

CANADA / JUDGMENT

Bradshaw v. Workers Compensation Board

2017 BCSC 1092

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2017 BCSC 1092 Bradshaw v. Workers' Compensation Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bradshaw v. Workers' Compensation Board,

2017 BCSC 1092

Date: 20170629

Docket: S163903

Registry: Vancouver

Between:

David Bradshaw

Petitioner

And

Workers' Compensation Board

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph [190], on September 1, 2017.

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioner:

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& J. Sanders

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& N. Bower

Place and Date of Trial:

Vancouver, B.C.

January 4-5, 2017

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2017

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INTRODUCTION

- [1] The petitioner, David Bradshaw, applies for judicial review of the November 23, 2015 decision of the respondent, Workers' Compensation Board (the "Board"), to no longer recognize him as a lay advocate under s. 94.1 of the Workers Compensation Act, R.S.B.C. 1996, c. 492, (WCA), and to bar him from acting or appearing on behalf of injured workers in proceedings before the Board and the Board's Review Division for two years (the "ban").
- [2] Mr. Bradshaw is a self-employed vocational rehabilitation consultant who earns his livelihood by representing and advocating on behalf of union and non-union workers before the Board, the Review Division and the Workers' Compensation Appeal Tribunal ("WCAT").
- [3] The petitioner contends the respondent has no jurisdiction to restrict his communications with the Board or to bar him from acting as a lay advocate. Alternatively, if the Board has jurisdiction, Mr. Bradshaw argues the Board made its decision without affording him procedural fairness.
- [4] For its part, the Board submits that it has a broad authority to control its own processes which includes, in appropriate cases, the power to bar lay advocates from representing persons in proceedings before the Board. The respondent argues the petitioner lacks standing to seek judicial review of the Board's decision. Alternatively, if the petitioner has standing, the Board maintains the process by which it made its decision met the requirements of procedural fairness in the circumstances of this case.

JUDICIAL REVIEW

- [5] Judicial review is based on the record before the tribunal. It is not an appeal or hearing de novo. The court does not re-weigh the evidence, substitute its own view of the merits for that of the tribunal or make findings of credibility: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 13. Rather, the court exercises its supervisory jurisdiction to ensure that the tribunal acts within its statutory authority or jurisdiction in determining matters it is authorized to decide by its governing legislation and does not lose jurisdiction by contravening the principles of procedural fairness or natural justice: *Canwood International Inc. v. Bork*, 2012 BCSC 578 at para. 9.
- [6] Here, the record, which I discuss in more detail later in these reasons, includes the following:

- a threat report concerning a meeting on May 7, 2015 attended by Mr. Bradshaw and representatives of the Board;
- multiple emails and facsimile transmissions between the petitioner and employees or officers of the Board;
- communications protocols issued by the Board to the petitioner on June 10, 2015 and August 11, 2015;
- a risk assessment dated June 8, 2015 and an updated risk assessment dated October 14, 2015;
- the Board's decision of November 23, 2015; and
- correspondence between the petitioner or his counsel and representatives of the Board regarding the Board's decision between November 24, 2015 and January 22, 2016

ISSUES

- [7] This application raises the following issues:
- (a) Is the Board's decision to no longer recognize the respondent as a lay advocate reviewable by the court under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 (JRPA)?
 - (b) Does the petitioner have standing to challenge the ban under the JRPA?
 - (c) If so, what standard of review applies to:
 - i. the Board's determination of its authority to impose the ban; and
 - ii. the fairness of the Board's process in imposing the ban?
 - (d) Does the Board have authority to restrict communications between the petitioner and its staff and to bar the petitioner from acting as a lay advocate?
 - (e) If so, was the petitioner afforded procedural fairness during the respondent's decision-making process concerning the ban?

LEGISLATIVE FRAMEWORK

- [8] The Board administers the comprehensive scheme of compensation for workplace injuries set out in the WCA.
- [9] The WCA, like other workers' compensation legislation, gives effect to the "historic trade-off" by which workers lost their right to sue employers for tort but gained guaranteed no-fault compensation for workplace injuries. For their part, employers were required to contribute to a common fund for payment of no-fault benefits to injured workers or their dependents, "but gained freedom from potentially crippling liability": *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 25; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at paras. 28 to 30.

[10] As the court observed in *Pasiechnyk* at para. 27, the four fundamental principles of workers compensation are:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment;
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission [the Board]; and
- (d) compensation to injured workers provided quickly without court proceedings.

[11] The Board's mandate under the WCA is succinctly described by counsel for the respondent at paras. 71 through 75 of their written submissions:

- 71. The Board is created by and charged with the administration of the Workers Compensation Act, R.S.B.C. 1996, c. 492 (the "Act"). The Act is divided into four parts. Part 1 deals with compensation and employer assessments and establishes a board of directors and an internal review system. Part 2 deals with liability of employers in industries not covered by the Act. Part 3 deals with occupational health and safety. Part 4 establishes an external appeal system.
- 72. Sections 2 through 35 of Part 1 set out the Board's responsibility and authority with respect to the adjudication of claims and payment of compensation benefits. The Act compensates workers who are disabled by injuries or diseases arising out of and in the course of employment or dependents of workers who are killed by injuries or diseases arising out of employment.
- 73. Sections 36 through 52 of Part 1 create an assessment structure. The workers' compensation system is funded through employer assessments. Assessments are based on industry classification, experience rating and payroll. Revenue from assessments is paid into the accident fund and the accident fund pays for the entire workers' compensation system, including compensation and regulation of occupational health and safety.
- 74. Part 3 of the Act creates a comprehensive occupational health and safety regulatory regime setting out duties of parties at the workplace and setting out consequences for breach of those duties.
- 75. Thus, the Board has three primary mandates:
 - a. Adjudication and payment of compensation for workplace injuries and occupational diseases (Part 1 of the Act);
 - b. Assessment and collection of sufficient funds from employers to support the system (Part 1 of the Act); and
 - c. Regulation of occupational health and safety in the workplace (Part 3 of the Act).

- [12] Under s. 99(2), the Board must make its decisions based on the merits and justice of each case, but in so doing, must apply any applicable policy of the board of directors.
- [13] Sections 96.2 through 96.5 establish the Review Division of the Board as a first level of appeal. Sections 231 to 252 of the WCA establish WCAT as a separate and independent appellate tribunal that hears appeals from those decisions of the Review Division or the Board set out in ss. 96.2(1), 239 and 240 of the WCA.
- [14] Section 96(8) confers on the Board the authority to control its own processes:
- (8) The Board may establish practices and procedures for carrying out its responsibilities under the Act, including specifying time periods within which certain steps must be taken and the consequences for failing to comply with those time periods.
- [15] By s. 96(1), the Legislature has enacted a strong privative clause which provides that the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under Part 1 of the WCA. Section 96(1) provides:

96 (1) Subject to sections 239 and 240, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court, and proceedings by or before the Board must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, and an action may not be maintained or brought against the Board or a director, an officer, or an employee of the Board in respect of any act, omission or decision that was within the jurisdiction of the Board or that the Board, director, officer or employee believed was within the jurisdiction of the Board; and, without restricting the generality of the foregoing, the Board has exclusive jurisdiction to inquire into, hear and determine

- (a) the question whether an injury has arisen out of or in the course of an employment within the scope of this Part;
- (b) the existence and degree of disability by reason of an injury;
- (c) the permanence of disability by reason of an injury;
- (d) the degree of diminution of earning capacity by reason of an injury;
- (e) the amount of average earnings of a worker, whether paid in cash or board or lodging or other form of remuneration, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation;
- (f) the existence, for the purpose of this Part, of the relationship of a member of the family of a worker as defined by this Act;
- (g) the existence of dependency;

- (h) whether an industry or a part, branch or department of an industry is within the scope of this Part, and the class to which an industry or a part, branch or department of an industry within the scope of this Part should be assigned;
- (i) whether a worker in an industry within the scope of this Part is within the scope of this Part and entitled to compensation under it; and
- (j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of this Part.

[16] Board decisions protected by s. 96(1) attract "the highest end of curial deference": *Canada Safeway Ltd. v. Retail Merchants Assn. of British Columbia* (1998), 59 B.C.L.R. (3d) 317 (C.A.) at para. 21.

[17] Practices and procedures established by the Board acting within the scope of its authority under s. 96(8), as matters arising under Part 1 of the WCA, are protected by the privative clause in s. 96(1).

[18] Section 94.1 provides lay advocates may give advice and represent persons appearing before the Board. It also exempts lay advocates from the prohibition against engaging in the practice of law contained in s. 15 of the Legal Profession Act, S.B.C. 1998 c. 9. (LPA):

Lay advocates

94.1 (1) A person may

- (a) give advice respecting the interpretation or administration of the Act, the policies of the board of directors, the Board's practices and procedures or any regulations, orders or decisions under the Act, or
- (b) act on behalf of a person
 - (i) by communicating with the Board, an officer or employee of the Board, the appeal tribunal or any other person acting under this Act, or
 - (ii) by appearing before the Board, an officer or employee of the Board or the appeal tribunal.
- (2) Section 15 of the Legal Profession Act does not apply to a person while the person performs the functions referred to in subsection (1).

[19] The Board, relying upon its power under s. 96(8), has established Standards of Conduct for Practice and Procedure before WorkSafe BC (the "Standards") that apply to lay advocates.

[20] The Standards require representatives to act honestly and to demonstrate a high degree of courtesy and respect for other parties, their representatives and Board staff. Representatives must be prepared and must adhere to the Standards both on and off Board premises in matters involving their clients. They must instruct their clients regarding appropriate conduct and the requirement for courtesy to Board staff and other parties. The Standards also provide that any public statements made by a representative on behalf of a client must

be factual and fair and must not involve personal attacks on Board staff or other parties. Representatives are also required to maintain and protect the confidentiality of information disclosed in Board proceedings.

- [21] Finally, the Standards provide that their breach may result in a representative's right of representation being restricted or denied.

BACKGROUND

- [22] On May 7, 2015, the petitioner, as the injured worker's representative, attended a meeting with Board Case Manager, Zuleika Gedeon, and Board Location and Rehabilitation Consultant, Susan Fortune, at the offices of OT Consulting Treatment Services Ltd. in Vancouver. The petitioner has deposed that upon his arrival, he was immediately asked by Mr. Chappell, the owner of OT Consulting, with whom he had previously had differences, to leave the premises. Mr. Bradshaw acknowledges that when Mr. Chappell insisted that he leave after he had explained he was there to represent the injured worker, a "verbal altercation" ensued. The petitioner has deposed that Ms. Gedeon left the foyer area immediately and denies that he threatened or attempted to intimidate her. The argument between the petitioner and the owner of OT Consulting escalated to the point where the police were called. The police attended and ultimately Mr. Bradshaw, the injured worker, and the Board representatives all departed.
- [23] On May 8, 2015, Ms. Fortune filed a threat report with the Board's security department documenting the incident at OT Consulting. She reported that shortly after his arrival at the offices of OT Consulting, Mr. Bradshaw pointed his finger at Ms. Gedeon, attacked her competence as a claims manager and asserted that she did not know how to manage her claims. Ms. Fortune also reported that Mr. Bradshaw said that he wanted to talk to Ms. Gedeon about another worker, who he identified. She described the petitioner as aggressive, hostile and confrontational.
- [24] Mr. Gordon Rumohr, a Board Manager of Client Services, added an addendum to the threat report. He noted that Charlene Wharton, OT Consulting's Operations Manager, advised that during their confrontation, Mr. Bradshaw repeatedly challenged Mr. Chappell to "hit me, come on, hit me". After the police arrived, the owner of OT Consulting escorted the Board representatives to their vehicle.
- [25] The Board's security department investigated the threat report.
- [26] On May 8, 2015, Mr. Michael Sheard, the respondent's manager of corporate security, telephoned the petitioner to discuss the incident. When he reminded Mr. Bradshaw of the Standards, Mr. Bradshaw responded by laughing and asserting he had the right to act in an adversarial manner.

- [27] Between May 7 and May 14, 2015 the petitioner sent two emails to Mr. Wes Gallasch, the Assistant Director of Claims at the Board. In the first, Mr. Bradshaw complained that Ms. Gedeon had permitted the owner of OT Consulting to "sabotage" the meeting and requested a transfer of his client's occupational rehabilitation program from OT Consulting to another rehabilitation facility. The petitioner requested a meeting with Mr. Gallasch to discuss these matters. In the second email, dated May 14, 2015, Mr. Bradshaw asserted that his verbal altercation with Mr. Chapell did not involve Ms. Gedeon or Ms. Fortune.
- [28] A few days later, Mr. Sheard telephoned Mr. Bradshaw and informed the petitioner that he was following up on the May 7, 2015 incident, and was gathering facts. Mr. Bradshaw provided an account of the incident to Mr. Sheard, who informed the petitioner that Ms. Gedeon had filed a complaint against him.
- [29] The respondent did not provide the petitioner with a copy of Ms. Gedeon's complaint, which is set out in the threat report. The petitioner also asserts the respondent failed to provide him with the particulars of the complaint at any time before the Board made its decision of November 23, 2015.
- [30] On May 20, 2015, Mr. Gallasch received a further e-mail from the petitioner, who said two clients had informed him that the Board would not deal with him. Mr. Bradshaw also inquired why the Board allowed a private contractor, OT Consulting, to decide who was permitted to represent an injured worker at a Board arranged case conference meeting. The petitioner repeated his request for a meeting with Mr. Gallasch, who responded that Mr. Sheard was dealing with the matter.
- [31] On May 29, 2015, Mr. Sheard and Mr. Kevin Molnar, the Board's Regional Director, met with the petitioner. According to Mr. Bradshaw, Mr. Molnar and Mr. Sheard interrogated him in a hostile manner. The petitioner says he repeatedly informed Mr. Molnar and Mr. Sheard that during the incident of May 7, 2015 his interactions were confined to the owner of OT Consulting. Mr. Bradshaw denied that he had threatened or harassed Ms. Gedeon.
- [32] Mr. Sheard recorded the meeting on his phone. However, the recording terminated approximately halfway through the meeting when it was interrupted by an incoming call. While Mr. Bradshaw acknowledged that he had a heated exchange with the owner of OT Consulting, he took no responsibility for his own conduct. He criticized Ms. Gedeon for failing to take control of the meeting. When Mr. Molnar informed Mr. Bradshaw that he had been led to believe the petitioner had invited Mr. Chapell to hit him, Mr. Bradshaw responded "I don't think so", and later asserted his right to stand his ground during his confrontation with the owner of OT Consulting. The petitioner was not prepared to acknowledge that anything occurred during his heated exchange with Mr. Chappell that might cause others present to be concerned about their personal safety. When Mr. Molnar referred to the Standards requiring representatives to demonstrate a high degree of courtesy to other parties and Board staff, Mr. Bradshaw responded by stating that he could not guarantee Board staff a positive experience if they were not doing their job properly. He

maintained that some Board case managers were incompetent and that others were in need of a lot of training. Although Mr. Bradshaw was initially dismissive of the Standards, describing them as "unrealistic", he eventually agreed to abide by them.

[33] On May 31, 2015, Mr. Bradshaw emailed Mr. Trevor Alexander, the Board's Senior Vice President, to complain that Mr. Sheard and Mr. Molnar had treated him abusively. He also made an unrelated complaint about the Manager of the Board's North Vancouver office.

[34] On June 3, 2015, Mr. Sheard completed a risk assessment and recommended that Mr. Bradshaw be restricted to a single point of contact with the Board. Mr. Sheard concluded:

This Subject continues to act in a hostile manner while attempting to intimidate others. If no efforts are made to manage the risk, the likelihood of violence is moderate to high. The anticipated threats range from bullying, harassment and intimidation, at the low end of the scale; to physical violence at a high end.

[35] Mr. Sheard thought the lower-level threats of bullying, harassment and intimidation would likely be high-frequency events of moderate severity, while the threats of physical confrontation and violence would likely be low-frequency events with a high potential for the risk of physical injury and related emotional and personal harm.

[36] On or about June 1, 2015, Mr. Bradshaw learned that Mr. Molnar had directed staff of the Board's North Shore office not to interact with him.

[37] On June 10, 2015, Mr. Bradshaw emailed Mr. Alexander to request his intervention in resolving the communication protocol, which the petitioner regarded as wholly unjustified. Mr. Alexander informed Mr. Bradshaw that Mr. Todd McDonald, the Vice President of Claims Services, would investigate the matter.

[38] Later on June 10, 2015, Mr. McDonald sent an email to Mr. Bradshaw informing him that his sole point of contact with the Board would be Mr. Hugh Legg, Manager of Community Services. Despite the communications protocol, Mr. Bradshaw wrote to a Board case manager concerning workers' claims on June 10 and June 15, 2015.

[39] On July 6, 2015, the petitioner sent an email to Mr. Legg complaining that the communication protocol was interfering with his ability to represent injured workers.

[40] On July 14, 2015, the petitioner sent an email to Mr. Legg, copied to Mr. McDonald and Mr. Alexander, under the subject line "Protocol Completed". Mr. Bradshaw complained that the communications protocol was impractical, and that Board staff were directly contacting his clients without respecting their rights of representation. The petitioner also complained that the Board had failed to resolve his complaint of bullying and harassment by Mr. Molnar and Mr. Sheard on May 29, 2015. He concluded by asserting the communications protocol was neither capable of, nor designed to serve the best interests of the injured workers he represented.

[41] On July 30, 2015, Mr. McDonald replied to the petitioner's July 14, 2015 email. Mr. McDonald explained the communications protocol was put in place to protect Board staff and allow them to effectively discharge their duty while still recognizing a role for Mr. Bradshaw on behalf of the workers he represented. Mr. McDonald also informed the petitioner that the protocol was also in place as a consequence of his failure to adhere to the Standards. In response to Mr. Bradshaw's communication of July 14, 2015, Mr. McDonald said this:

I want to ensure you have a clear understanding of what WorkSafeBC is prepared to put in place for you, and also what the consequences are if your behaviour and personal interactions do not significantly improve and if those improvements are not sustained.

I would bring your attention not just to the Standards of Conduct which you have previously reviewed, but also to the fact that these Standards of Conduct are enforceable and a failure to adhere to them will have consequences. The primary concern of WorkSafeBC staff is the fair and proper administration of the Workers Compensation Act. Certain parties are given rights and privileges under the Act, and lay advocates are permitted to communicate with WorkSafeBC on behalf of claimants pursuant to section 94.1 of the Act. However, WorkSafeBC has authority under section 96 of the Act to establish and enforce practice and procedures for lay advocates which are encapsulated within the Standards of Conduct.

The Standards of Conduct are in place to ensure that WorkSafeBC staff can discharge their duties as they administer the Act. They provide clear statements concerning how the conduct of a lay advocate must be of the highest moral and ethical standard. They speak to the conduct requiring a high degree of courtesy and respect to WorkSafeBC staff. They also speak to representatives maintaining fair and factual interactions and never involving personal attacks on WorkSafeBC staff. The Standards indicate that any breach may result in a lay advocate being restricted or denied in his or her ability to represent a claimant.

I wish to state unequivocally that your actions and interactions with our staff and others have - on many occasions - introduced unnecessary conflict and have been adversarial in nature. Your behaviour goes beyond advocacy for your clients; your behaviour is detrimental to the administration of justice and the Workers Compensation Act. I am aware of instances of personal attacks on WorkSafeBC staff where you have demonstrated a notable absence of courtesy and respect. In my opinion your actions and interactions have impacted the ability of Board Officers to discharge their duties and by extension to administer the Act.

[42] Mr. McDonald also informed Mr. Bradshaw that if he refused to abide by the protocol or failed to adhere to the Standards, the matter would be referred to the Board's legal and corporate security departments. He specifically warned the petitioner that failure to adhere to the Standards could result in the Board barring him from representing persons before the Board.

- [43] On August 5, 2015, Mr. Bradshaw contacted Ms. Sandra Caze, a vocational rehabilitation consultant, to report a suicidal worker. The following day, Mr. Legg emailed the petitioner to inform him that his contact with Ms. Caze was in breach of the communications protocol. Mr. Bradshaw responded by advising Mr. Legg that matter had been referred to legal counsel.
- [44] On August 11, 2015, the respondent placed further restrictions on Mr. Bradshaw's communications with the Board. Mr. Mark Evans, the Senior Manager for Corporate Security, wrote to Mr. Bradshaw explaining the new communication protocol and emphasizing that the petitioner's single point of contact with the Board was through Corporate Security.
- [45] On August 13, 2015, Mr. Evans emailed Mr. Bradshaw again to provide him with contact information for Corporate Security, including a fax number. Mr. Evans warned Mr. Bradshaw that further breaches of the Standards would result in the Board ceasing to communicate with him.
- [46] On August 19, 2015, Mr. Bradshaw emailed Ms. Diana Miles, the Board's President and Chief Executive Officer, to complain of his treatment by the Board. On the same day Mr. Bradshaw wrote to a case manager regarding a worker's claim and emailed Mr. Evans, with a copy to Ms. Miles, complaining again about his May 29, 2015 meeting with Mr. Sheard and Mr. Molnar.
- [47] Also on August 19, 2015, the petitioner wrote to Mr. Evans stating that erroneous information had been presented as fact in Mr. Evans letter of August 13, 2015 and complaining that the meeting of May 29 was an "ambush" where he was abused by Mr. Sheard and Mr. Molnar.
- [48] On August 22, 2015, Mr. Bradshaw sent an email to Ms. Miles captioned: "CEO agreement??? with Board Censorship, Bully Tactics, Impugnment based on SECRECY". Mr. Bradshaw complained that Ms. Miles had not responded to his email of August 19, 2015.
- [49] On August 23, 2015, Mr. Bradshaw replied to Mr. McDonald's email of July 30, 2015, denying any misconduct on his part and asserting he was prepared to comply with the Standards.
- [50] On August 25, 2015, Mr. Ian Shaw, the Board's general counsel, wrote to Mr. Bradshaw to remind him of the communication protocol and to advise that any non-claims related matters should be addressed to Mr. Shaw on behalf of the Board and its executive.
- [51] Mr. Bradshaw has deposed that after August 25, 2015 he attempted to submit correspondence through Corporate Security in compliance with the new communication protocol. He says that within a week of August 25, 2015, he received a telephone call from Corporate Security employee Harry Sidhu informing him that Corporate Security did not have a fax machine and directing him to "snail mail" all correspondence to them for review. Mr. Sheard has sworn on information and belief, without identifying the source of his information, that on August 24, 2015 Mr. Sidhu contacted the petitioner by telephone to

remind him of the protocol and to recommend he communicate by mail or telephone and not via email or fax.

- [52] In any event, the communications protocol was intended to channel all of the petitioner's communications with the Board through a single point of contact. Consequently, it restricted Mr. Bradshaw's ability to communicate with Board officials on behalf of the workers he represented.
- [53] Within a week of receiving Mr. Shaw's letter of August 25, 2015, the petitioner resumed direct communications with Board officers and employees.
- [54] On August 31, September 4, September 8 and September 9, 2015, Mr. Bradshaw, contrary to the communications protocol of August 11, 2015, wrote to various case managers and vocational rehabilitation consultants regarding workers' claims.
- [55] On September 25, 2015, Mr. Bradshaw wrote to Ms. Jennifer Hamilton, an entitlement officer, to request reconsideration of a worker's claim. The petitioner sent his letter by fax to WCB Claims, to the North Vancouver Board office and to the client employer's safety manager. The respondent contends that this communication not only breached the communications protocol but also violated the Board's privacy requirements as set out in the Standards.
- [56] Through late September and October 2015, Mr. Bradshaw continued to communicate with employees of the Board regarding workers' claims, and with Board managers concerning his complaints about the May 7, 2015 incident and his subsequent treatment by the Board.
- [57] On October 6, 2015, Mr. Bradshaw sent emails to Mr. Alexander complaining about the negative impact of the communication protocol on his ability to represent workers, and OT Consulting's refusal to admit him to their premises on May 7, 2015.
- [58] On October 7, 2015, Mr. Bradshaw wrote to Mr. Shaw reiterating his position that OT Consulting had no right to refuse him entry and asserting that the Board's case manager was incompetent. The petitioner called for the restoration of a "normal relationship".
- [59] On October 14, 2015, Mr. Sheard prepared an updated risk assessment. Mr. Sheard thought the situation with Mr. Bradshaw had deteriorated considerably since his initial risk assessment of June 2015. The updated risk assessment included the following:

Numerous steps have already been taken to attempt to manage this individual's risk for violence. Contact restrictions have been put in place to limit contact with those most at risk in an effort to reduce the potential for increasing violence, bullying and harassment of staff.

Over the past month the situation has deteriorated further. Sept. 9, 2015, Mr. Bradshaw sent an email to the North Vancouver office (604-214-4840) where he knows the staff he has threatened work. The CSM who found the fax was one of the people he has bullied and harassed in the past and she was concerned that he was doing this purposely to continue to attempt to intimidate and threaten. This is in direct contravention of the communications restrictions put in place to

prevent this. This behaviour constitutes stalking or menacing behaviour, which is described in the WAVR-21 as; "covert or deceptive Contact with a Victim; probing of Victim's physical boundaries; defiance of workplace rules or authority." One possible explanation is that Mr. Bradshaw is trying to telegraph to staff that he is still able to get to them and threaten them with impunity.

Oct. 2, 2015, Mr. Bradshaw sent another email directly to assistant director West Gallasch. Once again, this communication was in direct contravention of the communications restrictions. From a risk assessment perspective, this email is particularly disturbing. In the email Mr. Bradshaw goes to lengths to personally attack the people who he now sees as having caused this whole situation for him. This email constitutes a personal attack against Board staff for an incident some five months in the past. In that communication, Mr. Bradshaw includes a veiled threat that unless the Board deals with the CM, whom he only refers to as "She", there will be external repercussion from other unions. This appears to be just another attempt to threaten, but in another form.

Mr. Bradshaw has repeatedly and pointedly, expressed very high levels of anger and aggression towards women in general, and women staff members in particular. For this reason, women employees are considered to be particularly at high risk.

The current state of affairs appears to be leading to a steady increase in risk and threatening behaviour. The rationale for this comment is rooted in the research outlined in what is referred to as the 'Pathway to Violence'; "Years of research and experience reveal that the actions of individuals engaging in workplace targeted or intended violence are rarely sudden and impulsive, but almost invariably unfold in an escalating deliberate "pathway to violence." (Appendix 3)

[60] Mr. Sheard recommended the Board cease all communications with the petitioner immediately.

[61] Mr. Bradshaw contends the updated risk assessment is flawed and mischaracterizes his communications with Board staff. The petitioner said there is no indication that he ever bullied or harassed the case manager who received his fax of September 9, 2015, or that he sent that fax with the intention of intimidating or threatening anyone. Neither the respondent nor the petitioner has included the petitioner's September 9, 2015 fax in their documents. Mr. Sheard has attached as Exhibit 34 to his Affidavit a copy of an email from case manager Lisa Smith to Mr. Evans reporting that she had received a fax that day from Mr. Bradshaw, and that she was forwarding the fax to Mr. Sidhu. She requested that Mr. Bradshaw be advised he had sent the fax to an incorrect number.

[62] The petitioner says the respondent never informed him of any accusation that he had bullied or harassed a specific Board case manager. Mr. Bradshaw also denies that his email of October 2, 2015 to Mr. Gallasch was a personal attack against any Board employee. Rather, Mr. Bradshaw says that by his email of October 2, 2015 he sought a meeting with Mr. Gallasch and union representatives to review what he regarded as the poor treatment of union members by case managers in the Board's North Vancouver office. The petitioner also

contends that Mr. Sheard's assertion that "has repeatedly and pointedly, expressed very high levels of anger and aggression toward women in general, and women staff members in particular" lacks any factual foundation.

[63] On October 15, 19, 20, 26 and 27, 2015, Mr. Bradshaw, contrary to the communications protocol, wrote to various case managers regarding workers' claims. He also wrote to Mr. Gallasch to follow up on his earlier request for an in-person meeting.

[64] On November 23, 2015, Mr. Shaw wrote to the petitioner setting out the Board's decision to no longer recognize Mr. Bradshaw as an advocate under s. 94.1 of the WCA:

I am writing to inform you that you are no longer recognized as a lay advocate under section 94.1 of the Workers Compensation Act (the "Act"), including acting or appearing on behalf of a person on Review Division matters.

You have breached the Standards of Conduct for Practice and Procedure before WorkSafeBC ("Standards") that apply to representatives who act on behalf of claimants and others before WorkSafeBC. Section 96(8) of the Act provides WorkSafeBC may establish practices and procedures for carrying out its responsibilities under the Act. The Standards have been implemented under this section to ensure WorkSafeBC's ability to discharge its duties and effectively administer the Act. The Standards clearly state the following: "A breach of these standards may result in a representative's right of representation being restricted or denied."

On August 25, 2015, I advised you the single point of contact with Corporate Security would be enforced for all claims matters, as outlined in the August 13, 2015 letter from Mark Evans. I also advised you we would not allow inappropriate actions and behaviour to adversely affect WorkSafeBC's staff and their ability to administer the Act and perform their duties.

Despite our efforts to allow you to continue in your role as a lay advocate, you have continued to repeatedly breach the Standards and the communication protocol put in place.

WorkSafeBC is also an employer in British Columbia with obligations under the Act to provide for the health, safety and well being of our staff. Your conduct and interactions with staff pose a risk that can no longer be tolerated.

Our administrative staff have been instructed to cease any and all communications with you, and to refrain from communicating with you.

We have advised your clients who have matters before WorkSafeBC we will continue to administer their files without your representation. We have also advised them they may seek a new representative if they wish to do so.

Your designated point of contact at WorkSafeBC will remain Corporate Security at (604) 276-3138 for any non-representational matters that may arise.

We are prepared to reconsider this decision in 24 months if you wish to commence work as a lay advocate at that time.

[65] On December 22, 2015, Mr. Bavis, as counsel for the petitioner and for the International Longshore and Warehouse Union, Local 500, whose members Mr. Bradshaw frequently represented, wrote to Mr. Shaw. Mr. Bavis noted the Board's refusal to recognize a lay advocate was unprecedented. He requested a discussion with the Board regarding a communications protocol that would permit Mr. Bradshaw to continue to act as a lay advocate for workers who had chosen him as their representative.

[66] On January 4, 2016, Mr. Shaw replied to Mr. Bavis. He defended the respondent's authority under s. 96(8) to establish practices and procedures for carrying out its responsibilities under the WCA, and its power to bar Mr. Bradshaw from representing workers in proceedings before the Board.

[67] Regarding the petitioner's alleged breaches of the Standards, Mr. Shaw wrote:

As you are aware, lay advocates do not require professional certification, nor are they governed by any professional body or subject to any sanction for their conduct. In order to ensure we can effectively administer claims made under the Act, WorkSafeBC requires all lay advocates to abide by the Standards of Conduct for Practice and Procedure Before WorkSafeBC (the "Standards"). The Standards ensure lay advocates act in a professional manner. Specifically, they require lay advocates to demonstrate a high degree of courtesy and respect to WorkSafeBC staff, and maintain and protect confidentiality of information disclosed during WorkSafeBC proceedings.

Quite properly, a breach of the Standards may result in a lay advocate's rights to represent workers being restricted or denied.

Mr. Bradshaw has violated the Standards on many occasions. He has threatened WorkSafeBC staff. He has used derogatory terms for WorkSafeBC staff. He has engaged in bullying, harassing and intimidating behaviour towards WorkSafeBC staff. He has displayed a particularly hostile attitude toward women. He advised senior management he refuses to accept the Standards as he finds them contemptible and meaningless.

In addition, Mr. Bradshaw has deliberately sent personal and private medical information of injured workers to random WorkSafeBC fax numbers, despite the communication protocols in place and the direction to all representatives to use a particular fax number. WorkSafeBC staff who are not involved in claims adjudication are not permitted to access medical information of injured workers.

Mr. Bradshaw's actions in this regard as a lay advocate were potential violations of both section 95 of the Act and the Personal Information Protection Act. His actions were clear violations of the Standards.

[68] After referring to the Board's efforts to implement the communications protocols of June 10 and August 13, 2015, Mr. Shaw went on to state:

WorkSafeBC has conducted a risk assessment regarding Mr. Bradshaw's behaviour and the conclusions from that risk assessment - combined with his continued disregard for the Standards - formed the basis for WorkSafeBC's decision to no longer recognize him as a lay advocate.

- [69] The Board's general counsel concluded by advising that the respondent was not prepared to enter into a third communications protocol with Mr. Bradshaw, or to reconsider his status as a lay advocate for 24 months.
- [70] Before Mr. Shaw's letter of January 4, 2016, Mr. Bradshaw was unaware the Board had conducted a risk assessment regarding his behaviour, or of the results of that assessment.
- [71] On January 20, 2016, Mr. Bavis wrote to Mr. Shaw expressing his client's concern that the respondent had based its decision to refuse to recognize the petitioner as an advocate on a risk assessment of which the petitioner was unaware, and had no ability to review or dispute.
- [72] Correspondence between counsel concluded on January 22, 2016, when Mr. Shaw reiterated that the Board was not prepared to reconsider its decision of November 23, 2015. The Board took issue with the petitioner's contention that he had the right to review and dispute the risk assessment. In circumstances where the risk assessment recommended no further contact between Board employees and the petitioner, Mr. Shaw thought it illogical that the respondent should be required to disclose the risk assessment and invite further communication from Mr. Bradshaw.
- [73] On June 24, September 27 and October 6, 2015, the petitioner complained to the Board's Fair Practices Office ("FPO") concerning what he regarded as the failure of Mr. Alexander and Mr. McDonald to respond to his emails about the May 29, 2015 meeting; the communications protocols; and the conduct of Mr. Molnar and Mr. Sheard during the May 29, 2015 meeting.
- [74] After the FPO dismissed those complaints on January 29, 2016, Mr. Bradshaw brought his petition for judicial review of the Board's decision of November 23, 2015.

DISCUSSION AND ANALYSIS

Is the Board's Decision reviewable under the JRPA?

- [75] The Board based its decision to bar the petitioner from acting as a lay advocate under s. 94.1 of the WCA on grounds that he had repeatedly breached the Standards that apply to representatives acting on behalf of claimants and others. The respondent adopted the Standards in the purported exercise of the Board's powers under s. 96(8), which provides that the Board may establish practices and procedures for carrying out its responsibilities under the WCA.
- [76] The JRPA prescribes the procedures and remedies that apply when the court exercises its jurisdiction to review the statutory decisions of administrative decision-makers, or their exercise, refusal to exercise, or purported exercise of statutory powers.

[77] Section 2 of the JRPA provides:

2 (1) An application for judicial review must be brought by way of a petition proceeding.

- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[78] The terms "statutory power", "statutory power of decision", and "tribunal" are all defined in s. 1 of the JRPA:

"statutory power" means a power or right conferred by an enactment

- (a) to make a regulation, rule, bylaw or order,
- (b) to exercise a statutory power of decision,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

"statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
- (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,

and includes the powers of the Provincial Court;

"tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

[79] In *Western Stevedoring Co. Ltd. v. W.C.B.*, 2005 BCSC 1650, the court discussed the broad scope of judicial review at paras. 21 to 23:

- [21] The JRPA defines the scope of judicial review only by indicating the types of remedies that are available in judicial review proceedings. Two categories of remedies are available. The first consists of remedies set out in s. 2(2)(a): remedies that were historically granted by way of the prerogative writs of certiorari, mandamus, and prohibition. These remedies comprise the core of the superior courts' inherent supervisory jurisdiction over inferior tribunals. Modern developments in administrative law have given these remedies very broad scope.
- [22] The second category of remedies available in judicial review proceedings consists of remedies that owe their origins to private law, but which are now important public law remedies. These remedies - injunctions and declarations in respect of statutory powers - are provided for in s. 2(2)(b) of the JRPA. "Statutory powers" include, but are not limited to, statutory powers of decision. Almost all powers exercised by public authorities today have a statutory basis, so s. 2(2)(b) is also broad in scope.
- [23] In the result, the JRPA affirms the very broad judicial review jurisdiction that the Supreme Court enjoyed at common law, and further expands the remedial jurisdiction in respect of exercises of statutory powers. Almost all power exercised by a public authority may be reviewed by the court under the JRPA. The imposition of a premium surcharge is well within the scope of judicial review.
- [80] Here, the Board has established practices and procedures for regulating the conduct of lay advocates in the purported exercise of its statutory powers under s. 96(8).
- [81] The Standards provide that a breach may result in a representative's right of representation being restricted or denied.
- [82] The Board's decision required the petitioner to refrain from acting or appearing on behalf of persons before the Board or the Review Division, and restricted his communications with Board staff. As such, the Board's decision was the exercise, or purported exercise of a statutory power reviewable under the JRPA.
- [83] Further, notwithstanding the privative clause set out in s. 96(1) of the WCA, and the deference to which the Board is entitled as an expert tribunal when making findings of fact and law related to compensation, assessment and occupational health and safety, the court retains jurisdiction to review the Board's interpretation of its enabling legislation and to determine whether the Board's process complies with the requirements of procedural fairness: see *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174, at paras. 9, 63.
- [84] I conclude that the Board's decision is reviewable under the JRPA.

The Petitioner's Standing

[85] The petitioner submits that as a lay advocate who earned much of his income through representing workers before the Board, he has an economic and professional interest sufficient to afford him standing to challenge the Board's decision. Mr. Bradshaw submits the Board's decision prohibits him from engaging in his chosen profession as an advocate for injured workers.

[86] The respondent contends that Mr. Bradshaw has no standing to invoke the jurisdiction of the court under the JRPA. The Board submits the WCA confers no express or implicit right on the petitioner to challenge the Board's decision. According to the respondent, s. 94.1 does no more than permit lay persons to represent persons in proceedings before the Board without being prosecuted under s. 15 of the Legal Professions Act, S.B.C. 1998, c. 9. The respondent says that when read in the context of the WCA as a whole, s. 94.1 does not confer on lay advocates the right to complain about a decision made by the Board to control its own processes.

[87] Here, the petitioner is not a party in proceedings before the Board. In order to establish standing, Mr. Bradshaw must demonstrate that he has a sufficient interest in the Board's decision and that the WCA gives an express or implied right to a person in his position to complain about the impugned decision: *Emerman v. Association of Professional Engineers*, 2008 BCSC 1186; *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at paras. 7-11 and 13-15; *Sandhu v. British Columbia (Provincial Court)*, 2013 BCCA 88.

[88] In *Emerman*, the court stated the common law test for standing at para. 19:

To be accorded standing, a petitioner must demonstrate an interest in the proceeding. A petitioner will have an interest in the proceeding where he or she has a private right that has been infringed by the respondent, or which will cause or threaten to cause special damage which extends beyond that suffered by the general public (*Behr v. College of Pharmacists (British Columbia)*, 2005 BCSC 879). This interest may also be conferred by statute.

[89] The authors of *Brown and Evans, Judicial Review of Administration Action in Canada* (Toronto: Carswell, 2014) v. 2, state the test in these terms at para. 4:3420:

At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an "aggrieved person," an "affected person", or someone who is "exceptionally prejudiced" by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness.

[90] Here, Mr. Bradshaw is directly affected by the Board's decision, which affects his economic interests by preventing him from appearing as a lay advocate in all proceedings before the Board and the Review Division for at least two years. The Board's decision has a direct impact on the petitioner's economic interests and the conduct of his practice as a lay advocate. On the common law test for standing, the petitioner is an "aggrieved person" with a sufficient interest to seek a remedy by judicial review.

[91] I turn next to consider whether the WCA confers an express or implied right on lay advocates to complain about decisions of the respondent limiting or barring their representation of persons in proceedings before the Board. In *Sandhu*, the Court of Appeal held that the appellant court interpreter lacked standing to challenge the decision of a provincial court judge who refused to let him act as an interpreter in a small claims trial. Tysoe J.A., writing for the court, held at paras. 35 to 37:

[35] The approach to be taken with respect to the issue of standing on a judicial review proceeding was set out in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 2 All E.R. 93 at 108 (H.L.):

The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

This passage was quoted with approval by this Court in *Saanich Inlet Preservation Society v. Cowichan Valley Regional District* (1983), 147 D.L.R. (3d) 174, 44 B.C.L.R. 121 at 127-128 (C.A.).

[36] Although the chambers judge did not expressly conclude that the Small Claims Act did not give any express or implied right to interpreters to complain about the respondent's decision, she was referred to the above passage and she recited the respondent's argument to that effect. There is certainly nothing express in the Small Claims Act that would give the appellant the right to complain about the respondent's decision. Nor, in my view, is such a right given implicitly. The purpose of the Small Claims Act, as set out in s. 2(1), is the resolution of claims within the monetary limit set by the Act in a just, speedy, inexpensive, and simple manner. There is an implied right that the litigants can complain about decisions made in small claims actions that cannot be appealed, but the purpose of the Act would not be furthered by implying such a right in favour of non-parties such as the appellant.

[37] As the Small Claims Act does not give any express or implied right to non-parties such as the appellant to complain about decisions made in small claims actions, I conclude that the appellant does not have standing to seek judicial review of the respondent's decision.

- [92] As we have seen, the purpose of the WCA is to provide for the adjudication and payment of no-fault compensation to workers and their dependents arising from workplace accidents; the assessment and collection from employers of the funds necessary to support the system; and the regulation of occupational health and safety in the workplace. The WCA regulates the rights and obligations of workers and employers under the workers' compensation system.
- [93] Under ss. 96.3 and 241 respectively, workers, deceased workers' dependents, and employers directly affected by a decision of the Board or a review officer have rights to request a review or appeal from those decisions. The WCA expressly provides stakeholders directly affected by decisions of the Board respecting compensation, the assessment or classification of employers, or occupational health and safety with the right to complain about those decisions.
- [94] The respondent contends that the class of persons who may seek judicial review of decisions of the Board is limited to the stakeholders listed in ss. 96.3 and 241 of the WCA. The Board contends that the purposes of the WCA would not be advanced by implying a right of lay advocates to complain about Board decisions.
- [95] The WCA confers no express right on lay advocates to complain about Board decisions limiting their representation of workers or their communications with the Board.
- [96] However, s. 94.1 of the WCA permits lay advocates to give advice and represent clients without contravening s. 15 of the LPA.
- [97] For ease of reference, I set out Section 94.1 again:
- 94.1 (1) A person may
- (a) give advice respecting the interpretation or administration of the Act, the policies of the board of directors, the Board's practices and procedures or any regulations, orders or decisions under the Act, or
 - (b) act on behalf of a person
 - (i) by communicating with the Board, an officer or employee of the Board, the appeal tribunal or any other person acting under this Act, or
 - (ii) by appearing before the Board, an officer or employee of the Board or the appeal tribunal.
- (2) Section 15 of the Legal Profession Act does not apply to a person while the person performs the functions referred to in subsection (1).
- [98] Section 15(1) of the LPA provides:
- 15 (1) No person, other than a practising lawyer, is permitted to engage in the practice of law, except

- (a) a person who is an individual party to a proceeding acting without counsel solely on his or her own behalf,
- (b) as permitted by the Court Agent Act,
- (c) an articulated student, to the extent permitted by the benchers,
- (d) an individual or articulated student referred to in section 12 of the Legal Services Society Act, to the extent permitted under that Act,
- (e) a lawyer of another jurisdiction permitted to practise law in British Columbia under section 16 (2) (a), to the extent permitted under that section,
- (f) a practitioner of foreign law holding a permit under section 17 (1) (a), to the extent permitted under that section, and
- (g) a lawyer who is not a practising lawyer, to the extent permitted under the rules.

[99] Under s. 85 of the LPA, a person who contravenes s. 15 commits an offence.

[100] When Bill 37, which added s. 94.1 to the WCA, was introduced in the Legislature on October 6, 2003, the Honourable G. Bruce, then Minister of Skills, Development and Labour, explained its purpose:

This bill also provides that a person does not have to be a lawyer to give advice about the Workers Compensation Act or to represent workers or employers in a proceeding. Lay advocates have represented workers and employers for a number of years at WCB proceedings. This amendment ensures that workers and employers will continue to have access to administrative justice in a manner that has historically worked well in the WCB system. While not specifically regulated, lay advocates have clear practice guidelines to follow when appearing before the Workers Compensation Board and the appeal tribunal.

British Columbia, Official Report of Debates of the Legislative Assembly (Hansard) 37th Parl. 4th Sess., Volume 16, Number 9, (6 October 2003) at 7193 (Hon G. Bruce)

[101] Later in the debate, the Minister stated:

What this amendment does is actually ensure that lay advocacy can continue to provide assistance to WCB parties. We're trying to make the entire workers compensation system much more friendly, if you want to put it that way, in all of how it undertakes its business and also in how it treats and deals with folks that find themselves injured and having to go through the system.

There is a code of conduct that will be established for lay advocates. What this does is try to take away, hopefully once and for all, the friction that has been there between the Law Society and whether or not lay advocates ought to be able to assist people. It's our view that with what's put in place and what the practice has been to date, this is a valuable way for people to be able to get the type of assistance they need in what can be very difficult times.

British Columbia, Official Report of Debates of the Legislative Assembly (Hansard) 37th Parl. 4th Sess, Volume 16, Number 12, (8 October 2003) at 7267 (Hon G. Bruce)

[102] In enacting s. 94.1, the Legislature intended that workers and employers would have continued access to lay advocates.

[103] Section 94.1 permits lay advocates to represent workers and employers before the Board and exempts them from s. 15 of the LPA. By permitting lay advocates to give advice respecting workers' compensation matters and to represent workers and employers before the Board, s. 94.1 advances one of the fundamental principles of workers' compensation: that injured workers be compensated quickly and efficiently.

[104] The Board acknowledges that the parties have a common law right to representation and that, in the case of workers, the board of directors has encoded this right by item #98.23 of the Rehabilitation Services and Claims Manual, which provides:

#98.23 Representation

A worker has a right to bring a representative to any inquiry, both at first instance and on appeal.

If the worker is unable to communicate effectively in English, an interpreter is arranged.

[105] The Board and the Legislature have recognized that lay advocates play an important role in ensuring that workers have access to administrative justice.

[106] The respondent maintains that s. 96(8) of the WCA empowers the Board to make decisions affecting lay advocates, and authorizes the Board to bar the petitioner from acting as a lay advocate.

[107] While the respondent asserts its statutory authority to make decisions barring lay advocates from appearing before the Board, it maintains that lay advocates lack standing to challenge such decisions. Whether the WCA authorizes the Board to bar advocates in the exercise of its power to establish practices and procedures for carrying out its responsibilities under the Act is a central issue on this judicial review application.

[108] In *Alberta Liquor Store Association*, the Alberta Court of Queen's Bench addressed a similar problem, at para. 17:

In *United Telegraph Workers v. Canadian Brotherhood of Railway, Transport and General Workers*, [1982] 1 F.C. 603, 126 D.L.R. (3d) 228, 42 N.R. 243 (C.A.) a union was denied standing to protect its competitive position, because that was not one of the purposes of the statute. So, if the regulation of competition is clearly not a part of the regulatory scheme, then a judicial review application based on competitive issues might well be improper. However, where the very essence of the dispute is whether the challenged topic (in this case, competition) is embraced by the statute, and there is some arguable basis for that contention, then standing should not be denied on this ground. To hold otherwise would essentially be to say that only applicants who are correct in their positions, and will win the application for judicial review, have standing. This

involves circular reasoning. There is a distinct difference between whether a party has standing, and whether the party will ultimately be successful on the merits. Here the Applicants seek to raise a legitimate issue about the degree to which competitive factors are engaged by s. 51.1, and whether the Board has erred in asserting that competitive issues have no bearing whatsoever on the granting of liquor licenses to stores that are affiliated with retail grocery stores. To deny them standing on the basis these assertions are wrong would pre-judge the applications.

[Emphasis added.]

[109] Here, the Legislature has provided for the representation of workers and employers before the Board by lay advocates and has exempted those lay advocates from the prohibition against the practice of law contained in s. 15 of the LPA. The Legislature has also conferred a broad power on the Board to establish practices and procedures for carrying out its responsibilities under the WCA. Those responsibilities include the administration of processes for the adjudication of workers' compensation claims. The Legislature intended that lay advocates would continue to play a significant role in ensuring that persons appearing before the Board have ready access to administrative justice. When the Minister introduced Bill 37, he made the Legislature aware that lay advocates would be subject to a code of conduct. Having recognized, through the enactment of s. 94.1, the assistance lay advocates provide to their clients and to the Board in attaining the objective of speedy and efficient administrative justice, the Legislature must have intended that the Board's exercise of any statutory power to limit a lay advocate's representation of injured workers would be subject to the supervisory jurisdiction of the court.

[110] I conclude that s. 94.1, read in the context of the WCA as a whole, confers an implied right on lay advocates to complain about a decision of the Board limiting or barring their representation of persons in proceedings before the Board. Accordingly, I find that Mr. Bradshaw has standing to bring this petition for judicial review.

Standard of Review

(i) The Board's determination of its authority to impose the ban

[111] The petitioner submits that the question of whether the Board has the power to adopt practices and procedures under s. 96(8) of the WCA restricting the right of persons to act as lay advocates under s. 94.1 is a question of true jurisdiction reviewable on a standard of correctness.

[112] For its part, the respondent submits that the issue of whether s. 96(8) permits the Board to create standards of conduct for lay advocates and to bar persons who breach those standards from acting as advocates is a matter of statutory interpretation of the Board's home statute, subject to review on a standard of reasonableness. The Board submits that the interpretation of s. 96(8) engages a matter falling under Part 1 of the WCA that comes within the protection afforded by the privative clause in s. 96(1).

[113] In support of his position that the standard of review is correctness, the petitioner relies on *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 59, where the court held that questions of true jurisdiction arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.

[114] In *Dunsmuir*, the majority of the court held at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, per Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or vires. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[Emphasis added.]

[115] Where a tribunal interprets its home statute, the presumptive standard of review is reasonableness. As the court explained in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, 2013 SCC 67 at para. 21:

Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has repeatedly underscored that "[d]eference 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" (para. 54).[2] Recently, in an attempt to further simplify matters, this Court held that an administrative decision maker's interpretation of its home or closely-connected statutes "should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34).

[116] Further, in *Alberta v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, 2011 SCC 61, the court emphasized that true questions of jurisdiction are narrow and exceptional. Rothstein J., writing for the majority, observed at paras. 34 and 39:

- [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.
- [39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.
- [117] Most recently, in *Edmonton (City), v. Edmonton East (Capilano Shopping Centres Ltd.)*, 2016 SCC 47, the court considered whether the Assessment Review Board's power to "change" a property assessment authorized the Board to increase the assessment being appealed. At first instance, the petitioner company appealed the Board's assessment seeking a reduction. The company had not anticipated that the Board would increase the assessment. Karakatsanis J., writing for the majority, held, at paras. 25 and 26:
- [25] The chambers judge found, and the Company submits, that whether the Board had the power to increase the assessment is a true question of jurisdiction reviewable on correctness. The Court of Appeal did not agree that this issue was a true question of jurisdiction.
- [26] This category is "narrow" and these questions, assuming they indeed exist, are rare (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 2015 SCC 57, SCC 57, [2015] 3 S.C.R. 615, at para. 39; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 33-34). It is clear here that the Board may hear a complaint about a municipal assessment. The issue is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.

[118] Here, the Board has the power to control its own process and to establish practices and procedures under s. 96(8) for carrying out its responsibilities under the WCA. The question is whether s. 96(8) permits the respondent to establish standards of conduct for lay advocates, and, if those standards are breached, to restrict a lay advocate's communications with the Board and bar him from appearing before the Board. To paraphrase Karakatsanis J., the issue is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding workplace compensation matters. No true question of jurisdiction arises.

[119] Accordingly, I conclude the standard of review on the question of interpretation of the Board's home statute is reasonableness.

(ii) Procedural Fairness

[120] The applicable standard for review of the process followed by the Board in imposing communications restrictions on the petitioner and barring him from appearing as a lay advocate is a standard of fairness. As Groberman J.A. explained in *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52:

A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[121] Recently, in *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, the court, at para. 79, characterized the standard for determining whether a decision-maker complied with the duty of procedural fairness as "correctness".

[122] In my view, in the context of judicial review for procedural fairness, the standards of correctness and fairness are the same. In *CUPE v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, the Union challenged both the process by which the Minister of Labour appointed the chairs of certain arbitration tribunals and the Minister's ultimate exercise of his power of appointment. Binnie J., for the majority, referring to the issues raised by the Union concerning the process by which the Minister made the appointments, observed, at para. 100, that it was "for the courts, not the Minister, to provide the legal answer to procedural fairness questions". Whether the standard of review is framed as correctness or fairness, the court must determine whether the tribunal's process satisfies the applicable requirements of procedural fairness.

[123] Accordingly, the Board's procedures are reviewable on a standard of fairness.

Does the Board have authority to restrict communications between the petitioner and its staff and to bar the petitioner from acting as a lay advocate?

- [124] The petitioner submits the Board's refusal to recognize him as a lay advocate is ultra vires its statutory powers under the WCA. Mr. Bradshaw argues that s. 94.1 confers on lay advocates an express right of representation, and that neither s. 96(8) nor any other provision authorizes the Board to restrict or deny that right.
- [125] The petitioner contrasts the general power of the Board to establish practices and procedures for carrying out its responsibilities under the Act pursuant to s. 96(8) with the specific powers to control its own proceedings granted to WCAT as a tribunal to which the Administrative Tribunals Act, SBC 2004 c. 45 (ATA) applies. Section 245.1 of the WCA incorporates and applies various provisions of the ATA to WCAT, including ss. 14(c) and 48.
- [126] Section 14(c) provides that in order to facilitate the just and timely resolution of an application, WCAT may make any order "in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings".
- [127] Section 48 provides:

Maintenance of order at hearings

- 48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.
- (2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.
- (3) Without limiting subsection (1), the tribunal, by order, may
- (a) impose restrictions on a person's continued participation in or attendance at a proceeding, and
 - (b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.
- [128] Mr. Bradshaw argues that where the Legislature has provided one tribunal with express powers to restrict or exclude a person's participation in its processes and has not granted those powers to another tribunal under the same statute, the Legislature cannot have intended the Board to have the same powers to restrict or bar a lay advocate as s.245.1 confers on WCAT. Mr. Bradshaw contends the language of s. 96(8) is narrower than ss.14(c) and 48 the ATA.
- [129] The petitioner cites *Yu et al v. The Attorney General of British Columbia*, 2003 BCSC 1869 at para. 67 for the well-known proposition that regulations or other subordinate legislation may neither exceed, nor be inconsistent with the statutory provisions under which they are made. The petitioner submits the Board's power to establish practices and procedures

under s. 96(8) is qualified by the words "for carrying out its responsibilities under the Act", and thereby limited to matters within the scope of the Board's exclusive jurisdiction. Mr. Bradshaw contends that the Board's exclusive jurisdiction is limited to the matters relating to the administration of the compensation scheme for workplace injuries specifically enumerated in s. 96(1)(a) through (j) of the WCA. He urges the Court to find that s. 96(8) was not intended to interfere with s. 94.1 or any other right conferred by the WCA unrelated to the Board's responsibilities for the administration of the workers' compensation scheme.

- [130] The petitioner submits that as a matter of statutory construction, the Court should prefer an interpretation of the WCA which does not create internal inconsistencies: *Charlebois v. Saint John (City)*, 2005 SCC 74. The petitioner argues that s. 96(8) must be read narrowly so as to avoid conflict with s. 94.1. Mr. Bradshaw says it would be inconsistent with the broad right of representation afforded lay advocates by s. 94.1 to construe s. 96(8) as enabling the Board to adopt Standards that limit or curtail that right of representation.
- [131] The Board interprets s. 96(8) as providing it with the authority to restrict communications with a lay advocate who breaches the Standards, and to limit or deny his representation of workers in proceedings before the Board. I have found that the Board's determination of its authority to make the decision of November 23, 2015 is a matter concerning the interpretation of the tribunal's home statute, and as such is reviewable on the deferential standard of reasonableness. On review for reasonableness, the Court enquires into whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at para. 47.
- [132] As the respondent submits, tribunals derive their jurisdiction from two sources. The first consists of express grants of jurisdiction under various statutes. The second arises under the common law by application of the doctrine of jurisdiction by necessary implication. Under this doctrine, the powers conferred by enabling legislation are construed to include not only the explicit powers, but also by implication all powers which are practically necessary to accomplish the tribunal's statutory mandate: *ATCO Gas and Pipelines v. Alberta (Energy and Utilities Board)*, [2006] 1 SCR 140 at paras. 38, 51.
- [133] Absent specific rules prescribed by statute or regulation, administrative tribunals have the implied authority to control their own procedures: *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at paras. 568-569.
- [134] Further, s. 27(2) of the Interpretation Act, R.S.B.C. 1996, c. 238 provides:

Ancillary powers

27 (2) If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given.

- [135] In *Ebsworth v. Alberta (Human Resources and Employment)*, 2005 ABQB 976, officers investigating a workplace accident under the Alberta Occupational Health and Safety Act, RSA 2000, c. 0-2 excluded counsel from witness interviews. The court held, at paras. 34-36, that where the Act did not specify how the officers were required to conduct their inquiry, as statutory delegates, they had the implied authority to determine their own procedure as necessary for carrying out their function. In the absence of legislation expressly providing that counsel for a person being questioned might not be excluded, the ability to exclude counsel remained a matter of procedure to be determined by the officers.
- [136] Despite the absence of any explicit power to remove a taxpayer's agent, or to prohibit an agent from acting, the Tax Court of Canada, a statutory court, has the implied power to control its own process. That power includes the power to prevent agents from representing litigants if their continued representation would harm the proper administration of justice, and extends to prohibiting agents from acting in all matters before the court: *Shannon (Re)*, 2016 TCC 255 at paras. 5, 6.
- [137] Here, by s. 96(8), the Legislature has conferred a broad power on the Board to control its own process. For ease of reference, I reproduce s. 96(8) here:

Jurisdiction of Board

96 (8) The Board may establish practices and procedures for carrying out its responsibilities under the Act, including specifying time periods within which certain steps must be taken and the consequences for failing to comply with those time periods.

- [138] Relying upon s. 96(8), the Board has adopted and published the Standards, which prescribe the conduct expected of persons representing parties in the Board's processes. The Standards require representatives to act honestly and courteously; to be prepared; to observe the Standards both on and off Board premises concerning matters involving a party; to confine themselves to fair and factual public statements that do not involve personal attacks on Board staff or other parties; and to protect the confidentiality of information disclosed in Board proceedings.
- [139] The Standards specifically provide that their breach may result in the Board restricting or denying a representative's right of representation.
- [140] In my view, the Board's interpretation of s. 96(8) as implicitly authorizing the establishment of the Standards and the imposition of consequences for their breach not only satisfies the standard of reasonableness, but is correct.
- [141] The Standards enable the Board to control its processes for the administration and adjudication of workers' claims for compensation. They facilitate the orderly and efficient handling of the claims of injured workers. By establishing minimum standards of conduct for persons representing parties before the Board, they promote the fulfilment of the Board's mandate for the efficient and timely resolution of workers' claims. The Standards

also advance the Board's responsibilities for the protection of the health and safety of its employees and the privacy interests of the parties.

- [142] The petitioner argued that if the respondent does not have explicit statutory power to bar a disruptive lay advocate, and is unable to fulfil its mandate as a result of the behaviour of that lay advocate, the Board's remedy would be to apply to the Court for an injunction. A statutory tribunal lacking powers necessary for the fulfilment of its mandate may invoke the aid of a superior court to make appropriate orders: *Telecommunications Workers Union v. British Columbia Tel*, [1996] B.C.J. No. 617 (S.C.) at para. 24. Unless the Board suspended proceedings for resolution of the worker's claim, the Board would be compelled to continue to deal with the disruptive lay advocate pending the outcome of injunction proceedings. Further, requiring the Board to obtain a court order to enforce compliance with its practices and procedures would be contrary to the fundamental principle that workers should receive compensation quickly and without court proceedings.
- [143] Section 94.1 permits lay advocates to give advice and to represent persons in proceedings before the Board by exempting them from prosecution under s. 15 of the LPA.
- [144] Whether s. 94.1 confers upon lay advocates a right or a privilege of representation, that interest, no matter how it is characterized, is not absolute. As a matter of necessary implication, s. 96(8) must be read as conferring upon the Board the power to establish standards of conduct for lay advocates, and sanctions for their breach, in order to control its own processes. No provision of the WCA precludes the Board, in an appropriate case (and subject to the requirements of procedural fairness) from limiting or barring a lay advocate from representing parties in proceedings before the Board.
- [145] The imposition of restrictions on lay advocates as a consequence for their failure to comply with the Standards is consistent with the scheme of the WCA as a whole. Under various provisions of the legislation, not only parties, but also certain persons providing services to the parties, are subject to consequences for noncompliance. For example, under ss. 57 and 57.1, workers may have their benefits reduced or suspended if they persist in unsanitary or injurious practices, refuse to submit to medical or surgical treatment the Board considers necessary, or fail to provide information to the Board. By s. 56(5), a physician who fails to submit prompt, adequate and accurate reports and accounts may have his or her right to be selected by a worker to provide healthcare cancelled or suspended. Similarly, by s. 54(8) an employer who fails to submit a report of injury within seven days of an injury or death may be required to pay the full cost of the injured or deceased worker's claim.
- [146] I am not persuaded by the petitioner's submission that the Legislature, by applying ss. 14(c) and 48 of the ATA to WCAT, but not the Board, intended to restrict the respondent's authority to control its own procedures. While WCAT may exercise the specific powers to control its own procedures incorporated and applied to it by s. 245.1 of the WCA, the Legislature has conferred on the Board a broad and general power to establish practices and procedures for carrying out its responsibilities under the statute.

[147] I also respectfully disagree with the petitioner's argument that the practices and procedures the Board may establish for "carrying out its responsibilities under the Act" are limited to the matters specifically enumerated in subsections 96(1)(a) to (j). Section 96(1) grants the Board exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under Part 1 of the WCA, which includes s. 96(8). Further, the words "without restricting the generality of the foregoing" precede the subjects enumerated in subsections 96(1)(a) through (j). Practices and procedures established by the Board, including the Standards, that aid the respondent in controlling the proceedings by which it fulfills its responsibilities for the administration of workers' compensation are within the ambit of s. 96(1).

[148] For all these reasons, I find that the Board's interpretation of s. 96(8) as providing the authority to restrict communications with a lay advocate who contravenes the Standards, and to limit or deny his representation of workers in proceedings before the Board, falls within the range of acceptable and defensible outcomes and meets the standard of reasonableness. In my view, that interpretation is also correct.

Was the petitioner afforded procedural fairness?

[149] Mr. Bradshaw submits the respondent's decision to bar him from acting as a lay advocate in proceedings before the Board or the Review Division for a period of at least two years for breach of the Standards is analogous to a finding of professional misconduct. The petitioner says that the Board, in making a decision that adversely affected both his professional reputation and his economic interests, was required to follow a process that complied with the requirements of procedural fairness and natural justice. Mr. Bradford contends that the Board breached the requirements of procedural fairness and natural justice by failing to advise him that a decision would be made; failing to disclose the case against him; and failing to provide him with the opportunity to answer the case or make representations before the Board made its decision.

[150] Mr. Bradshaw says that, in breach of the requirements of procedural fairness, the Board:

- (a) never gave particulars of the behaviour alleged to have been "unprofessional, hostile and threatening" or otherwise in breach of the Standards;
- (b) never provided him with a copy of Ms. Gedeon's complaint or the threat report;
- (c) never provided him with a copy of the risk assessment or its update, nor disclosed its existence until after the ban was imposed;
- (d) did not advise the petitioner of any allegation that he had breached the Personal Information Protection Act, S.B.C. 2003, c. 63 (PIPA) until the ban was imposed; and
- (e) never afforded him the opportunity to respond to the decision to no longer recognize him as a lay advocate.

- [151] The respondent says the restrictions the Board imposed on Mr. Bradshaw concerning his communications with the Board and representation of workers are not akin to a finding of professional misconduct. The decision, while restricting Mr. Bradshaw's dealings with the Board, does not prevent him from providing advice to injured workers, or from representing parties in proceedings before WCAT. Further, the respondent submits the petitioner was informed of the Standards he was required to meet and of his failure to do so. The respondent maintains Mr. Bradshaw was afforded opportunities to respond to the Board's concerns, both in writing and in person. The Board says it provided Mr. Bradshaw with a process that met the requirements of procedural fairness in the particular circumstances of this case.
- [152] The content of the duty of procedural fairness is flexible and varies with the context of the particular statute and the rights or interests affected in each case. The purpose of the duty of fairness is to ensure that individuals affected by administrative decisions have the opportunity to present their case fully and fairly, and to have decisions affecting their rights, interests or privileges made in a fair, open and impartial process appropriate to the statutory, institutional and social context of the decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 21, 22 and 28; *Delivery Drugs Ltd. (c.o.b. Gastown Pharmacy) v. British Columbia (Deputy Minister of Health)*, 2006 BCSC 631 at para. 96.
- [153] In *Baker* at paras. 23 to 27, the court identified the following non-exhaustive list of factors for determination of the content of the duty of procedural fairness:
- (a) the nature of the decision being made and the process followed in making it;
 - (b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
 - (c) the importance of the decision to the individual or individuals affected;
 - (d) the legitimate expectations of the person challenging the decision; and
 - (e) the choices of procedure made by the agency itself.

Nature of the decision and the process followed in making it

- [154] The more the process and decision-making function of the tribunal resembles judicial decision-making, the more likely it is that procedural protection closer to the trial model will be required by the duty of fairness: *Baker* at para. 23.
- [155] Here, the Board was not adjudicating a dispute between different parties or determining a worker's entitlement to compensation benefits under the WCA. Rather, the Board engaged in an inquisitorial process in investigating the petitioner's conduct toward Board staff and his alleged breaches of the Standards. After conducting its own investigation, the respondent made its decision to restrict Mr. Bradshaw's communications with the Board

and to bar him from representing workers in proceedings before the Board and the Review Division for two years.

[156] As counsel for the respondent submits, the Board's decision does not affect any rights of Mr. Bradshaw's clients to workers' compensation benefits. The decision does however curtail the range of services Mr. Bradshaw is able to offer to clients, and thereby diminishes his utility to both present and prospective clients. While he may continue to provide advice to clients, the petitioner is barred from acting for or representing clients in any workers' compensation proceeding other than matters before WCAT.

[157] The nature of the Board's decision and the inquisitorial process followed in making it militate against a level of procedural fairness similar to the trial model.

Nature of the statutory scheme

[158] The Board's decision is not subject to internal review under s. 96.2, or to appeal to WCAT under s. 240 of the WCA. The Board has stated that it will not reconsider the two year ban.

[159] Under s. 96, the Board's exclusive jurisdiction to determine "all matters and questions of fact and law" arising under Part 1 includes its power to establish practices and procedures for carrying out its responsibilities under the WCA.

[160] The Board's decision is a final decision that may not be appealed under the governing statute. This factor weighs in favour of greater procedural protection: Baker at para. 24.

The importance of the decision to the petitioner

[161] The more important the decision to the affected individual, the higher the procedural protections required: Baker at para. 25. As the court observed in Baker at para. 25, citing Kane v. Board of Governors of the University of British Columbia, [1980] 1 SCR 1105, p. 113, "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake".

[162] While the consequences of the Board's decision for the petitioner are significant, they are not entirely analogous to a finding of professional misconduct. Because lay advocates are unregulated, there is no governing body that may make a finding of professional misconduct. Although the Board communicated its decision to the petitioner and to workers he represented as a lay advocate, it made no information available to the broader public that might adversely affect Mr. Bradshaw's reputation. Further, the Board's decision does not impose a complete prohibition on the petitioner acting as a lay advocate. As the respondent notes in its submissions, the petitioner may still give advice regarding the interpretation or administration of the WCA, the Regulations, Board policies and procedures, and may still appear before WCAT. The Board's decision was not a disciplinary measure aimed at punishing or correcting professional misconduct. Rather, the Board made the decision in the exercise of its powers to control its own process and to protect the

safety and well-being of its employees.

[163] Although not equivalent to a finding of professional misconduct, the Board's decision nonetheless had a significant impact on Mr. Bradshaw's practice as a lay advocate. The Board's decision has curtailed the services he is able to provide to clients. The two-year ban on representing workers before the Board and the Review Division renders Mr. Bradshaw less attractive to current or prospective clients as a lay advocate. While not requiring the same high level of procedural fairness that would apply to a finding of professional misconduct or a disciplinary suspension, the Board's decision is of sufficient importance to the petitioner to call for a significant degree of procedural fairness.

Legitimate expectations

[164] The doctrine of legitimate expectations applies where an official practice, statement, or undertaking gives rise to a reasonable expectation that the tribunal will follow a particular procedural step. The doctrine is subject to four limitations. The official representation or undertaking must be clear, unambiguous and unqualified. The doctrine has no application to the exercise of legislative powers. The representation must not exceed or interfere with the public body's statutory authority. Finally, the doctrine is confined to procedural, rather than substantive rights: *Vancouver Island Entertainment Inc. v. City of Victoria*, 2006 BCSC 1150 at paras. 42, 43.

[165] Here the Board was not exercising legislative authority and its decision concerned procedural rather than substantive rights.

[166] The Board's decision to no longer recognize the petitioner as a lay advocate was unprecedented. In these circumstances, there was no clear, unambiguous and unqualified representation that the respondent would follow a particular procedure in determining whether to impose the ban. Mr. Bradshaw can have had no legitimate expectation of the Board for a particular process.

[167] In this regard, the Board's decision is similar to the decision of the Legal Services Society ("LSS") in *Wise v. Legal Services Society*, 2008 BCSC 255. There, the LSS, for the first time, exercised its statutory power to deactivate a lawyer's vendor number on the basis he created an administrative burden that outweighed the benefits he provided to the LSS and its clients. The court held, at para. 19(4), that where LSS had never before made a decision based on administrative burden, the doctrine of legitimate expectations was a neutral factor.

Choice of procedure by the Tribunal

[168] When the statute enables the decision-maker to choose its own procedures, or where the tribunal has expertise in determining those procedures, its choice of procedure, while not determinative, is entitled to some deference: *Baker* at para. 27. Here, as previously noted, s. 96 confers on the Board "exclusive jurisdiction to inquire into, hear and determine all

matters and questions of fact and law". Sections 96.2 through 96.6 set out the procedures for hearing reviews, while WCAT's procedures for the hearing of appeals are governed by Part 4 of the WCA. Otherwise, the Board's processes for the administration of the Act are set at the direction of the board of directors under s. 82. The responsibilities of the board of directors under that section include broad powers to set and revise the policies of the board of directors and to set and supervise the direction of the Board.

- [169] The Board has expertise "not only in the assessment and review of workers' claims for compensation, but also in the application of the policy and purposes of the Act": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para. 25, citing *Pasiechnyk* at para. 36.
- [170] In determining the content of procedural fairness appropriate to the circumstances of this case, the Board's choice of procedure, although not decisive, is deserving of some weight.
- [171] In *Wise*, the LSS's decision to deactivate the lawyer's vendor number eliminated a significant portion of the lawyer's work. In applying the five Baker factors, the court found the decision to deactivate the lawyer's vendor number was related to the administrative workings of LSS and thus very different from a judicial decision. The statutory scheme, which unlike the case at bar, provided for an internal review of the decision, also suggested a lower duty of fairness. While deactivation of the vendor number had a significant impact on the lawyer's practice, it did not prevent him from continuing to practice. This factor suggested a medium duty of fairness. Because the LSS decision was unprecedented for both the lawyer and the LSS, the doctrine of legitimate expectations was not engaged. The expertise of LSS in the administration of legal aid also militated in favour of a lower duty of fairness.
- [172] In the result, the court concluded that the duty of fairness, while more than minimal, fell at the lower end of the spectrum, requiring LSS to provide disclosure, the opportunity to respond, and to give reasons for its decision: *Wise* at para. 21.
- [173] In *Wong v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, 2005 BCCA 509, the College had terminated Mr. Wong from his position as registrar. The parties agreed that, as a statutory officeholder, Mr. Wong was entitled to procedural fairness. The Court of Appeal reversed the decision of the reviewing judge, who found the College had provided Mr. Wong with notice of the grounds for his dismissal and a full opportunity to be heard before the termination of his employment. Mr. Wong was not aware of a report accusing him of dishonesty which formed the principal basis for the College's decision. At paras. 20 to 22 the court held that the allegations of dishonesty triggered a requirement that Mr. Wong have a fair opportunity to present his case and to influence the decision-maker. By denying that opportunity, the College breached the duty of fairness.

Conclusion on content of Board's duty of procedural fairness

- [174] The inquisitorial process adopted by the Board does not engage the trial model of procedural fairness. However, the Board's decision is final and significantly affects the petitioner's practice as a lay advocate. Mr. Bradshaw had no legitimate expectation of a particular process. In light of the respondent's expertise in both the administration of the WCA and the application of its policies, the Board's choice of process is entitled to some deference. Weighing all of these factors, I find the duty of procedural fairness required in this case was more than minimal, but fell below the midpoint of the spectrum. The respondent was required to inform Mr. Bradshaw of the substance of the complaints, the conclusions of the risk assessment, and the alleged breaches of the Standards it took into account in deciding to restrict the petitioner's communications with Board staff and to bar him from representing workers before the Board for a period of two years. The petitioner was entitled to a reasonable opportunity to respond to those allegations before the Board made its decision.
- [175] In my view, there was no requirement for an oral hearing before the decision-maker. The Board would meet the requirements of its duty of procedural fairness if Mr. Bradshaw had the opportunity to answer the allegations against him either in writing or when he was interviewed during the Board's investigative process.
- [176] The Board also had an obligation to provide reasons for its decision.

Application to Facts

- [177] Mr. Bradshaw maintains that the respondent failed to provide him with particulars of the behaviour the Board alleges was "unprofessional, hostile and threatening", or otherwise in breach of the Standards. He also complains that he was not provided with a copy of Ms. Gedeon's complaint or the threat report.
- [178] While the petitioner did not receive a copy of the complaint or threat report, he was made aware within a few days of the May 7, 2015 incident at OT Consulting that Ms. Gedeon had made a complaint, which Mr. Sheard was investigating. On May 29, 2015, the petitioner met with Mr. Sheard and Mr. Molnar. They informed Mr. Bradshaw the Board had received a threat report, that the Board attendees at the May 7, 2015 meeting were concerned for their own safety, and that the Board was concerned about the potential threat of violence arising from Mr. Bradshaw's confrontation with Mr. Chappell. Mr. Bradshaw was given the opportunity to provide his account of the incident. He explained why he did not perceive his behaviour as presenting any threat to the health or safety of the Board attendees. The petitioner was made aware of the substance of Ms. Gedeon's complaint and was afforded a reasonable opportunity to respond to that complaint in person during the meeting of May 29, 2015.

- [179] Mr. Sheard and Mr. Molnar also confronted Mr. Bradshaw with the allegation he had referred to a case manager at the Board's North Vancouver office as a "retard" and that staff of that office found it difficult to deal with him. Further, Mr. Sheard and Mr. Molnar discussed the Standards with Mr. Bradshaw and made him aware of the Board's expectation that he comply with the Standards.
- [180] On June 10, 2015, Mr. Todd McDonald informed Mr. Bradshaw of the respondent's decision to restrict his communications with Board staff to a single point of contact through Mr. Hugh Legg. The Board provided an explanation in writing of its reasons for imposing the communications restriction. Mr. Bradshaw made submissions to the Board in writing regarding the communications protocol and its impact upon his ability to represent injured workers. On July 14, 2015, in an email to Mr. Legg captioned "Protocol Completed", Mr. Bradshaw took the position that the communications protocol was unworkable. When Mr. McDonald responded on July 30, 2015, he emphasized that Mr. Bradshaw must adhere to both the communications protocol and the Standards. He expressly warned the petitioner that if his conduct did not meet the Standards he risked being barred from acting on behalf of injured workers. Mr. McDonald referred to the petitioner having engaged in personal attacks on Board staff; asserted that Mr. Bradshaw had repeatedly shown open contempt for staff; and stated that the petitioner's behaviour was not only detrimental to the administration of the WCA, but all but also posed a risk to the health, safety and well-being of Board staff.
- [181] By Mr. McDonald's email of July 30, 2015, the Board provided the petitioner with clear and unequivocal notice that failure to comply with the Standards and the communications protocol would have consequences, including the further restriction or denial of his representation of workers in proceedings before the Board.
- [182] Again, when the Board restricted Mr. Bradshaw's communications to contact only through Corporate Security, the respondent provided the petitioner with reasons for that decision on August 11 and August 13, 2015.
- [183] Mr. Bradshaw made representations to both the Board's Chief Executive Officer and the Senior Manager of Corporate Security concerning the second communications protocol and its impact upon his practice as a lay advocate.
- [184] The Board provided adequate disclosure of its reasons for imposing the communications protocols and the consequences for the petitioner in the event of their breach.
- [185] Mr. Bradshaw says the respondent breached its duty of procedural fairness by failing to provide him with the risk assessment or its update, and by failing to disclose the existence of the risk assessment until after the Board had imposed the 2 year ban on his representation of injured workers.

- [186] In its decision of November 23, 2015, the Board referred to the petitioner's repeated breaches of the Standards and the communications protocol. The Board also stated that Mr. Bradshaw's "conduct and interactions with staff pose a risk that can no longer be tolerated", but said nothing about the risk assessment conducted by Mr. Sheard.
- [187] When Mr. Shaw wrote to Mr. Bavis on January 4, 2016, he provided a further and more detailed explanation of the reasons for the Board's decision. His explanation included the following:
- WorkSafeBC has conducted a risk assessment regarding Mr. Bradshaw's behaviour and the conclusions from that risk assessment - combined with his continued disregard for the Standards - formed the basis for WorkSafeBC's decision to no longer recognize him as a lay advocate.
- [188] The Board had not previously disclosed the existence of the risk assessment.
- [189] The conclusions of the updated risk assessment, reproduced previously at para. 59 of these reasons, included assertions that Mr. Bradshaw had repeatedly expressed high levels of anger and aggression toward women in general; that woman employees of the Board were considered to be at particularly higher risk of violence; and that Mr. Bradshaw presented an escalating risk of workplace violence. The risk assessment formed one of two foundations for the respondent's decision to no longer recognize Mr. Bradshaw as a lay advocate. In these circumstances, fairness required the respondent provide the petitioner with a summary of the principal findings and conclusions of the risk assessment, and an opportunity to respond, either in person or in writing, before the Board rendered its decision.
- [190] Mr. Shaw also asserted in his letter of January 4, 2016 that Mr. Bradshaw had deliberately sent injured workers' personal and private medical information to "random WorkSafeBC fax numbers", in breach of the communications protocols, the Standards, and potentially, PIPA. The petitioner sent the fax in question to the Board's Claims and North Vancouver office fax numbers while the second communications protocol was in place. However, Mr. Bradshaw was afforded no opportunity to respond to the allegations that he had sent private personal and medical information of injured workers to "random" Board fax numbers, or that by doing so he had breached both Board policies and PIPA. The respondent should have afforded the petitioner the opportunity to respond to these allegations before the Board made its decision of November 23, 2015.
- [191] The Board breached its duty of procedural fairness by failing to disclose both the principal findings and conclusions of the risk assessment, and the allegation that the petitioner had breached the Standards and PIPA through fax transmissions of injured workers' private information. The Board also breached the applicable requirements of procedural fairness by not affording the petitioner an opportunity to respond to those allegations before imposing the ban.

REMEDY

- [192] The petitioner seeks an order quashing the Board's decision, without a remittal for reconsideration.
- [193] The general rule is where a party is successful in judicial review, the court will order a reconsideration before the administrative decision-maker, unless there are exceptional circumstances indicating the court should make the decision the legislation has assigned to the tribunal: *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49 at para. 51; *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at paras. 71-72.
- [194] Here, the Board disclosed some, but not all of the bases for its decision to impose the ban. Mr. Bradshaw had the opportunity to respond to those allegations, and did so. The respondent was alive to its duty to provide reasons for restricting the petitioner's communications with Board staff, and for no longer recognizing Mr. Bradshaw as a lay advocate. However, the Board fell short of fulfilling its duty of procedural fairness, particularly by failing to give the petitioner the opportunity to respond to the principal findings and conclusions of the risk assessment. Here, the breach of procedural fairness is not so serious as to render unlikely a fair reconsideration process. The petitioner has not shown a reasonable apprehension of bias, or other exceptional circumstances warranting a departure from the general rule that the tribunal should be allowed another chance to decide the matter on the merits.
- [195] Accordingly, I have determined that the appropriate remedy in this case is to set aside the decision and remit the matter to the Board for reconsideration in keeping with these reasons under s. 5 of the JRPA.

COSTS

- [196] Generally, costs are not awarded for or against an administrative tribunal in judicial review proceedings. In *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244, Mr. Justice Donald, writing for the court, held at para. 2 that if the decision is set aside, costs should not be awarded against the tribunal unless:
- (a) the tribunal exhibited misconduct or perversity in the proceedings before it; or
 - (b) made submissions on the merits of the judicial review application and did not limit itself to jurisdiction.
- [197] In *18320 Holdings Inc. v. StudentAid BC*, 2014 BCCA 494 at para 58, the court explained that *Lang* does not authorize an award of costs against a tribunal which, of necessity, argues the merits when there is no one else to argue the other side.

- [198] Here, the Board made submissions concerning the record, its statutory authority, and the applicable standards of review. In addition, the Board opposed the petitioner's standing and argued that its decision not only met the standard of reasonableness, but was correct. While the Board made some submissions that addressed the merits of the case, it did so out of necessity, in the absence of any other party to make those submissions.
- [199] The Board's conduct of the proceedings under review was not biased, did not give rise to an apprehension of bias, and was not otherwise perverse.
- [200] However, a breach of procedural fairness can by itself provide the ground for an award of costs: 18320 Holdings Inc. at para. 62. The closer the case is to one of a significant breach of the rules of procedural fairness, the stronger the case for a costs award: 18320 Holdings Inc. at para. 69.
- [201] The Court's discretion to award costs must be exercised judicially, having regard to the particular circumstances of the case before it. Here, the Board endeavored but failed to provide a process which offered the requisite level of procedural protection. That failure was not the product of bad faith or bias. Taking all of these factors into account, I decline to award costs against the Board. Each party will bear their own costs.

"PEARLMAN J."

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