

CANADA / JUDGMENT

British Columbia Securities Commission v. Burke

2008 BCSC 1244

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1244 British Columbia Securities Commission v. Burke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia Securities Commission v. Burke,

2008 BCSC 1244

Date: 20080916

Docket: S074546

Registry: Vancouver

Re: Sections 2, 3 and 7 of the Judicial Review

Procedure Act, RSBC 1996, c. 241 and the Decisions

of the Employment Standards Tribunal dated

May 4, 2007 and December 17, 2007

Between:

British Columbia Securities Commission

Petitioner

And

Mathew Burke

Respondent

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the petitioner

D.J. Jordan, Q.C.

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Counsel for the Employment Standards Tribunal

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Date and Place of Trial/Hearing:

April 17 - 18, 2008

Vancouver, B.C.

INTRODUCTION

- [1] In this petition for judicial review the petitioner, the British Columbia Securities Commission ("BCSC"), seeks the following relief:
1. An Order quashing the Reconsideration Decision of the Employment Standards Tribunal dated December 17, 2007;
 2. An Order quashing the Original Decision of the Employment Standards Tribunal dated May 4, 2007 confirming the Determination of the Delegate of the Director of Employment Standards dated January 26, 2007;
 3. An Order quashing the Determination of the Delegate dated January 26, 2007;
 4. A declaration regarding the correct interpretation of section 51(1)(c) of the Employment Standards Act, and in particular, whether parental leave is required to be completed within the 52 week period following the birth of the child; and
 5. Costs.
- [2] The relief sought arises from a determination made by a delegate of the Director of Employment Standards, ("the delegate's determination") under the Employment Standards Act, R.S.B.C. 1996, c. 113 ("ESA"), which was confirmed on appeal to the Employment Standards Tribunal ("the Tribunal") brought pursuant to s. 112 of the ESA, and further confirmed by a reconsideration panel of the Tribunal engaged by the application of the petitioner under s. 116 of the ESA.

- [3] The delegate's determination, made June 26, 2007, followed a complaint made by the respondent, Mathew Burke, an employee of BCSC, as a result of BCSC's refusal to allow him unpaid parental leave for 37 consecutive weeks pursuant to s. 51 of the ESA, following the birth of his child on May 23, 2006.
- [4] The leave sought by Mr. Burke was to commence within 12 months of his child's birth, but would have ended after the child's first birthday. BCSC took the position that s. 51 of the ESA provided that he was entitled to 37 consecutive weeks of parental leave, provided it began and ended within the 12 months following his child's birth.
- [5] The determination of the Director's delegate was that s. 51 did not provide that the 37 consecutive weeks had to begin and end within 12 months after the child's birth. It only had to begin within that time frame.
- [6] The petitioner's appeal to the Tribunal was unsuccessful. The Tribunal issued a decision ("the Original Decision") dated May 4, 2007, upholding the delegate's determination. The petitioner's application for a reconsideration of the Original Decision was also unsuccessful. By a decision dated December 17, 2007 (the "Reconsideration Decision") the Tribunal confirmed the Original Decision upholding the determination.
- [7] On this petition, the petitioner has raised issues not only with the substantive merit of the decisions under review, but also with the fairness of the process which led to them.
- [8] The substantive issue is governed by the legislative framework established in ss. 50 and 51 of the ESA, which read as follows:

50(1) A pregnant employee who requests leave under this section is entitled to up to 17 consecutive weeks of unpaid leave

(a) beginning

(i) no earlier than 11 weeks before the expected birth date, and

(ii) no later than the actual birth date, and

(b) ending

(i) no earlier than 6 weeks after the actual birth date, unless the employee requests a shorter period, and

(ii) no later than 17 weeks after the actual birth date.

(2) An employee who requests leave under this section after the birth of a child or the termination of a pregnancy is entitled to up to 6 consecutive weeks of unpaid leave beginning on the date of the birth or of the termination of the pregnancy.

- (3) An employee is entitled to up to 6 additional consecutive weeks of unpaid leave if, for reasons related to the birth or the termination of the pregnancy, she is unable to return to work when her leave ends under subsection (1) or (2).
- (4) A request for leave must
 - (a) be given in writing to the employer,
 - (b) if the request is made during the pregnancy, be given to the employer at least 4 weeks before the day the employee proposes to begin leave, and
 - (c) if required by the employer, be accompanied by a medical practitioner's certificate stating the expected or actual birth date or the date the pregnancy terminated or stating the reasons for requesting additional leave under subsection (3).
- (5) A request for a shorter period under subsection (1) (b) (i) must
 - (a) be given in writing to the employer at least one week before the date the employee proposes to return to work, and
 - (b) if required by the employer, be accompanied by a medical practitioner's certificate stating the employee is able to resume work.

51(1) An employee who requests parental leave under this section is entitled to,

- (a) for a birth mother who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive weeks of unpaid leave beginning immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,
 - (b) for a birth mother who does not take leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,
 - (c) for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event, and
 - (d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.
- (2) If the child has a physical, psychological or emotional condition requiring an additional period of parental care, the employee is entitled to up to an additional 5 consecutive weeks of unpaid leave, beginning immediately after the end of the leave taken under subsection (1).
- (3) A request for leave must
 - (a) be given in writing to the employer,

- (b) if the request is for leave under subsection (1) (a), (b) or (c), be given to the employer at least 4 weeks before the employee proposes to begin leave, and
- (c) if required by the employer, be accompanied by a medical practitioner's certificate or other evidence of the employee's entitlement to leave.
- (4) An employee's combined entitlement to leave under section 50 and this section is limited to 52 weeks plus any additional leave the employee is entitled to under section 50 (3) or subsection (2) of this section.
- [9] The question before the Director's delegate for determination was as to the meaning and effect of s. 51(1)(c). She framed the issue thus:

In particular, the issue is whether a birth father's parental leave must be completed within 52 weeks after the child's birth, or whether the leave only needs to begin within 52 weeks after the child's birth. [Emphasis in original]

- [10] The fairness issue raised by the petitioner relates to the nature and extent of the participation by the Director's delegate in its appeal to the Tribunal, and to the Director's participation in the proceedings before the reconsideration panel.
- [11] To some extent, the petitioner's submissions on the fairness issue involve consideration of the provisions of the ESA concerning the role of the Director and the nature of the appellate process. The sections of the Act said to be relevant and relating to the Director's role are as follows:

74(1) An employee, former employee or other person may complain to the director that a person has contravened

- (a) a requirement of Parts 2 to 8 of this Act, or
- (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
- (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

(3.1) Subsection (3) applies to an employee whose employment is terminated following a temporary layoff and, for that purpose, the last day of the temporary layoff is deemed to be the last day of employment referred to in subsection (3).

- (4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.

76(1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

- (2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.
- (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
 - (a) the complaint is not made within the time limit specified in section 74 (3) or (4),
 - (b) this Act does not apply to the complaint,
 - (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
 - (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,
 - (e) there is not enough evidence to prove the complaint,
 - (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,
 - (g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,
 - (h) the dispute that caused the complaint may be dealt with under section 3 (7), or
 - (i) the dispute that caused the complaint is resolved.

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

79(1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:

- (a) comply with the requirement;

85(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

- (a) enter during regular working hours any place, including any means of conveyance or transport, where
 - (i) work is or has been done or started by employees,
 - (ii) an employer carries on business or stores assets relating to that business,
 - (iii) a record required for the purposes of this Act is kept, or
 - (iv) anything to which this Act applies is taking place or has taken place;
- (b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;

- (c) inspect any records that may be relevant to an investigation under this Part;
 - (d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;
 - (e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;
 - (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).
- (2) Despite subsection (1), the director may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120.

86(1) Subject to subsection (2), the director may vary or cancel a determination.

- (2) If a person appeals a determination that the director intends to vary or cancel under subsection (1), the director must vary or cancel the determination within 30 days of the date that a copy of the appeal request was received by the director.
- .

29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, the following monetary penalties are prescribed for the purposes of section 98 (1) of the Act:

- (a) a fine of \$500 if the director determines that a person has contravened a requirement under the Act, unless paragraph (b) or (c) applies;
- (b) a fine of \$2,500 if
 - (i) after the date of a determination under paragraph (a), the director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (a), and
 - (ii) that subsequent contravention occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination under paragraph (a),unless paragraph (c) applies;
- (c) a fine of \$10,000 if
 - (i) after the date of a determination under paragraph (b), the director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (b), and

(ii) that subsequent contravention occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination under paragraph (b).

[12] The pertinent sections of the ESA relating to appeals are as follows:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
 - (b) deliver a copy of the request under paragraph (a) (i) to the director.
- (5) On receiving a copy of the request under subsection (2) (b) or amended request under subsection (4) (b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

116(1) On application under subsection (2) or on its own motion, the tribunal may

- (a) reconsider any order or decision of the tribunal, and
- (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may be made only once with respect to the same order or decision.

[13] It was common ground between the parties that by virtue of s. 103 of the ESA, this review is subject to s. 58 of the Administrative Tribunals Act, R.S.B.C. 2004 c. 45 ("ATA"), which reads as follows:

58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)

- (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
- (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.
- [14] It was an issue between the parties whether the standard of review relating to the substantive merits (findings of fact or law) of the Tribunal's decisions under review, remained one of patent unreasonableness as provided for in s. 58(2)(a), or whether, in the wake of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("Dunsmuir"), it has evolved into one of reasonableness.
- [15] It was common ground between the parties that the standard of review for discretionary decisions remains patent unreasonableness, because that term has been statutorily defined in s. 58(3) and hence could not be varied by a change in the common law. However, that section is not implicated in this review.

THE RECORD

- [16] The record before the Tribunal consisted of schedules (a) to (k) of the amended petition and comprised:
- (a) the January 26, 2007 Director's delegate's determination;
 - (b) the petitioner's appeal pursuant to s. 112 of the ESA dated February 16, 2007 seeking cancellation of the determination and a determination on the proper interpretation of s. 51;
 - (c) the invitation of the Tribunal to the respondent, Mathew Burke, and the Director, for submissions;
 - (d) the Director's written submissions in response to the petitioner's appeal dated March 13, 2007;

- (e) the Tribunal's invitation to the petitioner to reply to the Director's March 13, 2007 response submissions;
- (f) the petitioner's final reply submissions dated March 30, 2007 submitting that the Director's response submission has "exceeded the scope of her permissible participation in an appeal before the Tribunal" and that it "should be disregarded in its entirety";
- (g) the Tribunal's Original Decision dated May 4, 2007, confirming the determination;
- (h) the petitioner's application for a reconsideration under s. 116 of the ESA alleging that: the Tribunal breached the rules of natural justice and procedural fairness by failing to find that the Director had exceeded her permissible participation in the appeal by allowing the delegate to act as an advocate for Mr. Burke, by failing to disregard the submissions of the delegate made in excess of her permissible participation and the bounds of neutrality; and alleging substantive error in interpreting s. 51. The relief sought was to quash the original decision and to render a decision as to the correct interpretation of the ESA.
- (i) the Director's August 2nd, 2007 reply submissions to the petitioner's application for reconsideration;
- (j) the petitioner's final reply submissions August 2, 2007;
- (k) the Tribunal's Reconsideration Decision dated December 17, 2007 addressing both the ground of "the proper role for the Director before the Tribunal" and "the statutory interpretation issue."

THE FAIRNESS ISSUE - THE PETITIONER'S POSITION

A. Background: The Delegate and Tribunal Decisions

(i) The Delegate's Decision

- [17] The genesis of the fairness issue lies in the Director's delegate's disposition of Mr. Burke's complaint by resorting to grammatical principles that were neither raised nor argued before her, and by her asserted reliance on "societal trends" that were not supported by evidence, in interpreting s. 51(1)(c). The delegate rejected the petitioner's position that s. 51(1)(c) should be interpreted in light of the "presumption of consistent expression" to conclude that since the legislature used different words in 51(1)(c) than it did in 51(1)(d), it intended different meanings. Instead, she subjected the section to "a contextual and grammatical analysis" reasoning, in part, as follows:

Delving into basic grammatical principles, a few relevant points can be made. First, I note that a preposition always has an object, which is usually a noun or a pronoun. The preposition links and relates its object to some other word in the sentence. The preposition may follow rather than precede its object, and it may be placed at the end of the sentence. The preposition with its object forms a prepositional phrase.

Second, I note the significance of the term "and" within Section 51(1)(c). The word "and" is a conjunction. Conjunctions function as connectors of words, phrases or clauses. Also, the coordinating conjunction "and" connects sentence elements of equal grammatical rank. One of the rules of grammar is parallelism. To create a parallel structure, one must balance nouns with nouns, prepositional phrases with prepositional phrases, main clauses with main clauses, and so on.

Similarly, the preposition ("within") relates its object (52 weeks) to some other word in the sentence. In reading Section 51(1)(c) from a grammatical standpoint, the inclination is to seek parallel or grammatically equal sentence elements. This parallelism or balance exists if I read Section 51(1)(c) as stating: "37 consecutive weeks of unpaid leave beginning after the child's birth and [beginning] within 52 weeks after that event". The conjunction "and" in this way successfully connects sentence elements of equal grammatical rank. Conversely, in my view, the employer's position either requires me to read in the word "ending" in order to create parallelism (i.e. "37 consecutive weeks of unpaid leave beginning after the child's birth and [ending] within 52 weeks after that event") or to accept a violation of the rule of parallelism by finding that the second prepositional phrase ("within 52 weeks") modifies "the parental leave" as opposed to the verb "beginning".

Therefore, I find that contrary to the employer's position, the complainant's interpretation of Section 51(1)(c) does not in fact call for one to read out the phrase, "and within 52 weeks after that event". Rather, applying the rule of parallelism and analyzing the use of the preposition "within" in the context of surrounding provisions, I find the logical interpretation that flows from Section 51(1)(c) is as below:

For a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and beginning within 52 weeks after that event.

Alternatively, I find that to create a parallel structure, the employer's interpretation calls for one to read in the word "concluding" or "ending" as below:

For a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and ending within 52 weeks after that event.

In conclusion, I find the first interpretation to be more grammatically sound. The employer's options, in my view, call for me to read in the word "concluding" or "ending" before the phrase "within 52 weeks after the event". Alternatively, the employer's options necessitate finding that within the sentence, the prepositional phrase ("within 52 weeks after that event") modifies or is linked to the noun ("parental leave") as opposed to modifying the verb ("beginning"). I find it more logical that the prepositional phrase modifies the verb, especially considering the placement of the conjunction, ("and") in the sentence as well as the use of the preposition, ("within") in the surrounding provision.

[18] The delegate found alternatively, that the complainant's version of the provision was preferable by concluding:

It would be an absurd result to conclude in enacting s. 51 of the Act the legislature intended to create a parental leave scheme that resulted in unequal treatment among various forms of families.

[19] In coming to that conclusion, she reasoned as follows:

I consider it reasonable, in light of the increasing societal recognition of different family forms to similarly conclude that parental leave is a fundamental right of every parent in the province, whether biological or adoptive parents.

[20] In finding the asserted distinction in the timing of the 37 consecutive weeks of unpaid leave between birth parents and adoptive parents in s. 51(1)(c) and 51(1)(d) to be "irrational", the delegate concluded:

I find this amounts to an absurd interpretation because there is no rational connection between the consequence and the key determining factor (i.e. no rational connection between the fact that an individual became a parent through biological means versus through legal means).

[21] In the result, the Director found the petitioner to be in contravention of s. 54 of the ESA, fined it \$500 and ordered that it comply with the ESA as per the determination.

(ii) Appeal to the Tribunal

[22] In its appeal of the determination made by the Director's delegate, the petitioner relied on the same interpretive principle - the presumption of consistent expression - that the legislature intends two provisions to have the same effect when it uses identical wording - and its corollary - that when two provisions addressing the same subject matter use different wordings "the operative presumption is that the legislature did not intend them to have the same meaning or effect".

[23] The petitioner also argued before the Tribunal that the delegate failed to observe the rules of natural justice by relying on rules of grammar, which neither party had made submissions on or addressed, contending:

If it were the case that the Delegate were relying upon her own knowledge of the rules of grammar, it is respectfully submitted that these rules are not so "notorious" and in particular, the ones relied upon by the Delegate, as to entitle the Delegate to take judicial notice of them. The material relied upon by the Delegate does not relate to matters within the realm of common knowledge, nor are they matters which would arise from the specialized expertise of a person appointed as a Delegate.

[24] The petitioner also argued that the delegate failed to observe the rules of natural justice by relying on "the increasing societal recognition of different family forums" [sic] in coming to her conclusion as to the proper interpretation of s. 51(1)(c), when there was no evidence of that assertion before her.

[25] The petitioner submitted before the Tribunal as follows:

It is respectfully submitted that the real reason for the Delegate's conclusions are those articulated in her discussions under the heading "purpose and intention" and "consequential analysis". In summary form, it is clear that the Delegate simply assumed that her own preference that the Legislature not treat biological and adoptive parents differently be attributed to the Legislature. The Delegate concluded that it was reasonable to presume that the Legislature intended to grant the same entitlements to biological and adoptive parents and, further, it was irrational for the Legislature to draw distinction between them.

- [26] The petitioner also contended that, although in her determination the delegate eschewed reliance on the Interpretive Guidelines Manual ("IGM") of the Employment Standards Branch, which she interpreted as asserting that parental leave need not conclude within 52 weeks of the child's birth, that she preferred the interpretation of the IGM "from the outset." It is not, in fact, clear to me that the IGM policy interpretation as quoted by the Director's delegate in her determination says anything about whether a birth parent's leave can conclude beyond 52 weeks after the child's birth or not.
- [27] The Director's delegate's written response to the petitioner's submission to the Tribunal dated March 13th, 2007 included a submission on a ground of appeal - "reasonable apprehension of bias" - which had not been advanced by the petitioner. In the context of that submission, the Director's delegate responded to the petitioner's argument as to her "preference" for the alleged IGM interpretation of s. 51(1)(c).
- [28] The Director's delegate also addressed the petitioner's assertion that she committed errors of law and breached the principles of natural justice in her response.
- [29] By its reply dated March 30, 2007, the petitioner contended that the Director's delegate exceeded the scope of her permissible participation in an appeal before the Tribunal and contended her submission should be disregarded in its entirety.
- [30] The petitioner submitted that although the Director's delegate was entitled to be a party to the appeal, "the aggressive and adversarial nature of her submissions" was reflected in her response to a ground of appeal not raised by the petitioner, the fact that the delegate responded to the complaints of breach of the principles of natural justice, and that "throughout her submission, the Director's delegate [sought] to augment her written determination by providing new reasons and justifications for her decision which [were] not contained in the written determination itself." The petitioner sought to characterize the Director's delegate's additional arguments as creating a "receding horizon" and as "examples of the fervour and combativeness" of her reply.
- [31] In her written submissions before me, counsel for the Tribunal summarized the Tribunal's original decision dated May 4, 2007 as follows:

Schedule "G" is the Tribunal's Original Decision, dated May 4, 2007. After summarizing the Determination and the Petitioner's and Director's submissions in respect of it on appeal, the Original Decision finds that there are three issues raised by the appeal: the proper role of the Director on appeal; whether the Director's Delegate erred in law in her interpretation of s. 51(1)(c) of the Act; and whether the Delegate failed to observe principles of natural justice.

With respect to the first issue, the proper role of the Director on appeal, the Original Decision begins by briefly summarizing the position of the Petitioner on this issue. The Original Decision then notes that the "leading cases on the proper role of the Director on appeal" are BWI Business World, BC EST#D050/96 ("BWI") and D. Hall & Associates Ltd., BC EST#D354/99 ("D. Hall"). After a brief discussion of the principles enunciated in these two decisions, the Original Decision states that, in her view, these principles have not been changed by the fact that the Director now holds hearings into some complaints rather than investigating them: "The delegate has a role on appeals, although that role is limited to an explanation of the decision rather than advocating on behalf of one party or another".

The Original Decision then concludes that, in this case the Delegate's submissions "come close to the line of proper participation, but do not cross it". The Original Decision adds that, in any case, the role the Director plays on appeal is "subsequent to, and separate from, an adjudicative function". Accordingly, the Original Decision finds, the issue of "natural justice" does not arise in this part of the process.

The Original Decision then turns to the second issue, whether the Director's Delegate erred in law in her interpretation of s. 51(1)(c) of the Act. The Original Decision finds that the interpretation is not "untenable or unreasonable", adding: "I am unable to conclude that the delegate erred in law in applying a variety of statutory interpretation principles in arriving at her conclusion".

On the third issue, whether the Delegate failed to observe principles of natural justice in making the Determination, the Original Decision concludes that the Delegate did not fail to observe those principles as alleged by the Petitioner, and that, even if there was "a deficiency, that is, even if B.C.S.C.'s inability to make submissions on interpretive principles considered by the delegate was a failure to observe the principles of natural justice, such a failure would be cured by the present appeal proceedings, where the parties had an opportunity to make full submissions".

Having rejected all the grounds for appeal, the Original Decision confirms the Determination.

(iii) Tribunal's Reconsideration Decision

[32] In its submissions to the reconsideration panel dated July 16, 2007, counsel for the commission sought:

A reconstructed panel of the Tribunal reconsider the (original) decision, quash the decision and provide a declaration regarding the correct interpretation of s. 51(1)(c) of the Act, and in particular, whether parental leave is required to be completed within the 52 week period following the birth of the child.

- [33] In the Director's reply submissions dated August 2, 2007, counsel for the Director opposed the petitioner's application for reconsideration and, in the alternative, submitted there was no error of law in the original decision and no breach of natural justice by the original Tribunal in considering the Director's delegate's submissions on appeal. Counsel for the Director went on to argue more fully the issue of the proper interpretation of s. 51(1)(c), characterizing the petitioner's position as "never providing a reasoned or logical argument for the legislature wanting to discriminate against birth parents as opposed to adoptive parents by granting them a shorter period of parental leave." (In fact, it is the time frame within which the leave is to be taken that is said to be shorter, not the leave itself).
- [34] On August 27th, 2007 the petitioner made its final reply submissions in response to the Director's reply submissions. In those submissions, the petitioner confirmed that it had raised the issue of reasonable apprehension of bias against the Director's delegate on the basis of her "patently adversarial, fervent and combative" appeal submission to the original Tribunal, and sought that her submissions to the original Tribunal be disregarded in their entirety.
- [35] The petitioner emphasized its contention that "logic and common sense compel the conclusion that when two different expressions relating to limitations on entitlement for leaves are used within the same single section of a piece of legislation, the context requires the conclusion they were intended to mean different things."
- [36] The petitioner challenged the Director's submissions that characterized the asserted distinction between birth parents and adoptive parents as "discrimination", submitting that there had to be an evidentiary record to support an argument on the legislative intent behind the subsections. The petitioner also noted that the Director's submissions did not address the asserted error of the original decision in not applying a correctness standard to the delegate's determination.
- [37] In her written submissions, counsel for the Tribunal summarized the reconsideration panel's decision rendered December 17, 2007. Insofar as the decision relates to the fairness issue, the summary reads as follows:

Schedule "K" is the Tribunal's Reconsideration Decision, dated December 17, 2007. The Reconsideration Decision addresses both grounds for reconsideration raised by the Petitioner, the first under the heading "The Proper Role of the Director before the Tribunal", and the second under the heading "The Statutory Interpretation Issue".

With respect to the first issue, the Reconsideration decision begins by noting the position and arguments of the Petitioner, as well as the position and arguments of the Director in response. The Reconsideration Decision then describes the nature and purpose of the Act, and how they are "reflected in its appeal process". After noting that complaints are often made by laypersons, and some comments of the Supreme Court of Canada regarding the "unique nature of employment standards matters and legislation", the Reconsideration Decision turns to addressing "each of the [Petitioner's] arguments in respect of the proper scope of participation by the Director on appeal before the Tribunal".

With respect to the argument that the Director should not be allowed to make submissions on natural justice issues to the Tribunal, the Reconsideration decision comments that the Court's statements of law in *Northwestern Utilities* (regarding the standing of administrative tribunals before the courts), "must be applied contextually and with a view to the Court's specific comments on the particular nature of employment standards legislation and matters in *Danyluk*, *Rizzo & Rizzo Shoes*, and *Machtinger*, as noted above".

The Reconsideration Decision then states that the Act's "overarching purpose", which "includes providing fair and efficient procedures for resolving disputes over its interpretation and application", must be read "in light of the operational reality that most employers and employees involved in the appeal process are unrepresented and, without the Director's involvement, the Tribunal would be placed at a significant disadvantage in deciding many appeals".

The Reconsideration Decision then notes that, in the present case, the individual employee complaint, Mathew Burke, having received a favourable ruling from the Director, did not appear or make submissions before the Tribunal on appeal or reconsideration. The Reconsideration Decision states that this is "readily understandable", given that Burke is a layperson who had received from the Director the outcome he sought, and presumably he would have little further interest in the legal issues raised on appeal.

The Reconsideration Decision then states that it finds s. 81 of the Act, by which the Director is only required to give reasons for determinations under the Act on request, to be relevant to the issue of the Director's role on appeal. The Reconsideration Decision finds that, given the lack of requirement to give reasons for determinations unless requested, it is appropriate to allow the Director to provide the reasons for determinations on appeal to the Tribunal, or to "explain and defend his thinking and position" on appeal.

The Reconsideration Decision finds the appeal and reconsideration provisions of the Act (ss. 112 and 116) support this view of the role the Director may take on appeal and reconsideration before the Tribunal. The Reconsideration Decision further finds s. 110 of the Act supports its view:

Section 110 of the Act contains the Tribunal's privative clause. The purpose of the privative clause is to accord Tribunal decisions a level of finality. This finality engenders a special responsibility for the Tribunal to ensure that it has the assistance it needs to make its decisions as sound as they can be. Part of this responsibility is ensuring its process is designed and functions to allow submissions from all parties which are as comprehensive and complete as they can be.

The Reconsideration Decision then states that, as a result, "there are sound practical and policy reasons reflected in the Act for not unduly limiting the role of the Director in an appeal". The Reconsideration Decision then notes the "guiding principles" governing the status and role of the Director in appeal and reconsideration proceedings before the Tribunal were developed by the Tribunal in BWI. The Reconsideration Decision further notes that the BWI principles have been cited with approval in many Tribunal decisions and have received judicial approval.

The Reconsideration Decision finds that the 2002 amendments to the Act did not affect the "underlying rationale, grounded in the purpose and objectives of the Act, for the role allowed for the Director in proceedings before the Tribunal on appeal and reconsideration". The Reconsideration decision continues:

Those reasons include the matters identified above: the typical nature of the proceedings and litigants before both the Director and the Tribunal; the need to ensure that the Tribunal receives the perspective of the Director, who is primarily responsible for the administration of the Act and initially responsible for its interpretation, on the issue being addressed on appeal and reconsideration; and the objective of timely, efficient, and final resolution of complaints made under the Act.

The Reconsideration Decision goes on to state that the "above rationale informs the Tribunal's policy to allow the Director to make complete submissions on all aspects of an appeal, including natural justice". The reconsideration Decision further states that "[o]therwise, as is the case in the present matter, the Tribunal would often be left without any further information or submissions beyond that provided by the appellant. In our view, that would be an untenable situation in terms of the provisions, context, and purposes of the legislation".

The Reconsideration Decision then states that "[c]onsequently, we do not accept the [Petitioner's] position that the Director ought not to be allowed to make submissions on natural justice issues raised on appeal under the Act". The Reconsideration Decision goes on to say that "the Director's role is not to be the statutory agent or advocate of the employee, and the Director must appreciate that there can be a fine line between explaining the basis for a decision, or the process by which it was arrived at, and advocating on behalf of one of the parties".

With respect to whether the Director "crossed the line" in its submissions to the Tribunal's original panel, the Reconsideration Decision notes that the original panel concluded that the Director's response submissions came close to the line but did not cross it, and stated that "[i]n general, we agree". The Reconsideration Decision then goes on to consider "in greater detail" two specific aspects of the Director's submissions to the original panel complained of by the Petitioner: "the Delegate's decision to raise and respond to the issue of a reasonable apprehension

of bias, and the Delegate's submissions in support of the statutory interpretation given in her Determination".

With respect to the Delegate's reasonable apprehension of bias submission, the Reconsideration Decision finds that, while the submission was "inappropriate" in the circumstances, it did not render the Director's submissions as a whole improper. The Reconsideration Decision states that it therefore rejects the Petitioner's submission that the original panel breached natural justice by considering the Director's submissions a whole. The Reconsideration decision concludes on this issue:

For all of the above reasons, we find that while it was an error and improper for the Delegate to raise and respond to what she perceived to be an allegation of bias by the [Petitioner], that error did not render the entirety of the Delegate's submissions improper. The error was an isolated one and the rest of the Delegate's submissions were proper. Accordingly, we find the original panel did not breach natural justice in considering those submissions.

We have focused on the issue of the proper role of the Director raised by the [Petitioner] not because we find that the Director's submissions in this case have caused a breach of natural justice by the original panel of the Tribunal, but rather because we recognize that the [Petitioner] has raised legitimate concerns about whether the Director "crossed the line" in making these submissions.

With respect to what the Reconsideration Decision terms the Petitioner's "receding horizon" argument, the Reconsideration Decision begins by noting that it has accepted the need under the Act for the Director to play "a significant role" in respect to the appeal of a determination to the Tribunal. The Reconsideration then notes that there are some "limitations" on that role: "[i]t is important, for instance, that the administrative justice structure and processes under the Act be seen as neutral and fair". Accordingly, the Director "must not go beyond explanation of his Determination to advocacy for a party".

The Reconsideration Decision states that, with respect to the Petitioner's "receding horizon" argument, for the reasons it has already given, it finds that:

the Director should be given full status and scope to explain on appeal the Determination which has been rendered. That includes providing or even expanding upon reasons in support of the Determination. This is different from what occurs on judicial review or appeal of a decision in Court, but as we have explained, it is consistent with the context and needs of employment standards matters and the provisions and policies in the Act.

However, the Reconsideration Decision continues, once the Director has been given full status and scope to explain the Determination on appeal to the Tribunal, its role on reconsideration is more constrained:

In order to have timely, efficient and final decisions, which are perceived to be fair and balanced, the Director should generally not be adding further reasons or justifications for the Determination at the reconsideration level. Thus, beyond the first level of appeal to the Tribunal, we agree with the [Petitioner] that the Director generally should not be adding further reasons or justifications for the Determination at the reconsideration level.

The Reconsideration Decision finds that the Petitioner's "receding horizon" argument was directed at the submissions the Director made to the original panel on appeal. Given its finding that the Director should have broad scope to make submissions supporting its determination at the appeal level, the Reconsideration Decision does not accept the Petitioner's argument: "We find no breach of natural justice in the original panel's consideration of the Director's submissions explaining and expanding upon the reasons for the Determination".

The Reconsideration Decision then notes that the Director "has continued to give further reasons in support of his decision on the statutory interpretation issue in submissions to this panel", but finds that "most of the statutory interpretation arguments made by the Director before us on reconsideration are consistent with what we have set out here and are properly before us". Accordingly, the Reconsideration Decision dismisses the Petitioner's first ground for reconsideration on its merits.

The Reconsideration Decision confirms the Original Decision upholding the Determination of the Director's delegate that Mathew Burke was entitled to take parental leave, on giving appropriate notice, for 37 weeks commencing at any time within 52 weeks of the birth of his child.

B. The Petitioner's Position

- [38] In its submissions on the fairness issue, before me, the petitioner contends that the delegate "exceeded the scope of her reasonable permissible participation" in the original appeal before the Tribunal, compounding her failure to observe the principles of natural justice in making her original determination through the "aggressive and adversarial nature" of her submissions and by making submissions on the issue of natural justice.
- [39] The petitioner cites *Re: D. Hall & Associates Ltd.*, [1999] B.C.E.S.T. No. 315 (QL) ("D. Hall"), in which the Tribunal held a program advisor's submissions resisting an appeal from a determination was too vigorously adversarial in parts, and did not distinguish between issues on which the Director could present her position forcefully and those where it was doubtful that the Director could present her position at all.
- [40] The petitioner extracted three principles from *D. Hall*, and sets them out in his written submissions thus:
- (a) the first and overriding principle is that the Director is and must remain a statutorily neutral party.

- (b) The Director's participation is, of necessity, a limited participation. It is limited to explaining the underlying basis for the determination and to show that the determination was arrived at after a full and fair consideration for the evidence and submissions of both the employer and the employee. The Director must not act as an advocate for the party seeking to uphold the determination. The perception of either of the parties as to the effect of the Director's participation is not the governing concern. What is governing is whether, on a review of the manner and content of the Director's submissions or participation, the Director has in fact stepped over the bound of neutrality.
- (c) A submission which is fervent or combative will likely not meet the standard of the neutrality expected by the Tribunal.
- [41] The petitioner contended, on the basis of *D. Hall, supra, Quintette Coal Ltd. v. British Columbia (Assessment Appeal Board)* (1984), 54 B.C.L.R. 359 (B.C.S.C.); and *British Columbia (Securities Commission) v. Pacific International Securities Inc.*, [2002] BCCA 421, 171 B.C.A.C. 86, ("*Pacific International Securities*") that the Director's participation in proceedings before the Tribunal ought not to exceed the permissible scope of participation by administrative tribunals on an application for judicial review, as outlined by the Supreme Court of Canada in *Canadian Assn. of Industrial Mechanical and Allied Workers, Local 14 v. Pacar of Canada Ltd.*, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437 ("*Paccar*") and *Northwestern Utilities Ltd. v. Edmonton (City of)*, [1979] 1 S.C.R. 684, 89 D.L.R. (301) 161 ("*Northwestern Utilities*"), in which Estey J. noted at 710, in the context of allegations the Tribunal at issue failed to adhere to the rules of natural justice, as follows:

In such an issue, when it is joined by a party to proceedings before the tribunal in a review process, it is the tribunal that finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

- [42] The petitioner submits that the observations in *Northwestern Utilities* and other decisions to the same effect are particularly applicable to the delegate's March 13th, 2007 submission to the original Tribunal, in which the delegate wrongly characterized and responded to the petitioner's submissions to the original Tribunal as alleging "a reasonable apprehension of bias." The petitioner also contends that, in the delegate's March 13, 2007 submissions, the delegate augmented her reasons "by reference to a good number of cases and interpretive principles, not adverted to in the determination" that emphasized "the fervour and combativeness of her reply."
- [43] The petitioner submits that the reconsideration panel's conclusion that the Director may make complete submissions on all aspects of an appeal including natural justice, falls outside the proper scope of a Tribunal's participation in appeals or reviews of its determinations, as contemplated by the relevant case law. Counsel for the petitioner argues by analogy that the Director's participation before the reconsideration panel should attract similar disapproval, and justifies quashing the reconsideration decision on the grounds of

breach of natural justice.

- [44] The petitioner's submission is thus predicated on the proposition that the Director's delegate significantly over-reached a mandate of neutrality in her March 13, 2007 submissions in response to the petitioner's appeal submissions to the Tribunal. The petitioner argues that the delegate over-reached by augmenting the basis for her initial determination, and by responding to the petitioner's submissions to the Tribunal as though they advanced an argument of reasonable apprehension of bias when they did not. In the result, the petitioner contends, the Director's delegate went well beyond the scope of permissible participation in the appellate process, which required the Tribunal to disregard the delegate's reasons in its entirety, which it did not do, either in its Original Decision or in the Reconsideration Decision.
- [45] The essence of the petitioner's submission, with respect to the fairness aspect of the Tribunal decisions under review, is that the original panel's failure to find that the delegate exceeded her permissible participation and its failure to disregard the submissions said to be excessive constituted a breach of the rules of natural justice and procedural fairness, and that the reconsideration panel's failure to find an error in the original panel's decision and to overturn it similarly constitutes a breach of procedural fairness and of the rules of natural justice.
- [46] The petitioner submits that, in the result, the court ought to quash the Reconsideration Decision on the basis of its failure to act fairly.
- [47] The petitioner also submits that the reconsideration panel erred in finding that it was not improper for the director to provide further submissions to it on the statutory interpretation issue. The petitioner contends that, by denying a fair procedure through breaching the rules of natural justice and procedural fairness, the Tribunal, acting through the original panel and the reconsideration panel, acted outside its jurisdiction and its decisions should therefore be quashed.
- [48] Finally, the petitioner contends that the absence of procedural fairness implicit in both the original decision and the reconsideration decision renders those decisions void, without regard to what the decision would have been had the breach of a duty of procedural fairness not occurred. In that submission, the petitioner relied on *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 110 D.L.R. (3d) 311 ("Kane"); *Cardinal v. Director of Kent Institute*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44 ("Cardinal") at para. 23; and *Universite du Quebec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494 at para. 51 ("Larocque").

C. Discussion and Conclusion

- [49] It seems to me that there are critical distinctions between the authorities relied on by the petitioner (Kane, Cardinal and Larocque) as justification for quashing the reconsideration decision. In each of Kane, Cardinal and Larocque, it was the conduct of a party to the hearings subject to judicial review which was at issue; and, importantly, the breach of procedural fairness involved depriving the aggrieved parties of an opportunity to respond to or address a factual issue respecting the impugned conduct.
- [50] In Kane, the board was considering whether the conduct of a university professor justified a three month suspension and a full accounting and restitution of sums due the university, said to arise from his misconduct in using university computers for personal use. In Cardinal, at issue before the director was whether the alleged involvement of prisoners in a hostage taking incident justified their continued segregation in the prison's general population in the face of a contrary recommendation from the segregation review board. In Larocque, at issue before the arbitrator was whether the Université du Québec had terminated the contracts of two research assistants without necessary cause.
- [51] In Kane, the majority of the Court adopted the words of Harman L.J. in *Ridge v. Baldwin*, 1962 1 All ER 834 (C.A.) ("Ridge") to describe natural justice as "fair play in action." The court in Kane held at 1113 that:

In any particular case, the requirements of natural justice will depend on the circumstances of the case, the nature of the enquiry, the rules under which a tribunal is acting, the subject matter which is being dealt with, and so forth.

- [52] In Kane the court was dealing with a circumstance in which the university Board of Governors, before arriving at its decision to suspend the appellant, had acquired evidence from the president of the university to which the petitioner was not made privy and had no chance to respond.
- [53] The court noted that "a high standard of justice is required when the right to continue in one's profession or employment is at stake," and that the decision maker "must listen fairly to both sides, giving the parties to the controversy a fair opportunity 'for correcting or contradicting any relevant statement prejudicial to their views' ". The court also noted it was "a cardinal principle of our law" that the decision maker "must not hold private interviews with witnesses" as the party "must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them." (at 1113 - 1114).
- [54] Then, in a passage relied on by the petitioner in the present case, the court in Kane held at 1116 that:

The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given. We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons. (citations omitted)

[55] In *Cardinal*, the director was acting under s. 40 of the Penitentiary Service Regulations, C.R.C. 1978, c. 1251, in ordering the prisoners into segregation. Subsequently, in the face of a contrary recommendation by the Segregation Review Board, ("SRB") the director refused to release the prisoners without informing them of his reasons for so doing, and without giving them an opportunity to be heard as to whether he should act in accordance with the SRB recommendations. The court confirmed at para. 22 that the duty of procedural fairness was applicable to the director in such circumstances, and would include "the requirement of notice and hearing by the Director, where he does not intend to act in accordance with a recommendation by the Segregation Review Board for the release of an inmate from segregation"

[56] In responding to the suggestion at the British Columbia Court of Appeal that the Director's failure to make the requirement of notice and hearing did not result "in a substantial injustice," and that a hearing by him "would not serve any useful purpose," the court held at para. 23 that:

There is the question, suggested by the reasons for judgment of Nemetz C.J.B.C., whether the breach of the duty to act fairly in this case should be held not to have resulted in an excess or loss of jurisdiction and to have made the continuing segregation of the appellants unlawful because, having regard to the merits of the substantive issue, it did not result in a substantial injustice, or to use the words of Nemetz C.J.B.C., was not of "sufficient substance". Both Nemetz C.J.B.C. and Macdonald J.A. considered the substantive issue of whether the appellants should be released from segregation and appeared to conclude that the Director's reasons for refusing to follow the recommendation of the Segregation Review Board were reasonable and fair. It is a possible implication of their approach that they were of the view that given the Director's reasons for refusing to follow the recommendation of the Board a hearing by him of the appellants would not serve any useful purpose. Certainly a failure to afford a fair hearing, which is the very essence of the duty to act fairly, can never of itself be regarded as not of "sufficient substance" unless it be because of its [page 661] perceived effect on the result or, in other words, the actual prejudice caused by it. If this be a correct view of the implications of the approach of the majority of the British Columbia Court of Appeal to the issue of procedural fairness in this case, I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been

had there been a hearing.

- [57] In *Larocque*, where the arbitrator excluded evidence tendered by the university to demonstrate why the cause they cited for terminating the contracts of the research assistants justified the termination, the court relied on *Cardinal* in concluding that the application of the rules of natural justice "should not depend on speculation as to what the decision on the merits would have been, had the rights of the parties not been denied." In the result, it was found that the arbitrator's exclusion of evidence "infringed the rules of natural justice."
- [58] By contrast, in the case at bar, the ultimate decision at issue rested entirely upon an interpretation of s. 51(1)(c) and did not call for a controversial finding of fact or the exercise of discretion. Moreover, while the petitioner may have had to contend with an inappropriate submission by the Director's delegate before the original Tribunal and may have had to contend with the Director's submissions relating to both natural justice and substantive issues before the reconsideration panel, it could not be said that the petitioner was deprived of an opportunity to address or respond to any live issue before the decision maker in a manner engaging the reasoning in *Kane*, *Cardinal* or *Larocque*.
- [59] The issue, therefore, pursuant to s. 58(2)(b) of the ATA is "whether, in all the circumstances, the Tribunal acted fairly." In my view, the ultimate issue turns on whether the reconsideration panel acted fairly in the course of the proceedings before it.
- [60] In *Canadian Office and Professional Employees Union, Local 15 v. Telecommunications Workers' Union Pension Plan*, 2007 BCSC 1834, 145 C.L.R.B.R. (2d) 27 at para. 8694 ("*COPE*"), in considering whether under s. 58(2)(b) the Tribunal (in that case the Labour Relations Board) acted fairly, the court held:

Taking into account the choice of procedures made by the LRB, the strong privative clause giving it exclusive jurisdiction over the matters in question, and the availability of reconsideration for breach of natural justice, I conclude, as did Brine J. in *United Food and Commercial Workers, Local 1518*, that some degree of deference to the LRB is appropriate on questions of procedural fairness. To put it another way, the requirements of procedural fairness must be understood in context. Here, the context is that of a tribunal with exclusive jurisdiction under a privative clause, which sets its own procedures and which has provided in those procedures for reconsideration based on natural justice grounds.

- [61] In the present case, the ESA has a similarly strong privative clause (in s. 110), which gives the Tribunal exclusive jurisdiction over matters in issue, including the availability of an appeal and reconsideration for a breach of natural justice in the Director's determination. Moreover, since the Director clearly has a role to play in the internal appeal process and, indeed, can apply for reconsideration of a Tribunal decision under s. 116(2), it seems logical that the legislature contemplated his involvement in such issues at least at the reconsideration stage.

- [62] Those circumstances, when taken with the fact that the complainant was unrepresented at the hearing before the director, that he did not even participate before the original Tribunal or reconsideration panel, and that the issue involved was a pure question of law, provide the context for assessing whether the reconsideration panel met the requirements of procedural fairness in its disposition of the petitioner's application under s. 116(2).
- [63] I conclude that, although the Director's delegate's March 13, 2007 submissions to the original panel were, in part inappropriate and tinged with undue advocacy on behalf of a position (as opposed to a party), the process that unfolded thereafter does not justify the court's interference in the Tribunal's exercise of its jurisdiction to determine the nature and scope of a provision of the ESA.
- [64] I consider that the procedural unfairness identified by the petitioner in the present case is not analogous to what confronted the Supreme Court of Canada in the cases of Kane, Cardinal and Larocque. In the present case, in the hearing before the reconsideration panel, the petitioner was able to fully address all the issues of procedural fairness and all the substantive issues raised by the Director's delegate's decision and her submissions to the original Tribunal. I conclude that whatever procedural deficiencies may have beset the Director's delegate's original decision, or those which were implicated by her March 13, 2007 submission to the original panel, or which were perpetrated by the original panel's refusal to decline to consider her submissions, or to review her decision on a correctness basis, were cured by the reconsideration process.
- [65] In coming to that conclusion, I have regard for the decision of L. Smith J. in COPE, supra, in which in the context of allegations of want of procedural fairness she relied on *International Union of Operating Engineers, Local 882 v. Burnaby General Hospital Society* (1997), 46 B.C.L.R. (3d) 97, 100 B.C.A.C. 147 ("International Union of Operating Engineers"). In that case, what was at issue was "whether a Tribunal's failure to observe the rules of natural justice can be cured by a review panel's reconsideration under s. 141 of the Labour Relations Code, S.B.C. 1992, c. 82 ". The particular breach at issue was "the denial of the opportunity to make a particular argument to the board" which was "critical for the party affected by the breach." That application for leave for reconsideration of a decision of a panel "required consideration of the merits of the appeal, including whether any principle of natural justice has been breached."
- [66] Smith J. referred to and quoted from *International Union of Operating Engineers*, at para. 156 as follows:

The Court then recounted the details of the reconsideration application procedure that had been followed in the case, and concluded that the reconsideration had cured the procedural defects in the original application. It stated a paras. 32 - 34:

The reconsideration panel had the power, under section 141(7), to vary or cancel the decision of the original panel, or to remit the matter to the original panel for a further hearing, had it been persuaded by the appellant's submissions. While there is no absolute right of appeal under the Code, in applying for leave for reconsideration the appellant was required to (and did) fully set out its case. The reconsideration panel addressed the issues raised by the appellant. The factual basis of the appellant's argument was not in issue.

The failure of the reconsideration panel to recognize the breach of procedural fairness by the original panel does not necessarily lead to the conclusion that the breach was not cured.

The breach of procedural fairness by the original panel lay in deciding the case as it did without advising the parties that it might decide the case in accordance with its general approach to the IUOE bargaining units, without regard to the evidence of work history, and without inviting submissions in that regard. The appellant was able to make the very submissions it was denied the opportunity to make before the original panel, with full notice of the approach the Board had taken.

[67] Madam Justice Smith concluded in COPE, in para. 160 as follows:

The petitioner had and used the opportunity afforded by the reconsideration process to present arguments that it alleges it would have made in an oral hearing of the TWUPP application. Those arguments were considered by the Reconsideration Panel. I conclude that if there were any breaches of procedural fairness and natural justice, they were cured by the reconsideration process.

[68] Insofar as the petitioner here relies on the deficiencies of the process before the Director's delegate and the original Tribunal as a foundation for asserting breaches of procedural fairness or natural justice, I conclude that they were cured by the reconsideration process.

[69] As to the question of whether the Director's participation before the reconsideration panel constitutes a breach of the principles of natural justice, I conclude that issue must be viewed in a broader context than that advanced by the petitioner. The cases relied on by the petitioner as a foundation for asserting limitations on the participation of a Tribunal in appeals from its decision relate to Tribunals appearing before a court on a judicial review or statutory appeal to debate "as a protagonist" whether it has acted in accordance with the principles of procedural fairness or natural justice.

[70] In *Pacific International Securities*, supra, the principal case relied on by the petitioner, Smith J.A. noted for the court at para. 6 - 8 that:

It is now settled law that all administrative tribunals must provide procedural fairness: see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 at 623-24; *Moreau-Berube v. New Brunswick (Judicial Council)* (2002), 209 D.L.R. (4th) 1 at para. 75 (S.C.C.). However, administrative tribunals are the masters of their own procedures and, unlike courts, need not be shackled by all of the requirements of natural justice; rather, they are entitled to devise flexible

procedures adapted to their needs in order to "achieve a certain balance between the need for fairness, efficiency and predictability of outcome": *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685.

Thus, the duty of fairness is flexible and variable and will depend upon an appreciation of the context of the statute involved and the rights affected: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21 - 22. At paras. 23 - 27 of that decision, L'Heureux-Dube J. set out a non-exhaustive list of factors that are relevant to the determination of the level of procedural fairness required in particular cases. They include: (1) the nature of the decision and its underlying procedures, that is, the degree of similarity of the administrative process to the judicial process; (2) the role of the particular decision in relation to the nature of the statutory scheme; (3) the importance of the decision to the individuals affected by it; (4) the legitimate expectations of the person challenging the decision where expectations were created as to the procedure to be followed; and (5) the choice of procedure made by the tribunal, as well as its expertise and its institutional constraints.

It has been said that the more the administrative process resembles a judicial hearing, the more important it is to apply the rules of natural justice strictly: see, for example, *Knight*, supra, at 683. The procedure in question has some of the attributes of the judicial process and the appellants lay stress on them. However, the Act is regulatory in nature and its essential goal is to serve the public interest by protecting investors and, secondarily, by ensuring capital market efficiency and public confidence in the securities system: *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 589.

- [71] In concluding, on the basis of the observations of Estey J. in *Northwestern Utilities*, supra, that the respondent, BCSC should not have appeared to argue the merits of the question of whether it had failed to afford procedural fairness in its initial decision, Smith J.A. noted that "this conclusion does not mean that the Commission's decisions cannot be defended on their merits on appeal". He pointed out that the commission had the authority to appoint an executive director who could have appeared on the appeal and "made the arguments that were made by the commission."
- [72] Similarly, in the decisions relied on by the petitioner, including *Quintette Coal, Ltd.* supra, *Paccar*, supra, *Vancouver Rape Society v. Nixon*, 2005 BCCA 601, 262 D.L.R. (4th) 360, *Vancouver (City of) Police Department v. Hayes*, 2007 BCCA 51, 235 B.C.A.C. 266 and *Northwestern Utilities*, supra, the principle of limiting the participation of the Tribunals, whose decisions were subject to review or appeal in proceedings before the court, emerged from circumstances in which there was a protagonist to counter or provide illuminating context for the petitioner or appellant's argument.
- [73] In the present case, as already noted, the complainant was unrepresented at the hearing before the Director's delegate, and did not participate in the hearing before the original panel or reconsideration panel. The fundamental issue for resolution by the reconsideration panel engaged by the complaint was a pure question of statutory interpretation, somewhat

complicated by an accretion of complaints of procedural unfairness along the way. The statutory provision at issue was from the "home statute" of the Director in the sense described by Deschamps J. for himself, Charron and Rothstein JJ. in concurring reasons in *Dunsmuir*, supra, at para. 162:

Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

- [74] The ESA itself is regulatory in nature, and although in the present case the petitioner was exposed to a fine, its jeopardy was secondary to the main issue concerning the proper scope of s. 51(1)(c) of the ESA, which affects the rights of employees and obligations of employers across the province. As such, the issue at bar is not akin to that which required "a high standard of justice" in *Kane*, supra, where what was at stake was "the right to continue in one's profession or employment". Rather, at stake in the present case is the proper interpretation of a statutory provision determining when an employee's right to take and an employer's obligation to give 37 consecutive weeks of unpaid parental leave to a birth father arises.
- [75] It is in these circumstances, as well as the fact that the petitioner was not deprived of any opportunity to respond to the Director's submissions on either natural justice or the proper interpretation of s. 51(1)(c), that the petitioner's assertion that its right to procedural fairness was breached by the reconsideration panel's consideration of the Director's submissions must be judged.
- [76] In my view, the circumstances at bar fall short of establishing a breach of the principles of natural justice that would justify setting aside the decision of the reconsideration panel.
- [77] First, as noted by L. Smith J. in *COPE*, supra, the Tribunal is entitled to some deference in its choice of procedures in disposing of assertions of breach of the principles of natural justice.
- [78] Second, this case is unlike *Kane*, *Cardinal* and *Larocque*, in which the petitioners were deprived of an opportunity to address or respond to evidence or issues cogent to the impugned decisions. Here, the petitioner has had full opportunity to make its case and to respond to any countervailing concerns, issues or submissions.
- [79] Third, the issue in this case is, in substance, one of statutory interpretation. It does not, except incidentally, concern the petitioner's conduct. It was not the petitioner's conduct that was at the heart of the dispute, it was the petitioner's interpretation of s. 51(1)(c).

- [80] Finally, the legislative scheme of the ESA expressly contemplates some involvement from the Director or his delegate in the appellate process, even to the extent of authorizing the director to apply for a reconsideration of a Tribunal's order or decision. In doing so, the legislature has effectively conferred protagonist status on the Director, at least before the Tribunal at the reconsideration stage, in the interests of ensuring that cases of significance to the proper administration of the ESA and its regulations are fully and thoroughly considered before becoming the subject of a final decision or order, subject only to judicial review with a high degree of curial deference.
- [81] This is a case which, at its core, is not a simple dispute between the petitioner and its employee, Mr. Burke. The effect of the interpretation of the ESA urged by the petitioner would be to confine a birth father's entitlement to unpaid leave to a period that necessarily overlaps with a birth mother's entitlement to unpaid leave, whether the birth mother took pregnancy leave or not. Clearly, as a matter of practical family economics, such an interpretation of the unpaid parental leave provisions of the ESA would reduce the amount of unpaid leave that many birth fathers or birth mothers could afford - or be willing - to take, despite their entitlement.
- [82] As I see it, that is an issue of significance, not only to employers and employees which are governed by the ESA, but also to the Director, who is charged with the responsibility of administering the ESA in a way that comports with a "more comprehensive view" of its provisions, purposes and effects in the world of employment standards and employment law.
- [83] I therefore conclude, having regard to the overall context of the reconsideration decision, including: the deference to be afforded the Tribunal in matters of procedural fairness; the full opportunity afforded the petitioner to present its case and refute any countervailing propositions; the fact that the issue, in essence, is a matter of statutory interpretation rather than an ad hominem determination; and, the fact that the legislature clearly intended that the director have some level of input at the reconsideration level, as a protagonist, in the interests of the proper administration of the ESA, that it would not be appropriate to accede to the petitioner's application to quash the reconsideration decision on the basis of a breach of the principles of natural justice.

THE RECONSIDERATION PANEL'S INTERPRETATION OF S. (50)(1)(c) OF THE ESA

A. The Applicable Standard of Review

(i) The Position of the Parties

- [84] It is the petitioner's contention that a distinction must be drawn, in the application of s. 58(2) (a) of the ATA between a finding of fact or law and an exercise of discretion. The petitioner argues that because s. 58(3) defines patent unreasonableness as it applies to the exercise of discretion, particularly, that standard of review is not affected by developments in relation to the common law standards of judicial review. On the other hand, the petitioner contends,

since s. 58(2)(a) simply refers to the patently unreasonable standard of review in connection with findings of fact or law, without attempting to define it or in any way distinguish it from the common law standard, developments in the common law must, logically, affect the scope of that section.

[85] In particular, the petitioner submits that the effect of the Supreme Court of Canada decision in *Dunsmuir*, supra, which collapses the patently unreasonable and reasonableness standard into one standard of review of "reasonableness", is to alter the meaning of patent unreasonableness in s. 58(2)(a) of the ATA, insofar as it relates to a finding of fact or law only.

[86] The petitioner submits that the new standard applicable to the issue of the interpretation of s. 51(1)(c) is that which is set out at para. 47 in *Dunsmuir*, supra, as follows:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[87] The petitioner submits that this explication of the unified reasonableness standard represents a "paradigm shift" because, before *Dunsmuir*, the outcome of a decision would only be considered on a correctness standard.

[88] Counsel for the petitioner therefore submits as follows:

[I]n applying the applicable standard regarding the Tribunal's interpretation of s. 51(1)(c), this court must ask whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law, and whether there exists justification, transparency and intelligibility within the decision making process.

[89] For its part, the Tribunal contends that, as the issue of the interpretation of s. 51(1)(c) was a pure issue of law or statutory interpretation falling within the exclusive jurisdiction of the Tribunal to determine, it was subject to a patent unreasonableness standard of review as prescribed by s. 58(2)(a) of the ATA. The Tribunal submits that *Dunsmuir* is only applicable to British Columbia Tribunals (and other statutory decision makers) not covered by the ATA.

Tribunals and other statutory decision makers not covered by the ATA are subject to the common law with respect to the standard of review, and therefore subject to *Dunsmuir*. However, *Dunsmuir* is inapplicable to Tribunals which are covered by the ATA's standard of review provisions.

[90] The Tribunal relies on the decision of the B.C. Court of Appeal in *University of British Columbia v. University of British Columbia Faculty Assn.*, 2007 BCCA 201, 239 B.C.A.C. 181 ("UBC Faculty Assn.") which referred to the remarks of the then Attorney General, Geoff Plant, in concluding at para. 55 that "one of the objectives of the legislature in enacting the ATA was to simplify the analysis required to determine the standard of review applicable on judicial review of decisions of various administrative provincial tribunals." In particular, the court quoted the Attorney General's statements that the question of the applicable standard of review should be "a search for legislative intent," which is sometimes confounded by the failure of the legislature to make its intent clear, and the number of different standards which are "sometimes confusing."

[91] The Tribunal also relies on the remarks of the Attorney General quoted in *UBC Faculty Assn.* at para. 55, defining the legislative intent as one of:

simplifying and codifying the standards of review that we want courts to apply in their review of tribunal decisions. For tribunals with specialized expertise like the Employment Standards Tribunal, this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.

[92] The Tribunal argues that the legislature has spoken and fixed patent unreasonableness as the standard of review for findings of law made by it, a standard that is not altered by the developments in the common law affected by *Dunsmuir*. The petitioner submits that it is significant that the legislature reduced the number of standards that could apply to the decisions of "expert" tribunals from three to two, electing to use patent unreasonableness rather than reasonableness as the sole standard for such tribunals, and reserving reasonableness as the standard of review for fact finding by tribunals with no privative clause under s. 59 of the ATA.

[93] The Tribunal submits that the clear intent of the legislature was to apply the most deferential, existing common law standard to findings of law and fact made by "expert" tribunals, such as the EST. That is the standard articulated in *Karbalaeiali v. British Columbia (Deputy Solicitor General)*, 2007 BCCA 553, 250 B.C.A.C. 33 ("*Karbalaeiali*") at para. 13:

An administrative decision can be said to be patently unreasonable if it does not accord with reason or is so flawed that no amount of curial deference can justify letting it stand.

[94] The Tribunal notes that although it collapsed the reasonableness and the patently unreasonable standard into one standard of review, the court in *Dunsmuir* was not heralding a move towards "a more intrusive review by courts [or] a return to pre-Southam formalism." The Tribunal relies on the judgment of Binnie J. in *Dunsmuir*, in which he concurred with the majority judgment, while at para. 141 noting that:

The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

[95] In support of its contention that, regardless of the meaning to be attributed to the reasonableness standard of review addressed in *Dunsmuir*, it is not applicable to decision makers covered by the ATA, the Tribunal relies on the decision of Hinkson J. in *Carter v. Travellex Canada Ltd.*, 2008 BCSC 405, 70 Admin. L.R. (4th) 88 ("*Carter*").

[96] In that case, Hinkson J. was dealing with judicial review of a decision of the Human Rights Tribunal under the Human Rights Code, R.S.B.C. 1996, c. 201, which does not have a privative clause and in respect of which s. 59 of the ATA applies. Under s. 59, the only decision of the Human Rights Tribunal susceptible to review on a standard of patent unreasonableness is a discretionary decision. As in s. 58, s. 59 defines patent unreasonableness as it applies to discretionary decisions. As noted earlier in this application, counsel for the petitioner concedes that the patent unreasonable standard as it applies to discretionary decisions in ss. 58 and 59 is not affected by the common law change wrought by *Dunsmuir*, because in that context it is statutorily defined.

[97] The Supreme Court of Canada decision in *Dunsmuir* was issued after the case before Hinkson J. was argued, but before he gave his reasons. In his reasons, after setting out s. 59 of the ATA, Hinkson J. held at para. 14 as follows:

In the result, despite the recent decision of the Supreme Court of Canada in *Dunsmuir*, three standards of review remain applicable on judicial review in British Columbia depending on the nature of the question or questions asked.

[98] The Tribunal notes that in *Howe v. 3770010 Canada Inc.*, 2008 BCSC 330 ("*Howe*"), Gerow J. drew a distinction in s. 58(2)(a) between the applicability of the patent unreasonableness standard in discretionary decisions on the one hand, and to findings of fact or law on the other, in light of s. 58(3), which defines the term as it applies to the former category of decision only.

[99] In *Howe*, Gerow J. held in paras. 17 - 18 that:

Although the petitioners argue that the definition of patently unreasonable in s. 58(3) applies, that definition is limited to discretionary decisions. As a result, one must look to the common law for the definition of patently unreasonable.

The Supreme Court of Canada has recently considered the issue of what standards of review should be applied in judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Court concluded at ¶45 that the two standards of patently unreasonable and reasonableness simpliciter should be collapsed into a single form of "reasonableness" review. The result is two standards of judicial review - reasonableness and correctness.

[100] The Tribunal submits that the analysis in *Carter* is preferable to that in *Howe* "because *Carter* recognizes that, in British Columbia, standards of review are legislated with respect to Tribunals as covered by ss. 58 - 59 of the ATA, and that changes to the common law with respect to standards of review applicable where the legislature is (not) 'silent' do not affect that statutory regime."

[101] The Tribunal also cites *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 [2002] 1 S.C.R. 156 ("*Pepsi-Cola*"). In that case, the court altered the common law with respect to picketing in light of Charter considerations, in order "to [maintain] an appropriate balance between third party interests and prevent labour strife from spreading unduly, and the need to respect the Charter rights of picketers," (para. 107).

[102] In coming to its conclusion, the court went on to note that:

The legislatures too may play a role. Clarification of the status of picketing at common law should not be viewed as a restriction on legislative intervention. Rather it should be seen merely as a tool to assist the courts where federal and provincial laws remain silent.

[103] The Tribunal argues by analogy that, just as the *Pepsi-Cola* decision does not apply where the legislatures have spoken, the *Dunsmuir* decision does not apply in the face of the ATA, which expressly adopts the patently unreasonable test as it previously existed.

(ii) Discussion and Conclusion on the Standard of Review

[104] As I see it, the two decisions of this court in *Carter*, supra, and *Howe*, supra, are not irreconcilable. In *Carter*, Hinkson J. was dealing with the patent unreasonableness standard as it was defined in s. 59(4) and applicable to a discretionary decision referred to in s. 59(3). In that context, it could not be argued that *Dunsmuir* conditions the meaning or effect of the ATA, because *Dunsmuir* was dealing with the common law definition of patent unreasonableness, not its statutory counterpart. On the other hand in *Howe*, Gerow J. was dealing with the meaning and effect of patent unreasonableness as it applies to findings of fact or law under s. 58(2)(a) of the ATA which offers no statutory definition as to its meaning or effect.

- [105] Thus, in my view, Hinkson J.'s conclusion that "three standards of review remain applicable in B.C. depending on the nature of the question asked," goes no further than establishing that, insofar as patent unreasonableness is defined and applied to discretionary decisions by ss. 58 - 59 ATA, it remains a live standard of review. Nothing said by Gerow J. in *Howe* gainsays that proposition, as she was dealing only with the application of the common law patent unreasonableness standard to findings of fact or law in s. 58(2)(a), not to discretionary decisions as set out in 58(2)(a) or 58(3).
- [106] In my view, the preferable position is that advanced by the petitioner that the effect of *Dunsmuir*, which collapses the common law patent unreasonableness and reasonableness standards of review into one standard of "reasonableness", is to similarly change the meaning and effect of the phrase "patent unreasonableness" as it is used in relation to findings of fact and law in s. 58(2)(a), but not as it is used and defined in relation to the exercise of discretion in either s. 58 or s. 59.
- [107] The use of the phrase "patently unreasonable" in s. 58(2)(a), as it applies to a finding of fact or law, is nowhere defined in the ATA. It can only be given meaning and effect by reference to the common law, which by its nature, is evolutionary. There is nothing in the remarks of the Attorney General as cited in *UBC Faculty Assn.*, or in the context of s. 58, that supports the interpretation that the phrase "patently unreasonable" in s. 58(2)(a), insofar as it applies to findings of fact or law, is to be given a static definition to the point of falling out of step with ongoing developments in the common law. Had the legislature intended to freeze the definition of patent unreasonableness, it could have done so explicitly. A clear implication from the absence of any explicit reference in the ESA to the meaning to be attributed to the phrase is that the courts are to be guided by the common law.
- [108] That point is amplified when one considers that the rationale of the majority in *Dunsmuir* for collapsing the standards of review into one deferential standard "concerned with the existence of justification, transparency and intelligibility within the decision-making process (para. 47), was to find compatibility with the rule of law in the interests of achieving palatable results.
- [109] In that vein, *Bastarache and LeBel JJ.* for the majority, explained at para. 42 as follows:
- [E]ven if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough. It is also inconsistent with the rule of law to retain an irrational decision. As *LeBel J.* explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness simpliciter or patent unreasonableness.

[110] In my view, given the context of the ATA, in which the phrase "patent unreasonableness" is defined only insofar as it applies to discretionary decisions, but given no definition insofar as it applies to findings of fact or law, and given the inherently developmental nature of the common law, which is implicitly referenced in s. 58(2)(a) of the ATA, it follows that the deferential standard of review articulated in *Dunsmuir* in para. 47 under the rubric of "reasonableness" is that which applies to the Tribunal's interpretation of s. 51(1)(c) in the case at bar.

[111] The new standard of "reasonableness" enunciated in *Dunsmuir*, requires consideration of "the process of articulating the reasons" for a decision, and "the outcomes" of that decision, having regard to "the existence of justification, transparency and intelligibility within the decision making process." The standard also requires the court to consider "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."

[112] The courts, of course, must apply that standard in a way that does not intrude upon the legitimate exercise of a tribunal's jurisdiction. The majority in *Dunsmuir* described the appropriate approach in para. 49 as follows:

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

B. The Interpretation of s. 51(1)(c)

[113] The remaining issue is whether the reconsideration panel's finding of law in respect of the interpretation of s. 51(1)(c) falls within the range of reasonableness in its articulation of reasons or outcome, as described in *Dunsmuir*.

(i) The Petitioner's Submissions

[114] The essence of the petitioner's submission with respect to the reasonableness of the reconsideration panel's decision, is that it misapplied the "modern principle" for the interpretation of statutes as set out in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, ("*Rizzo & Rizzo Shoes*") which provides at para. 21 that:

[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[115] The petitioner submits that it inexorably flows from this principle or approach that s. 51(1)(c), in light of its obviously different wording from s. 51(1)(d), must obviously mean something different. The petitioner submits that in this context, the only meaning the legislature could have intended by the different wording in the two sub-sections was to confine a birth father's 37 consecutive weeks of unpaid parental leave to the 52 week period immediately following his child's birth.

[116] The petitioner contends that the Tribunal's ultimate conclusion that there was "no difference in meaning between the legislative text" in ss. 51(1)(c) and 51(1)(d) was, in light of the presumption of consistent expression - a rule of construction conducive to the fulfillment of the modern principle enunciated in *Rizzo & Rizzo Shoes* - untenable to the point of being unreasonable or patently unreasonable.

[117] The petitioner submits that the Tribunal fell afoul of the modern principle of statutory interpretation by wrongly characterizing s. 51(1)(c) as "ambiguous", and from that foundation, went on to infer the legislature's intention and the meaning of the wording on the basis of considerations beyond the logic and common sense reflected in the presumption of consistent expression.

[118] The petitioner further submits that the other considerations relied on by the Tribunal, notably, the history of the legislative changes, the notion that the legislation should be given a broad interpretation, and the "unexplained differentiation" between adoptive and natural parents, were not sufficient to displace "the clear implication from the language chosen and the logical import of several hundred years of common law which resulted in the presumption of consistent expression."

[119] The petitioner contends that although the purpose of s. 51 was to provide job-protected leave to parents following the birth or adoption of a child, it doesn't follow that the time frame for the leave was intended to be identical for birth parents and adoptive parents.

[120] Counsel for the petitioner argues that if the legislature intended the time frame to be the same, there would be no need for the distinct references to birth mother in 51(1)(a) and (b), birth father in 51(1)(c), and adopting parent in 51(1)(d). Counsel submits that if the legislature intended the same entitlement to birth and adopting parents, it "would have simply constructed s. 51 to apply to parents and would not have used the descriptive qualities, birth and adopting."

[121] The use of such distinctions, argues the petitioner, reflects an intention to create different entitlements. The petitioner submits that, had the legislature intended to create the same entitlements for both categories of parent, it would have been easy to do so by using the same language.

[122] The petitioner also submits that it was an improper approach for the Tribunal to attempt to "speculate" as to why the legislature intended to treat the categories of parents differently in the absence of any evidentiary foundation for a conclusion on the question.

[123] The petitioner concludes in its written submissions as follows:

Given the plain and unambiguous language used in section 51(1)(c) of the Act, it was patently unreasonable for the Tribunal to conclude that section 51(1)(c) of the Act entitles an employee upon notice to commence unpaid parental leave at any time within 52 weeks of the birth of their child (at para. 110). Such a conclusion does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. It is respectfully submitted that there is only one possible acceptable and defensible outcome with respect to the interpretation of section 51(1)(c) and that is that the unpaid leave must be taken and be completed within 52 weeks of the child's birth.

(ii) Discussion and Conclusion

[124] Despite the logical force of the petitioner's submissions on the statutory interpretation issue, I do not find it sufficient to overcome the deference owed to the reconsideration Tribunal implicit in a reasonableness standard of review. Considering both the articulation of the panel's reasons, and the outcome of its decision in light of the qualities of justification, transparency and intelligibility, I am not able to say that the decision falls outside of a range of possible acceptable outcomes, defensible in respect of the law.

[125] The starting point for the panel's analysis is that s. 51(1)(c), standing on its own, could mean either that the 37 consecutive weeks of unpaid parental leave are only to begin after the child's birth and within 52 weeks of it, or that the entirety of the leave must start and finish within that time frame.

[126] The panel went on to consider, in light of the identified ambiguity, the principles of statutory interpretation, including the modern principle expressed in *Rizzo & Rizzo Shoes*, and the presumption of consistent expression as it was expressed in *Ruth Sullivan, ed., Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham, Int: Butterworths 2002) at 162-63:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that were a different form of expression is used, a different meaning is

intended.

- [127] The Tribunal went on to note that inadvertent variations may arise within the same statute, and "the presumption of consistent expression should be weighted against other competing considerations such as contextual ones." The Tribunal posed the question "how much weight should be given to the presumption of consistent expression and what are the competing considerations?"
- [128] The Tribunal noted that s. 51(1)(a) put a birth mother in a different category than a birth father or an adopting parent, thus necessitating a separate subsection to deal with that different category. In particular, s. 51(1)(a) necessitated reference to s. 50, which provided for pregnancy leave, an entitlement obviously not available to a birth father or an adopting parent of either gender.
- [129] The Tribunal noted that s. 50(1) prescribed both a beginning and an ending period for pregnancy leave by using the words "beginning" and "ending", whereas s. 51 only uses the word "beginning". The Tribunal noted "having made express provision for [an early termination date or period before which leave must be taken] in s. 50, it seems unlikely that the legislative draftsman or legislature would seek to convey an early termination period through an ambiguous form of expression in s. 51(1)(c) and (d)."
- [130] The Tribunal noted that in its initial form, s. 51 was structured in a way that unambiguously granted the same entitlement to unpaid parental leave to a birth father and adopting parents, despite the same variation in language. Section 51(1) from the Employment Standards Act, S.B.C. 1995, c. 38 reads as follows:

51(1) An employee who requests parental leave under this section is entitled to up to 12 consecutive weeks of unpaid leave beginning,

- (a) for a birth mother, immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,
- (b) for a birth father, after the child's birth and within 52 weeks after that event, and
- (c) for an adopting parent, within 52 weeks after the child is placed with the parent.

[131] The next and most current iteration of the ESA, altered the length of the unpaid parental leave and altered the structure of the section without varying the critical wording. It reads as follows:

51(1) An employee who requests parental leave under this section is entitled to,

- (b) for a birth mother , up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,
- (c) for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event, and

- (d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.

[132] The Tribunal observed that to accept the petitioner's position that the different wording intended a different result, it would be necessary to conclude that the effect of the 2000 amendment was to change the effect of the section to limit the period within which birth parents could take their unpaid leave, but not to similarly limit the same period for adopting parents, even though the critical wording remained the same and "the simple expedient of introducing the term "ending" as used in s. 50 was not resorted to by the legislature."

[133] The Tribunal reasoned that the change in structure (by putting the word "beginning" into the individual subsections - (a)(b)(c) and (d) - instead of the initiating section (51(1)), was to accommodate the "more complicated descriptions" of those entitled to the leaves - birth mother who took pregnancy leave, birth mother who did not take pregnancy leave, birth father, and adopting parents.

[134] The Tribunal found no evidentiary basis to support the position that a birth parent's leaves should either be the same as or different from an adopting parent's, and no basis to conclude that one interpretation or another would give rise to any form of prohibited discrimination. The Tribunal considered that it was left in the position of considering the plausibility of the petitioner's submission that the variation in language provides for "an unexplained differentiation between adoptive and natural parents." The Tribunal went on to consider how the Supreme Court of Canada approached the interpretation of employment standards legislation at paras. 22 - 24 in *Rizzo & Rizzo Shoes*:

I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger* the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual [they] concluded [that], " an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not".

[135] The Tribunal noted that narrowing the entitlement of birth fathers (and birth mothers who don't take pregnancy leave) compared to adopting parents, through interpretation of the statute, would run contrary to the principles expressed in *Rizzo*. The Tribunal reasoned

that in light of those principles, as well as given a contextual analysis of the legislation's current and historical provisions, and in the absence of any rational basis for the differentiation, the Director's interpretation should be favoured over that advanced by the petitioner. In the result, the Tribunal concluded that the Director did not err, and that s. 51(1)(c) of the ESA "entitles an employee upon appropriate notice to commence unpaid parental leave any time within 52 weeks of the birth of their child".

- [136] I do not see in the analysis and conclusion of the Tribunal the unreasonableness attributed to it by the petitioner. While the presumption of consistent expression is an important interpretive tool, it is not superordinate. Moreover, in the context of s. 51(1), the variation in wording between the present 51(1)(c) and (d) is of limited significance, as the same variation in wording between the equivalent subsections in the predecessor legislation manifestly did not connote a different entitlement. In other words, in the predecessor legislation, the difference in wording reflected no more than different ways of saying the same thing, and was conditioned by different triggering acts (the birth of child versus the placement of child), rather than different intended results.
- [137] It may not be unreasonable to conclude that the change in structure to s. 51(1) to its present form reflected a legislative intention to curtail the period within which the parental leave for birth fathers (and birth mothers not taking pregnancy leave) may be taken. Some support for that conclusion might be found in the corresponding extension of the length of the unpaid parental leave from 12 weeks to 37, and in the fact that a birth mother who takes pregnancy leave under s. 50 is confined to 35 weeks of parental leave immediately following the end of her pregnancy leave, meaning that in no circumstances can the combination of her pregnancy leave and parental leave exceed 52 weeks or extend beyond 52 weeks immediately following the child's birth.
- [138] On the other hand, a birth mother taking pregnancy leave is in a different situation from a birth mother who does not, a birth father, or an adopting parent, and there is no similar express provision or combination of provisions fixing the end point of unpaid leave for the parents in the three latter categories as there is in the former.
- [139] In any event, the existence of a reasonable interpretation adverse to that of the reconsideration panel does not, of course, render the panel's interpretation unreasonable. In assessing the decision under review, it is necessary to consider: the ambiguity of s. 51(1)(c); the limited significance of the difference in wording between ss. 51(1)(c) and (d); the lack of any apparent or evidentiary foundation for a differentiation between adopting and birth parents in the manner contended by the petitioner; and the Supreme Court's exhortation to interpret the ESA in a way "which encourages employers to comply with the minimum requirements of the Act, and so [extend] its protection to as many employees as possible." In relation to the latter point, I note that s. 8 of the Interpretation Act, R.S.B.C. c. 238 is the same as s. 10 of the Ontario Interpretation Act, considered by the Supreme Court in *Rizzo*, *supra*.

[140] Given these considerations, I am unable to say that the panel's decision, either in its articulation or outcome, fails to meet the standard of reasonableness established in Dunsmuir. It does not lack the necessary degree of intelligibility or transparency, and it offers a careful and thorough justification of its conclusion, which in my view "falls within a range of possible acceptable outcomes which are defensible in respect of the law".

DISPOSITION

[141] I accordingly dismiss the petition without costs to any party.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen

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