soon as practicable.

(6) Subject to subsection (7), the court must hear and determine the stated case and give its decision as soon as practicable.

(7) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Tribunal without jurisdiction to apply the *Human Rights Code*

46.3 (1) The tribunal does not have jurisdiction to apply the *Human Rights Code*.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c. 3

VII. Judicature

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

***Employment and Assistance Act*, S.B.C. 2002, c.40**

Reconsideration and appeal rights

17 (1) Subject to section 18, a person may request the minister to reconsider any of the following decisions made under this Act:

(a) a decision that results in a refusal to provide income assistance, hardship assistance or a supplement to or for someone in the person's family unit;

(b) a decision that results in a discontinuance of income assistance or a supplement provided to or for someone in the person's family unit;

(c) a decision that results in a reduction of income assistance or a supplement provided to or for someone in the person's family unit;

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement;

(e) a decision respecting the conditions of an employment plan under section 9 *[employment plan]*.

(2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified by regulation.

(3) Subject to a regulation under subsection (5) and to sections 9 (7) *[employment plan]*, 18 and 27 (2) *[overpayments]*, a person who is dissatisfied with the outcome of a request for a reconsideration under

subsection (1) (a) to (d) may appeal the decision that is the outcome of the request to the tribunal.

(4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in this Act and the regulations.

(5) The Lieutenant Governor in Council may designate by regulation

(a) categories of supplements that are not appealable to the tribunal, and

(b) circumstances in which a decision to refuse to provide income assistance, hardship assistance or a supplement is not appealable to the tribunal.

Employment and Assistance Appeal Tribunal

19 (1) The Employment and Assistance Appeal Tribunal is established to determine appeals of decisions that are appealable under

(a) section 17 (3) *[reconsideration and appeal rights]* of this Act,

(b) section 16 (3) *[reconsideration and appeal rights]* of the *Employment and Assistance for Persons with Disabilities Act*, and

(c) section 6 (3) *[reconsideration and appeal rights]* of the *Child Care Subsidy Act*.

(2) The tribunal consists of the following individuals appointed after a merit-based process:

(a) a member appointed by the Lieutenant Governor in Council and designated as the chair;

(b) one or more members appointed by the Lieutenant Governor in Council and designated as vice chairs after consultation with the chair;

(c) other members appointed by the minister after consultation with the chair.

(3) To be eligible for an appointment under subsection (2), a person must have the prescribed qualifications.

(4) The chair and vice chair may be paid the remuneration specified by the Lieutenant Governor in Council in accordance with general directives of Treasury Board.

(5) A member of the tribunal, other than the chair or vice chair, may be paid remuneration in the time and manner and at the rates prescribed by the Lieutenant Governor in Council in accordance with general directives of Treasury Board.

Application of *Administrative Tribunals Act*

19.1 The following provisions of the *Administrative Tribunals Act* apply to the tribunal:

(a) Part 1 *[Interpretation and Application]*;

(b) Part 2 *[Appointments]*, except sections 7 (3) *[remuneration and benefits after expiry of term]* and 10 *[remuneration and benefits for members]*;

(c) Part 3 *[Clustering]*;

(d) section 30 *[tribunal duties]*;

(e) section 44 *[tribunal without jurisdiction over constitutional questions]*;

(f) section 46.3 *[tribunal without jurisdiction to apply the Human Rights Code]*;

(g) Part 8 *[Immunities]*;

(h) section 58 *[standard of review with privative clause]*;

(i) section 59.1 *[surveys]*;

(j) section 59.2 *[reporting]*;

(k) section 60 (1) (g) to (i) and (2) *[power to make regulations]*;

(l) section 61 *[application of Freedom of Information and Protection of Privacy Act]*

Reconsideration and appeal rights

16 (1) Subject to section 17, a person may request the minister to reconsider any of the following decisions made under this Act:

(a) a decision that results in a refusal to provide disability assistance, hardship assistance or a supplement to or for someone in the person's family unit;

(b) a decision that results in a discontinuance of disability assistance or a supplement provided to or for someone in the person's family unit;

(c) a decision that results in a reduction of disability assistance or a supplement provided to or for someone in the person's family unit;

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement;

(e) a decision respecting the conditions of an employment plan under section 9 *[employment plan]*.

(2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified by regulation.

(3) Subject to a regulation under subsection (5) and to sections 9 (7) *[employment plan]*, 17 and 18 (2) *[overpayments]*, a person who is dissatisfied with the outcome of a request for a reconsideration under

subsection (1) (a) to (d) may appeal the decision that is the outcome of the request to the tribunal.

(4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in the *Employment and Assistance Act* and the regulations under that Act.

(5) The Lieutenant Governor in Council may designate by regulation

(a) categories of supplements that are not appealable to the tribunal, and

(b) circumstances in which a decision to refuse to provide disability assistance, hardship assistance or a supplement is not appealable to the tribunal.

How a request to reconsider a decision is made

79 (1) A person who wishes the minister to reconsider a decision referred to in section 17 (1) of the Act must deliver a request for reconsideration in the form specified by the minister to the ministry office where the person is applying for or receiving assistance.

(2) A request under subsection (1) must be delivered within 20 business days after the date the person is notified of the decision referred to in section 17 (1) of the Act and may be delivered by

(a) leaving it with an employee in the ministry office, or

(b) being received through the mail at that office.

Time limit for reconsidering decision

80 The minister must reconsider a decision referred to in section 17 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 79 (1) *[how a request to reconsider a decision is made]*,

(a) within 10 business days after receiving the request, or

(b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

How a request to reconsider a decision is made

71 (1) A person who wishes the minister to reconsider a decision referred to in section 16 (1) *[reconsideration and appeal rights]* of the Act must deliver a request for reconsideration in the form specified by the minister to the ministry office where the person is applying for or receiving assistance.

(2) A request under subsection (1) must be delivered within 20 business days after the date the person is notified of the decision referred to in section 16 (1) of the Act and may be delivered by

(a) leaving it with an employee in the ministry office, or

(b) being received through the mail at that office.

Time limit for reconsidering decision

72 The minister must reconsider a decision referred to in section 16 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71 (1) *[how a request to reconsider a decision is made]*,

(a) within 10 business days after receiving the request, or

(b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

[en. B.C. Reg. 76/2008.]

***Workers Compensation Act*, R.S.B.C. 1996, c.482**

Application of *Administrative Tribunals Act* to appeal tribunal

245.1 The following provisions of the *Administrative Tribunals Act* apply to the appeal tribunal:

(a) Part 1 *[Interpretation and Application]*;

(b) section 7.1 *[validity of tribunal acts]*;

(c) Part 3 *[Clustering]*;

(d) section 11 *[general power to make rules respecting practice and procedure]*;

(e) section 13 *[practice directives tribunal may make]*;

(f) section 14 *[general power to make orders]*;

(g) section 15 *[interim orders]*;

(h) section 28 *[facilitated settlement]*;

(i) section 29 *[disclosure protection]*;

(j) section 30 *[tribunal duties]*;

(k) section 31 *[summary dismissal]*;

(l) section 32 *[representation of parties to an application]*;

(m) section 35 (1) to (3) *[recording tribunal proceedings]*;

(n) section 37 *[applications involving similar questions]*;

(o) section 38 *[examination of witnesses]*;

(p) section 42 *[discretion to receive evidence in confidence]*;

(q) section 45 *[tribunal without jurisdiction over Canadian Charter of Rights and Freedoms issues]*;

(r) section 46.3 *[tribunal without jurisdiction to apply the Human Rights Code]*;

(s) section 48 *[maintenance of order at hearings]*;

(t) section 49 *[contempt proceeding for uncooperative witness or other person]*;

(u) section 52 *[notice of decision]*;

(v) Part 8 *[Immunities]*;

(w) Part 9 *[Accountability and Judicial Review]*, except section 59 *[standard of review without privative clause]*;

(x) section 60 (1) (a), (b) and (g) to (i) and (2) *[power to make regulations]*;

(y) section 61 *[application of Freedom of Information and Protection of Privacy Act]*.

Application of policies of board of directors

251 (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

(2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

(3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.

(4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.

(5) If the chair determines under subsection (3) that the policy should not be applied, the chair must

(a) send a notice of this determination, including the chair's written reasons, to the board of directors, and

(b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under subsection (6).

(6) Within 90 days after receipt of a notice under subsection (5) (a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).

(7) On a review under subsection (6), the board of directors must provide the following with an opportunity to make written submissions:

(a) the parties to the appeal referred to in subsection (2);

(b) the parties to any appeals that were pending before the appeal tribunal on the date the chair sent a notice under subsection (5) (a) and that were suspended under subsection (5) (b).

(8) After the board of directors makes a determination under subsection (6), the board of directors must refer the matter back to the appeal tribunal, and the appeal tribunal is bound by that determination.

(9) The chair must not make a general delegation of his or her authority under subsection (3), (4) or (5), but if the chair believes there may be a

reasonable apprehension of bias the chair may delegate this authority to a vice chair or to a panel of the appeal tribunal for the purposes of a specific appeal.