

CANADA / JUDGMENT

Rathje v. Business Practices and Consumer Protection Authority

2007 BCSC 1191

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1191 Rathje v. Business Practices and Consumer Protection Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rathje v. Business Practices and Consumer Protection Authority,

2007 BCSC 1191

Date: 20070809

Docket: L053155

Registry: Vancouver

Between:

Andrea Rathje, Eric Thompson, Lois Burton,

Stephanie Brown, Dianne Liberto,

Patti Kininmonth and Darlene Birch

Petitioners

And

Business Practices and Consumer Protection

Authority of British Columbia

Respondent

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Petitioners:

Harley J. Harris

Counsel for the Respondent:

Patrick Gilligan-Hackett

Date and Place of Hearing:

March 21-22,

July 12, 2007

Vancouver, B.C.

- [1] The petitioners, other than Ms. Rathje and Ms. Burton, who have withdrawn from the proceeding, apply under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, for an order quashing compliance orders issued by the Business Practices and Consumer Protection Authority of British Columbia (the "Authority").
- [2] The Authority is a not for profit corporation established by the Business Practices and Consumer Protection Authority Act, S.B.C. 2004, c. 3, to which the Lieutenant Governor in Council has delegated responsibility for the administration of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 (the "BPCPA"), and the Travel Industry Regulation, B.C. Reg. 296/2004 (the "Regulation").
- [3] The compliance orders directed the petitioners to refrain from offering travel services to the public from their personal residences without first obtaining a licence under the BPCPA.
- [4] Each petitioner is party to an agreement with 680818 B.C. Ltd., which operates as a licensed travel agent in British Columbia under the trade name "Travelonly". The agreements confer rights and obligations appurtenant to the operation of a travel business and, in the Authority's view, result in each petitioner becoming a travel agent requiring a licence under the BPCPA and the Regulation. The petitioners claim that the agreements create a working relationship between each of them and Travelonly that does not require licensing. In substance, this administrative law proceeding is concerned with licensing obligations associated with "home-based" travel businesses.
- [5] On this judicial review, the petitioners claim that the Authority incorrectly interpreted and applied the licensing legislation, violated the rules of natural justice and procedural fairness in the investigation and reconsideration process, were biased against the petitioners, and acted in bad faith towards them. Alternatively, the petitioners say the Authority made unreasonable findings of fact, or findings of fact without supporting evidence.

The Statutory Scheme

[6] The thrust of the licensing legislation for which the Authority is responsible, as it pertains to travel agents generally and the petitioners in particular, is expressed in ss. 142 and 143(1) of the BPCPA which provide as follows:

142 In this Division:

...

"travel agent" means a person who, in the course of business, sells or otherwise provides to the public travel services supplied by another person;

"travel service" means transportation, accommodation or other service for the use or benefit of a traveller, tourist or sightseer;

"travel wholesaler" means a person who, in the course of business,

- (a) supplies the person's own travel transportation to the public on an irregular basis at nonfixed times,
- (b) purchases or acquires from another person rights to travel services for the purpose of resale, or
- (c) deals with travel agents or other travel wholesalers for the sale of travel services supplied by another person.

143 A person must not act or hold himself, herself or itself out as any of the following, unless the person is licensed for that purpose or is exempt by Regulation from the requirement to be licensed:

- (a) bailiff;
- (b) collection agent;
- (c) debt pooler;
- (d) telemarketer;
- (e) [Not in force.]
- (f) travel agent;
- (g) travel wholesaler

[7] Sections 194(1) and (3)(a) of the BPCPA authorize regulations by order in council:

194(1) The Lieutenant Governor in Council may make Regulations referred to in section 41 of the Interpretation Act.

...

(3) The Lieutenant Governor in Council may make Regulations as follows:

(a) defining a word or expression used but not defined in this Act;

[8] The Regulation does not attempt to refine the definition of "travel agent" set forth in s. 142 of the BPCPA, but s. 2 of the Regulation exempts certain persons from the licensing requirement as follows:

2 The following classes of persons are exempt from the requirement to be licensed as a travel agent or travel wholesaler:

- (a) a person providing sightseeing tours of a duration of not more than one day if the person is not providing any other travel services;
- (b) a person providing tour guide services or sightseeing attractions, or both, if the person is not providing any other travel services;
- (c) a common carrier if the common carrier is not providing tours of a duration of more than one day or any other travel services;
- (d) a common carrier providing scheduled interline transportation if the carrier is not providing any other travel services;
- (e) a person, who is an agent of a person licensed or whose licence is continued under the Passenger Transportation Act, selling bus travel services if the person is not providing any other travel services;
- (f) an operator of a motel, hotel, resort or other accommodations who, as incidental to the operator's primary business, offers local travel services that may be purchased from another person.

[9] Section 3 of the Regulation sets forth the qualifications required of an individual or corporate applicant for a travel agent's licence:

3 An applicant for a licence must meet the following qualifications:

- (a) if the applicant is an individual, the individual
 - (i) is at least 19 years of age,
 - (ii) is ordinarily resident in British Columbia, and
 - (iii) in the opinion of the director, has the experience and knowledge of travel services that affords reasonable grounds to believe that the individual will be able to operate a travel service business;
- (b) if the applicant is a corporation,
 - (i) the corporation has a net worth of at least \$15,000,
 - (ii) one of the following is ordinarily resident in British Columbia:

(A) a director of the corporation;

(B) an individual who holds a position of authority and responsibility with the corporation, is appointed by the corporation for the purposes of this section and is satisfactory to the director, and

(iii) in the opinion of the director, an officer or director of the corporation has the experience and knowledge of travel services that affords reasonable grounds to believe that the corporation will be able to operate a travel services business;

...

(d) if the applicant is not a corporation, the person has, in the opinion of the director, sufficient net worth to reasonably be expected to be able to operate a travel service business;

(e) in the opinion of the director, the person has sufficient working capital to reasonably be expected to be able to operate as a travel service business.

[10] Section 5 of the Regulation provides that a travel agent must have a licence for each location from which it conducts business in British Columbia.

[11] Section 9 of the Regulation prohibits a licensee from doing or permitting certain acts and things and provides as follows:

9(1) A licensee must not

(a) carry on business from a place that is not a permanent place of business or from a private dwelling unless authorized by the director,

(b) carry on business from a place that is not open to the public during normal business hours,

(c) carry on business in a name other than the name in which the licensee is registered,

(d) carry on business in a name that indicates the licensee has a sponsorship, approval, status, affiliation or connection that the licensee does not have, or

(e) knowingly carry on business in British Columbia with a travel agent or travel wholesaler in British Columbia who is not licensed unless the travel agent or a travel wholesaler is exempt from licensing.

(2) A licensee must ensure that the licensee and the licensee's employees and agents do not use a personal credit card to pay for travel services on behalf of a customer.

[12] While there appears to be no statutory or regulatory authority for them, the Authority published the "Travel Agency-Travel Wholesaler Commission Agent Guidelines" (the "Guidelines"), the text of which is the following:

Travel Agency-Travel Wholesaler Commission Agent Guidelines

The following Sections of the Business Practices and Consumer Protection Act and the Travel Industry Regulation apply:

Sec. 143(f)(g) of the Act states that a person shall not act, or hold himself, herself or itself out as a travel agent or travel wholesaler unless the person is licensed for that purpose or is exempt by Regulation from the requirement to be licensed.

Sec. 9(c) of the Regulation states that a licensee must not carry on business from a place that is not a permanent place of business or from a private dwelling unless authorized by the director.

Sec. 9(a) of the Regulation states that a licensee must not carry on business from a place that is not a permanent place of business or from a private dwelling unless authorized by the director.

Based on the preceding, employees and/or Commission Agents (referred to herein as Representatives) must adhere to the following guidelines:

There cannot be any advertising, or solicitation material including business cards in any name, address and telephone number other than those of the licensed agency.

There cannot be any signage or advertising at the residence (or other place of business) for the purpose of pick up of tickets.

The representative[s] cannot receive client[s] at their residence (or other place of business) for the purpose of conducting travel business, only at the licensed agency.

The representative[s] cannot install/utilize a computer for the specific purpose of gaining access to any online/network travel product/reservation system at their residence (or other place of business) for the purpose of conducting travel business.

The representative[s] cannot install and maintain a telecommunication line (telephone or fax) at their residence (or other place of business) for the purpose of conducting travel business.

NOTE

Commission agent refers to an independent contractor, independent travel consultant, outside sales representative, travel counsellor, etc. Other place of business refers to an employment location that is not a residence or the licensed agency at which the commission agent[s] normally works.

Representatives refers to commission agent[s] and/or employee[s] of the licensed travel agency.

[13] The Guidelines were in effect in 2005 when the Authority directed the petitioners to obtain travel agent licences. The Guidelines were withdrawn in April 2006 and have not been replaced.

The Investigation and Enforcement Scheme

[14] The administrative action resulting in this judicial review arose following the exercise of investigation and enforcement powers conferred upon the Authority by the BPCPA.

[15] The Lieutenant Governor in Council has designated the Authority to be the "director" responsible for the administration of the BPCPA.

[16] Section 176 empowers the Authority to designate a person as an "inspector" for purposes of the BPCPA. An inspector may conduct an inspection for purposes of determining compliance with the BPCPA: s. 149. An inspector is provided a broad range of inspection powers as set forth in s. 150(1):

150(1) For the purposes of an inspection, an inspector may do any of the following:

- (a) enter the business premises of a person at any reasonable time;
- (b) inquire into any business, affairs or conduct of a person;
- (c) inspect, audit or examine any record, goods or other thing or the provision of services in the premises;
- (d) inspect a vehicle or vessel that is being used for business purposes;
- (e) require any person who has possession or control of any of the records, goods or other things in the premises, vehicle or vessel to produce the records, goods or things;
- (f) make a record, including a record on film, audio tape, video tape or otherwise, of the premises, vehicle or vessel and any thing in or on the premises, vehicle or vessel;
- (g) remove any record from the premises, vehicle or vessel for the purpose of making copies;
- (h) remove and retain any record, good or other thing that may be required as evidence from the premises, vehicle or vessel.

(2) The authority under subsection (1) must not be used to enter a private dwelling except with the consent of the occupant or with the authority of a warrant under section 152 [inspection under warrant].

[17] Following an inspection, and after giving a person an opportunity to be heard, an inspector may order a person who is contravening, has contravened, or is about to contravene the BPCPA or Regulation, to comply: s. 155(1). A compliance order may include a term requiring a person to stop engaging in, or to refrain from engaging in, a specified act or practice: s. 155(3).

[18] As an alternative to a compliance order, and with a view to ensuring compliance with the BPCPA, the Authority may accept an undertaking to comply from a person whom the Authority has reason to believe is contravening, is about to contravene, or has contravened the BPCPA or the Regulation: s. 154(1).

- [19] Finally, after giving a person an opportunity to be heard, the Authority has the power to impose an administrative penalty upon a person who contravenes a compliance order or an undertaking: s. 164(1).
- [20] A person to whom a compliance order has been directed, or against whom an administrative penalty has been levied, may apply to the Authority for reconsideration specifying the error that was made or the grounds justifying reconsideration: s. 181(2). The Authority is vested with discretion to decide whether to proceed or refrain from proceeding with reconsideration: s. 181. A compliance order is stayed once the Authority decides to proceed with reconsideration unless the Authority orders otherwise: s. 181(3).
- [21] The Authority is empowered to vary or cancel a compliance order or administrative penalty upon reconsideration, but only if it is satisfied that new evidence has become available or has been discovered that is substantial and material to the determination and did not exist at the time of the review, or did exist at that time but was not discovered and could not have been discovered through the exercise of reasonable diligence: s. 182(2).
- [22] If reconsideration has been refused, or the compliance order has been confirmed following reconsideration, the party affected by the order may apply for judicial review. On review, the court may, among other things, set aside the order or remit the matter to the director for reconsideration and further action in conformity with reasons for judgment.

The Administrative Review and Determination on Reconsideration

- [23] The course of the administrative action that resulted in the compliance orders, and the confirmation thereof following reconsideration in this instance, is apparent from the record of the Authority's proceedings. It may be summarized as follows:
1. In September 2003, the Authority learned of Travelonly's intention to commence operations in British Columbia.
 2. In October 2003, after reviewing a Travelonly advertisement announcing a "home-based" travel seminar scheduled for Vancouver, an inspector advised Travelonly it was concerned that those who became its Associates might be operating travel businesses from their residences and could not be licensed in British Columbia because of s. 7(2) of the Regulation which then provided as follows:

7(2) Every person registered as a travel wholesaler or travel agent, or his employees or commission agents, shall carry on his business from a permanent place of business that is not a dwelling and which is open to the public during normal business hours, or such other place of business as the registrar, in his discretion, may permit.
 3. From the fall of 2003 through April 2004, inspectors engaged in discussions with Travelonly regarding its business model. On May 3, 2004, solicitors acting for Travelonly wrote to an inspector as follows:

we write to acknowledge and address your concerns regarding the operation of a "home-based" travel business" in British Columbia. Specifically, and in response to your request, we have been advised by the Company that it confirms the following:

1. the Company has obtained, read and understood the Travel Agents Act,, the Travel Agents Act Regulations and the related Guidelines (collectively, the "Travel Legislation");
2. the Company undertakes to comply with the Travel Legislation in the operation of its business in British Columbia; and
3. neither the Company, nor any of its affiliates (as such term is defined in the Business Corporations Act of British Columbia), will operate a "home based travel business" in British Columbia in contravention of the Travel Legislation.
4. On May 5, 2004, the inspector replied in the following terms:

To further clarify the business activities, please have [Travelonly] confirm that neither the company nor its affiliates will be offering or promoting the "home based travel associates program" in British Columbia as offered in its website . It is appropriate to this process that your client advise of its intentions regarding their program. In support of their commitment, I would suggest their website include the statement that the program is not available in British Columbia in some visible manner.

5. On May 6, 2004, Travelonly became licensed to carry on business as a travel agent in British Columbia from premises at 1027 Pandora Avenue, Victoria.
6. On September 23, 2004, a licensed travel agent operating in British Columbia complained to the Authority about possible unlicensed activity under the Travelonly umbrella.
7. An investigation ensued in the course of which inspectors looked at the Travelonly website where they observed that individuals were being offered the opportunity to operate their own travel business, and the opportunity to learn more by attending an information session.
8. Two inspectors attended an information session in Burnaby, British Columbia, on October 21, 2004, at which they heard the presenter represent that once signed up as a Travelonly Associate, individuals could begin operating their own travel business from their residence, no travel experience or licence was required, training would be provided by Travelonly, Associates would be covered by the licence held by Travelonly for its location on Pandora Street in Victoria, and a computer and internet access were all that was required to commence operations. Inspectors also reviewed a licence agreement between Travelonly and a prospective Associate, and a DVD of a Travelonly information presentation.
9. On November 3, 2004, the Authority's Director of Investigations and Enforcement wrote to a Travelonly director as follows:

It is our contention that the independent business opportunity you are promoting as a Director and Representative of TRAVELONLY is deceptive. Any consumers entering these associate agreements and operating in BC are doing so in contravention of the BC Business Practices and Consumer Protection Act (BPCPA) Travel Industry Regulation.

As an inspector under Section 150(e) of the BPCPA, I am requiring that you produce records related to all other TRAVELONLY business associates operating in BC.

The associates conducting business in BC other than the location licenced on 1027 Pandora St. in Victoria are doing so in violation of the Act and they should be instructed to cease operations immediately or contact our office to initiate the licencing process.

10. On November 4, 2004, Travelonly responded expressing concern about the Authority's actions in relation to Travelonly. Travelonly asserted that it was in compliance with provincial licensing legislation and that its Associates were independent commission travel agents who were operating in conformity with the Guidelines issued by the Authority.

11. At November 9, 2004, the Travelonly website displayed the following advice:

Travelonly has established its very successful business in BC and meets all of the provincial licensing requirements. You can enjoy all the benefits by becoming an independent Travel Consultant under our Travelonly host agency opportunity.

12. On November 10, 2004, Travelonly provided the Authority with the names of the Associates with whom it had agreements in British Columbia, a copy of the first and last pages of the agreement with each, and the standardized text of the entire agreement that pertained to those who are petitioners on this review.

13. Between November 23 and December 17, 2004, counsel for Travelonly and the Authority exchanged correspondence outlining the position of each in relation to the Authority's investigation.

14. On December 10, 2004, the Authority wrote to petitioners Brown, Liberto, Kininmonth, Thompson, and Birch to advise of the results of the investigation and to state the following:

Based on our investigation, it appears that you are offering travel services to the public and, therefore, you must be licensed to do so pursuant to s. 143(f) of the [Act]. The position of Travelonly, that you are covered by the Victoria license, is contrary to the legislation. In order to complete this investigation, pursuant to s. 155 of the [Act] we offer you an opportunity to be heard. We would like to have your understanding of your relationship with Travelonly and the nature of the travel services you provide.

15. None of the petitioners to whom the letter of December 10, 2004 was addressed responded. On January 12, 2005, the director issued compliance orders to each of the petitioners directing them not to offer travel services to the public without a licence to do so. The action was explained as follows:

Issuance of this Compliance Order is based on the facts determined through discussions with Associates, an examination of the License Agreement document between Travelonly and the Associates, a review of the website www.Travelonly.net, a review of the presentation DVD shown to prospective licensee's [sic] and other general enquiries.

16. On February 10, 2005, the petitioners requested reconsideration. The Authority exercised its discretion to proceed and asked counsel whether they wished an oral hearing or to proceed by written submission. Counsel chose to proceed on the basis of written submissions. As a result, no new affidavit or viva voce evidence was tendered by the Authority or any petitioner in the course of the reconsideration.
17. On October 31, 2005, the Authority's president and chief executive who conducted the reconsideration issued his decision upholding the compliance orders, but outlining a form of undertaking which he suggested the petitioners should be able to provide to the Authority.
18. In his reasons, the president wrote as follows in relation to the evidence which led to the issue of the compliance orders:

It is unusual to have a situation where one party has submitted no supporting evidence of any kind, and where the evidence available has been submitted by only the director [of the Authority]. Whether this situation has arisen from oversight, misunderstanding, or for some other reason is uncertain. Regardless of the reason, the fact remains that the submissions provided by the Associates comprises only statements that, in many cases, appear to be contradicted by, or are at odds with, the evidence.

The majority of material submitted by both parties can be characterized as essentially an exchange of opinions or statements of position. There are no submissions of supporting evidence, beyond the original material amassed by the director and shared with counsel for the Associates. Since the Associates have not supported their statements concerning matters of substance, they have made a less than [sic] persuasive argument than has the director.

I conclude from the evidence that Travelonly was offering, or was representing itself as offering, a home-based business opportunity. This is clearly not permitted by the legislation without the express exercise of discretion of the director to permit operation from a home. There has been no exercise of discretion in this case.

19. The president pointed out that the petitioners repeatedly asserted compliance with the Guidelines, and correctly stated that "guidelines" were just that and neither changed, augmented or nullified legislation or Regulations and did not bind the decision maker.
20. The president addressed another issue in the following terms:

Another crucial matter is whether or not the Associates are employees, contractors, independent businesses or some other entity. Reference is made to the Associates receiving T4 slips from Travelonly, yet no corroborating evidence is provided either way by either party. Other

inferences can be drawn from material provided which tend to support the idea that the Associates are more like employees. Yet the advertising material and other information supplied leads in the opposite direction that the Associates are actually operating as independent businesses.

.

I conclude that the weight of evidence supports the confirmation of the Compliance Order and the requirement of the Associates to be licensed.

21. The president concluded his reasons by suggesting that some reasonable accommodation should be possible from both sides, and the dispute resolved accordingly.

[24] I interpret the president's reasons to suggest that the relationship between Travelonly and the petitioners was capable of being fashioned in a manner that should cause the Authority to exercise its discretion to permit the Associates to provide travel services from their residences.

Analysis

[25] I have described the legislative framework and the background to the petition in some detail as this appears to be the first occasion on which administrative action by the Authority under the BPCPA and the Regulation, enacted in 2004, has been challenged by way of judicial review. A number of issues arise.

The Record on Judicial Review

[26] The first point to be addressed is the content of the record for purposes of judicial review.

[27] Both the petitioners and the Authority tendered evidence in the form of affidavits prepared and sworn several months after the Authority's decision that gives rise to the judicial review. The entirety of the material before the administrative decision-maker was only tendered at the judicial review hearing following a direction to that effect from the court.

[28] Section 1 of the Judicial Review Procedure Act, *supra*, defines the "record of proceeding" as follows:

"record of the proceeding" includes the following:

- (a) a document by which the proceeding is commenced;
- (b) a notice of a hearing in the proceeding;
- (c) an intermediate order made by the tribunal;
- (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;

- (e) a transcript, if any, of the oral evidence given at a hearing;
 - (f) the decision of the tribunal and any reasons given by it;
- [29] The issue on this judicial review is whether the Authority's decision was correct or reasonable, depending upon the appropriate standard of review, on the basis of the evidence which was collected and considered by the Authority, and the reasoning that was essential to the decision. The determination must be made on the basis of the record of the proceeding, that being the evidence that was before the Authority. It cannot be made on the basis of evidence that was not considered by the Authority.
- [30] Those portions of the affidavits filed in the judicial review in order to adduce evidence of facts that could have been provided to the Authority, but was not provided, are not admissible. The prohibition against the admission of such evidence applies to affidavits whether tendered by the petitioners or the Authority.
- [31] Relevant affidavit evidence directed solely to the issues of bias and bad faith is admissible.

Standing of the Authority on a Judicial Review

- [32] The second point for consideration is the standing of the Authority on this judicial review.
- [33] The Authority was represented by counsel who submitted that the Authority should not be limited to explaining the record of the proceeding, making submissions on jurisdiction, or making submissions on the standard of review, but should be permitted to outline issues relevant to the review of the Authority's decision, describe the position of the petitioners, set out the relevant portions of the tribunal decision, and review the relevant statutory and judicial authorities. Counsel acknowledged that the Authority should not attempt to defend its decision or make argument on its merits.
- [34] Counsel for the petitioners submitted that contrary to the acknowledgment that a limitation existed, counsel for the Authority engaged in an extensive defence of the Authority's actions, arguing much as if it were party to an appeal.
- [35] The rule formulated by the Supreme Court of Canada in *Re Northwestern Utilities Ltd. v City of Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, that limits a tribunal whose decision is under review to explaining the record before the decision-maker and making representations relating to jurisdiction has been relaxed to some degree, but not to the extent of granting the decision-maker a broad opportunity to argue the merits.
- [36] The limit to which the decision-maker should be permitted to travel was stated by Garson J. in *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)* (2005), 50 B.C.L.R. (4th) 151, 2005 BCSC 1562 at para. 44, which I adopt for present purposes:

Notwithstanding the evident erosion to the rule in *Northwestern* and the persuasive submissions of Ms. Ross in this regard, there is no authority for the proposition (however attractive) that the scope of a tribunal's submissions at the judicial review of its own decision are completely unfettered. I agree with Mr. MacTavish that Lang confirms the present state of the law applicable in British Columbia, which does not permit a tribunal to argue the merits of its decision upon judicial review. Although Lang is factually distinguishable from the present case, it makes clear that the essential principle in *Northwestern* continues to be applied in British Columbia and further, that the court must monitor what can often be a blurry line between arguing the merits of a decision and explaining the record. In my view, the line between permissible and impermissible argument by the tribunal is drawn at the point at which the Commissioner defends the actual merits of his decision.

- [37] Extending the limit to which counsel for Authority may go in making submissions can be of assistance to the court. Without representations from the Authority, the court may be left without knowledge of factors it should take into account in assessing the merit of the petitioners' claims.
- [38] In this instance, however, the affidavit evidence and written submissions tendered by counsel on behalf of the Authority extended considerably beyond providing an explanation of the record and informing the court of matters relevant to the decision-making process. In their entirety, the submissions comprised a defence of the administrative action and were, with respect, "impermissible argument" which I have declined to consider.
- [39] As will become apparent, the court would have benefited from submissions on issues of statutory interpretation, the manner in which the licensing regime has been applied by the Authority, and an explanation of the origin, intended effect, and application of the Guidelines that were in circulation. The Authority made no submissions in relation to such matters.

Standard of Review

- [40] The third issue of concern is the determination of the standard of review that should be applied to the Authority's decision.
- [41] The proper construction of the relevant provisions of the BPCPA and the Regulation is a question of law. What an individual or corporation actually did in the course of providing travel services is a question of fact. Whether, having regard for that which was in fact done, the individual or corporation was engaged in supplying travel services in a manner that requires a licence, is a mixed question of fact and law. What, then, is the appropriate standard of review in relation to the issues that gave rise to the administrative action and this judicial review?

- [42] At the commencement of this judicial review, the parties advised of their agreement that s. 59 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 (the "ATA") applied to the Authority. Under that section, the standard of review would be correctness in relation to questions of law and questions of mixed fact and law; reasonableness in relation to findings of fact; patent unreasonableness in relation to the exercise of discretion; and fairness in relation to the application of common law rules of natural justice and procedural fairness.
- [43] Subsequent to the hearing, respondent's counsel identified decisions of this court providing authority for the proposition that s. 59 of the ATA does not apply to decisions of a tribunal in the absence of enabling legislation: see *Albert v. British Columbia (Workers' Compensation Appeals Tribunal)*, 2006 BCSC 838, and *Vernon (Assessor), Area No. 20 v. Interior Health Authority*, 2006 BCSC 930. Counsel advised the court and petitioners' counsel of his findings, but suggested that s. 59 of the ATA would apply to the Authority, whether or not enabling legislation provided made reference to the section.
- [44] Advised of respondent counsel's findings, petitioners' counsel reiterated his view that s. 59 of the ATA determined the standard of review, but submitted that if it did not apply, its terms should be used as an aide in determining the standard of review. Counsel also submitted that if s. 59 had no application, the common law "pragmatic and functional approach" to the determination of the standard of review supported the conclusion that correctness was the appropriate standard in the present circumstances.
- [45] By way of further written response, respondent's counsel claimed that reasonableness was the appropriate standard in the context of the pragmatic and functional approach.
- [46] Counsel attended on July 12, 2007, in order to provide further submissions on the standard of review.
- [47] The parties claim that notwithstanding the omission of any reference to it in the BPCPA, s. 59 of the ATA applies to the Authority. Section 59 provides as follows:
- 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
- (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
- (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
- (4) For the purposes of subsection (3), 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.
- (5) 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.

[48] Counsel for the parties say that because some of the provisions of the ATA have been incorporated into the BPCPA, the Authority is a "tribunal" for purposes of the ATA, and s. 59, a provision that applies to a "tribunal" acting without the protection of a privative clause, applies to the Authority. In support of the argument, the parties point to s. 1 of the ATA which defines "tribunal" as follows:

"tribunal" means a tribunal to which some or all of the provisions of [the ATA] are made applicable under the tribunal's enabling Act;

[49] The argument is based on the premise that reference to any provision of the ATA in a tribunal's enabling legislation renders the tribunal one to which all provisions of the ATA containing the word "tribunal" apply. Were that the case, there would be no need to make reference in enabling legislation to any provision of the ATA other than the definition of "tribunal" in s. 1. Indeed, the definition does not support the conclusion as it contemplates adoption of some or all provisions of the ATA by other tribunals.

[50] The ATA creates no tribunal and nothing in the legislation states that it will automatically apply to all administrative tribunals. Rather, the ATA creates a template by which stand-alone administrative tribunals may be governed in whole, in part, or not at all, depending upon the enabling legislation that pertains to the stand-alone tribunal. A stand-alone tribunal may adopt none, some, or all of the provisions of the ATA. The purpose of the definition of "tribunal" in s. 1 of the ATA is to make it clear that a provision of the ATA applies to any tribunal to which that specific provision has been made applicable by enabling legislation. Provisions that have not been adopted do not apply.

[51] In this case, s. 175 of the BPCPA incorporates some of the provisions of the ATA:

175. In making a determination under [the BPCPA], sections 1, 11, 14(a) and (c), 15, 18, 28, 29, 33, 35 to 37, 39, 40(5) and 57 of the Administrative Tribunals Act apply to the [Authority] as if the [Authority] were a tribunal under that Act.

[52] There is no reference to s. 58 or 59 of the ATA. By way of contrast, s. 115.1 of the Labour Relations Code, R.S.B.C. 1996, c.244, provides as follows:

115.1 Sections 1 to 10, 43, 46, 47(c), 48, 49, 56, 57, 58(1) and (2) and 61 of the Administrative Tribunals Act apply to the board.

- [53] Hence, while the ATA creates rules for a model administrative tribunal, its provisions may not be suitable for all tribunals. The legislature is at liberty to decide which, if any, of the provisions of the ATA will apply in the unique circumstances of a particular tribunal. In this case, the legislature has concluded that the review provisions of s. 59 will not apply to the Authority.
- [54] It follows that the standard of review must be determined in accordance with the "pragmatic and functional approach" described by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 223 D.L.R. (4th) 599.
- [55] The Court of Appeal described the factors to be considered in the application of the pragmatic and functional approach in *Speckling v. British Columbia (Workers' Compensation Board)* (2005), 46 B.C.L.R. (4th) 77, 2005 BCCA 80 at para. 18, in the following terms:
- The four contextual factors considered in the pragmatic and functional approach are: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question - law, fact, or mixed law and fact.
- [56] The absence of a privative clause or statutory right of appeal in the BPCPA suggests that less deference is due the Authority.
- [57] The difficult issue in this case is the proper characterization of the relationship between Travelonly and a number of individuals and whether the relationship is one of employment, agency, independent contractor or licensee-franchisee. I am not persuaded that the Authority has any greater expertise to properly characterize the relationship than does the court. Little deference is due the Authority on the basis of expertise.
- [58] The purpose of the legislation and the provisions with which the Authority is concerned are directed at the Regulation of business practices and licensing and consumer protection. That being the case, greater deference is due the Authority because of the public policy issues that are of concern.
- [59] Finally, the base question here is one of properly defining the relationship between Travelonly and the petitioners. The question is more one of law, or mixed law and fact, than it is a question of fact alone. As a result, less deference is due the Authority.
- [60] In my opinion, the appropriate standard of review in relation to the questions of law, and mixed fact and law, at the centre of this case is correctness. The appropriate standard in relation to matters of a strictly factual nature is reasonableness.

Application of the Standard of Review

- [61] One of the principal issues in this case is whether the Authority has properly interpreted the meaning to be given to the words "travel agent" in the BPCPA and the Regulation.
- [62] The statutory definition of "travel agent" is very broad and could potentially include anyone who, as employee or agent, offers travel services on behalf of an employer or principal, as the case may be. In my opinion, the wording of the BPCPA and the Regulation compels a more limited interpretation, and must be construed to require only the proprietor of a travel service business to be licensed. The legislation does not require a proprietor's employees, and others who offer services as an agent for the proprietor, to be licensed.
- [63] Section 2 of the Regulation provides an exemption for persons "providing" certain kinds of travel services or offering travel services "incidental to the [person's] primary business". Section 3 contemplates experience and knowledge of travel services sufficient to "operate a travel service business". Section 9(2) requires a licensee to ensure that the "licensee and the licensee's employees and agents do not use a personal credit card to pay for travel services on behalf of a customer". These provisions support the conclusion that the licensing obligation attaches to the proprietor or operator of the business, and not to those engaged by the proprietor or operator to carry on the proprietor's business.
- [64] Foremost among the questions to be addressed in this instance is whether the Authority's determination that each petitioner was a "travel agent" within the meaning of the BPCPA and the Regulation was correct. The determination must be adjudged incorrect in the event the legislation has been improperly interpreted, the mixed question of fact and law has been incorrectly answered, facts required to support the determination have not been found, or findings of fact were made without evidence to support them.
- [65] The record of proceeding indicates that the Authority based its decision to issue compliance orders primarily on information originating with Travelonly about the character of the undertaking in which the petitioners were engaged. The evidence consisted of information obtained from the Travelonly website, statements made by Travelonly personnel at public information sessions, and the text of the standard agreement between Travelonly and the Associates. That evidence offered prima facie support for the conclusion that Travelonly was advertising the opportunity to become involved in an independent, home-based, travel services business.
- [66] I have set forth some, but not all, of the references in the Travelonly material that were relied upon by the inspectors. The character of all of the representations was substantially the same. However, the starting point in the analysis must be the standard form of agreement between Travelonly and the petitioners. The agreement is material because of repeated references to the fact that persons like the petitioners would be carrying on their own business.
- [67] The following definitions in the standard agreement are material and informative:

Corporate Associate - Any Registered Business that has entered into a contract with TravelOnly and are {sic} desirous of building their own travel business within the TravelOnly program. The term includes all individuals, employees, corporations and general partners.

Affiliate - Any person or persons who have entered into a contract with an Associate of TravelOnly, in order to support the building of the Affiliate travel business within the TravelOnly program. The term is inclusive of all employees of the Associate who will solicit business, book travel products and/or services, offer advice, support, or in any other way interact with the customers, be they current or prospective.

Tools - Are the Internet, technical, written and oral support services supplied by TravelOnly and the Official Travel Suppliers to enable the Affiliate to offer quality service to their clients. Travel Tools are constantly being re-evaluated and are subject to change or modification as market conditions dictate.

[68] Section 3 of the agreement defines the Travelonly affiliate program in the following terms:

The TravelOnly Affiliate program is designed for individuals or businesses that wish to obtain the rights and licenses from TravelOnly to use its trademarked name, and as well to receive the training, operational services and materials to allow the Affiliate to operate a travel business for its clientele in a professional and businesslike manner under the TravelOnly name.

[69] Section 6 of the agreement describing affiliate standards contains the following caution or admonition:

The Affiliate/Associate acknowledges that it has conducted an independent investigation of the business contemplated by this agreement and recognizes that it involves business risks. The Affiliate/Associate is entering into this agreement voluntarily without threat or inducement, having been advised by TravelOnly to seek independent advice prior to entering into this contract.

...

- e) The Affiliate/Associate agrees that it shall be solely responsible for all expenses related to the operation of its business, including all operating expenses, licenses or registration fees, taxes and levies of any and all kinds;
- f) No Affiliate/Associate shall be allowed an exclusive territory for operating its business; nor represent or suggest to customers, current or potential, that such exists;
- g) The Affiliate/Associate will take great care when adding affiliates to their team and will always conduct a hiring interview and background check on potential employees; ...

- [70] Finally, section 7 of the standard form agreement stipulates that the agreement will be terminated if the affiliate derogates from, or improperly transfers or uses, the Travelonly trademark, goodwill and proprietary marks. Section 8 provides that upon termination, the affiliate shall immediately cease to operate the business under the Travelonly name and logo, and shall not directly or indirectly represent to the public that the business is operated in association with Travelonly.
- [71] The foregoing extracts and other provisions of the standard form of agreement suggest that Travelonly is really a franchisor in that, upon payment of a fee, the affiliate acquires the right to use attributes of Travelonly's business in the conduct of the affiliate's own business during the currency of the agreement.
- [72] The operating model raises two issues of concern: whether by offering the kind of arrangement embodied in the standard operating agreement, Travelonly is carrying on business in British Columbia in conformity with the requirements of the BPCPA and the Regulation, and, if so, whether an affiliate who operates in the manner stipulated by the standard form of agreement is carrying on his or her own business as opposed to carrying on business for and on behalf of Travelonly.
- [73] The manner in which Travelonly advertises the business opportunity, or operates its business, is part of the factual matrix by which the activities of the petitioners must be judged. Also of concern is the conduct of the petitioners under the Travelonly umbrella. These matters cannot be addressed without identifying that which Travelonly actually does in the conduct of its business, and that which each of the petitioners actually does for the purpose of offering travel services in order to identify the real nature of the working relationship between Travelonly and each of the petitioners.
- [74] Requests were made for some of the information that is essential to the analysis, but the inspectors did not demand compliance with the requests. The record is substantially devoid of any evidence of the actual operating methods of Travelonly and the petitioners. The submissions of counsel about the method of operation, unsupported by viva voce evidence at a hearing, or by statutory declaration emanating from a petitioner in the course of the administrative process deposing or declaring to facts as opposed to conclusions, argument or opinion cannot provide the evidentiary base from which facts may be determined, and a mixed question of fact and law correctly answered.
- [75] The Authority has not taken administrative action against Travelonly. It could do so in the event the petitioners are found to be operating for and on behalf of Travelonly other than from a fixed place of business without the approval of the Authority, and therefore contrary to the Regulation: BPCPA, s. 146(1).
- [76] I agree with the observation in the president's reasons on reconsideration that the relevant evidence before the Authority at the investigative stage, and correspondingly that before the president on reconsideration, was meagre. There was no evidence about the manner in which any particular petitioner actually operated under the Travelonly umbrella on a day-to-

day basis, what was done at any fixed place of business for which Travelonly held a licence, or how Travelonly actually assisted a petitioner in supplying travel services from his or her residence. Evidence of that kind is of singular importance because of the prohibition against conducting a travel services business from a residence without the approval of the Authority.

- [77] The petitioners claim they were operating in conformity with the Guidelines before they were withdrawn in April 2006. As I have previously stated, the Guidelines were not authorized by either the BPCPA or the Regulation. In the event the Guidelines did not correctly reflect the law, they must be ignored.
- [78] Whatever the origin of them, the Guidelines are ambiguous.
- [79] A licensed travel agent's employee who works from a residence carries on a portion of the licensee's business from that residence. If the director's approval is not obtained, the licensee will be operating in contravention of the Regulation. Without stating the point, the Guidelines suggest that if an employee complies with their terms, the licensee and the employee will be considered to be carrying on business from a residence with the director's approval.
- [80] The situation in relation to an agent operating on behalf of a licensed travel agent from a residence is not clear. The Guidelines stated that a commission agent included "an independent contractor, an independent travel consultant, an outside sales representative, a travel counsellor, etc." No definition of any of those terms was provided. Independent contractors and independent travel consultants would not, in common parlance, be agents of the licensee to whom they provided services. If such persons were providing travel services, the BPCPA and the Regulation would require them to be licensed. One cannot determine from the Guidelines, the BPCPA, or the Regulation what services the Authority concluded a person who was an independent contractor, an independent travel consultant, an outside sales representative, or a travel counsellor could provide for a licensed travel agent without need of a licence.
- [81] Other portions of the Guidelines are problematic. Three of the Guideline requirements are self-explanatory, but the meaning of two is ambiguous. It is not clear what was meant by the prohibition against the installation or utilization of a computer for the "specific purpose" of gaining access to the licensed agent's online/network travel product/reservation system. The prohibition might be construed to prohibit any computer access to the licensee's reservation system from a residence, or it might be construed to mean that any computer that was so used had to be available for general family use and not for exclusive use by the employee or agent. Without explanation from the Authority, it is difficult to comprehend the purpose or advantage of the restriction in the context of the licensing legislation.

- [82] The prohibition against the installation and maintenance of a telecommunication line is equally obscure. It is not clear whether all telecommunication from the residence for travel service purposes was prohibited, or whether the installation and use of a line dedicated solely to the supply of travel services was prohibited.
- [83] What is clear is that the Guidelines could not excuse an individual who was the proprietor or operator of his or her own business, or who supplied any aspect of travel services as an independent contractor or consultant from a residence, from the requirement to obtain approval of the Authority to operate from the residence, and the requirement to obtain a licence to carry on business as a travel agent.
- [84] Now that the Guidelines have been withdrawn, the Authority must answer three questions. Are the petitioners employees or agents of Travelonly, or the operators or proprietors of their own businesses? If the latter, are the petitioners exempt from the licensing requirements under s. 2 of the Regulation? If not, is the Authority prepared to exercise discretion to permit the travel service business in which they are engaged as operators or proprietors to be carried on from a residential location?
- [85] The answer to the first question must be derived from evidence of that which Travelonly and the petitioners actually do pursuant to the agreements that have been signed. An inspector, acting on behalf of the Authority, has the power to investigate the real nature of the business by requiring documents and information from Travelonly and from the petitioners. The investigative powers were not adequately exercised in the case of these petitioners as few, if any, meaningful questions were asked of them, and little or no information regarding operating procedures was obtained from them.
- [86] Travelonly and the petitioners must respond to demands made by the inspectors for information. Failure on the part of Travelonly to provide the information and evidence sought by the inspectors, rather than offering conclusory submissions through its personnel or by counsel, could prompt the Authority to revoke the Travelonly licence to provide travel services of any kind in British Columbia.
- [87] Failure on the part of any petitioner to provide information required by the inspector would justify an order prohibiting a petitioner from providing travel services in any manner whatever for his or her account, or the account of any other person.
- [88] Should the order be filed in the court, and should the person to whom it is issued fail to respect its terms, contempt proceedings could be initiated by the Authority.
- [89] If the information requested by the inspector is forthcoming, as one would expect to be the case, it must be examined and considered in order that the mixed question of fact and law, namely whether the petitioners are employees or agents of a licensee, or independent contractors or proprietors of their own business who require a licence, may be answered.

- [90] In my opinion, the nature of the administrative process in which the Authority was required to engage was not properly construed by the Authority. The inspectors did not use the investigative powers conferred by s. 151 of the BPCPA to obtain the evidence from which the facts that are necessary to a determination of contravention could be found. The jeopardy in which Travelonly and the petitioners placed themselves by their conduct in this case, in particular by refusing to provide evidence to support factual assertions as opposed to making general submissions based on factual assumptions, was not adequately explained to them by the Authority.
- [91] In the result, the compliance orders must be set aside because they were premised on facts and conclusions for which no reasonable evidentiary base had been obtained. That being the case, I cannot express any opinion regarding the correctness of the Authority's conclusion that the petitioners required licences because they were carrying on business as travel agents.
- [92] The appropriate remedy in this case is to remit the matter to the Authority in order that the investigative powers conferred by statute may be used to obtain evidence by compelling the production of detailed and relevant information from both Travelonly and the petitioners relating to that which is in fact done by each for the purpose of supplying travel services to consumers in British Columbia. The need to inquire, and the obligation to respond, extends far beyond simple references to provisions of the operating agreements, promotional material, and assertions of compliance with, or departure from, the Guidelines as they once were.
- [93] Once the Authority has obtained the relevant evidence, it will be obliged to find the facts that are reasonably supported by it. It will then have to determine whether, as a matter of law or mixed law and fact, the petitioners are employees or agents of Travelonly conducting themselves in a manner that does not require licensing, or independent contractors or business proprietors operating in a manner that requires licensing. The ultimate determination will be subject to judicial review on the basis of correctness.
- [94] Finally, I dismiss the claim that the Authority was biased against Travelonly or any petitioner, the claim that any petitioner was denied the opportunity to be heard, and the claim that the Authority acted in bad faith.
- [95] In *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 at para. 153, 126 D.L.R. (4th) 449, Finch J.A. (as he then was), described "bad faith" in the following terms:

The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that

is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.

[96] Travelonly was aware of the Authority's concerns from 2003 forward. The concerns were entirely justified by reference to the promotional material disseminated by Travelonly. While the administrative process was flawed, there is no evidence of bad faith.

[97] Likewise, there is no support for the allegation of bias. In *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394, 68 D.L.R. (3d) 716, the Supreme Court of Canada addressed the question of bias in the following terms:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".

[98] Having regard for the content of the agreement that governs the relationship between Travelonly and the petitioners, the content of the advertising and representations made to the public, and course of conduct followed by the Authority, and the nature of the responses of Travelonly to inquiries from the Authority, I cannot conclude that an informed person, viewing the matter realistically and practically, would think that the Authority decided the issue before it unfairly.

[99] On all of the evidence in the record of the proceeding, and the admissible portions of the affidavit evidence tendered on judicial review, I find that the petitioners and Travelonly were afforded ample opportunity to provide evidence, as opposed to general statements, to support their claim that they were licensed in conformity with the requirements of the BPCPA and the Regulation. They chose not to do so, or to do so in a most limited and uninformative manner. The compliance orders were the result.

[100] In the result, the compliance orders are quashed and the issue of compliance is remitted to the Authority for consideration in accordance with these reasons. The other claims for relief enumerated in the petition are dismissed.

[101] The petitioners are entitled to costs.

"Mr. Justice Pitfield"

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