Re-defining access to justice: concerning trends for low income people*

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Introduction

In discussions about access to justice, the focus is often on access to courts or access to legal advice and representation. Discussions about the functioning and efficacy of the justice system tend to focus on the accessibility of procedure, the time and cost associated with using the system and, in the case of the administrative justice system, on the analytical framework used by courts reviewing decisions on judicial review. However, limiting our consideration to these points misses an important and possibly more relevant aspect of access to justice for private individuals, and particularly for low income individuals. Access to justice has a broader meaning that includes access to an effective and competent decision-maker that adjudicates legal issues in a manner that satisfies those involved that their legal matter has been taken seriously and fairly determined.

This aspect of access to justice is just as important in the administrative justice system as it is in the court system, if not more so. As Chief Justice McLachlin of the Supreme Court of Canada has observed about administrative justice in Canada, many more citizens have their rights determined by tribunals than by the courts.[1] Our administrative tribunals handle a large volume of disputes. It is likely that an individual will interact with and experience the justice system through the lens of an administrative decision-maker, and that lens can colour their experience of the justice system as a whole. To maintain public confidence in the justice system, there must be confidence in its administrative components and adjudicative tribunals in particular.

[1] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 70.

The need for effective and respectful administrative tribunals is further highlighted by the kinds of rights at stake. In addition to sheer volume of interactions, many legal issues that are determined by tribunals involve fundamental rights that impact the overall health and wellbeing of those involved in the matter.

For example, if a worker in BC is not paid minimum wage or overtime, they may find recourse at the Employment Standards Appeal Tribunal. If someone experiences a severe disability, they may have their claim for disability benefits assessed by BC's Employment Assistance Appeal Tribunal or the federal Social Security Tribunal. A worker who is unable to work because of an injury at an unsafe workplace may have a claim for compensatory benefits and an assessment of any safety violations determined by the Workers' Compensation Appeal Tribunal. A worker who is fired because she is pregnant, or a tenant who is refused a rental unit because they are transgender can enforce their rights at BC's Human Rights Tribunal.

The security of an individual's home provides another illustrative example of the types and volume of issues determined by administrative decision-makers. In BC, a tenant who is living in unsafe housing, or who needs to recover their security deposit from a landlord, must bring their claim before the Residential Tenancy Branch (the "Branch") in most situations. The Branch has exclusive jurisdiction over almost all residential tenancy disputes in the province up to a monetary limit of $25,000, and opens over 18,000 new files per year.[2] That number can be compared to BC's Small Claims Court, which has the same monetary limit and can determine a wide variety of civil disputes, and sees just over 15,000 new cases per year.[3] Given that approximately one third of BC's population resides in rental housing and almost all legal issues that arise in a rental relationship must go before the Branch, it is unsurprising that people are more likely to find themselves in a tenancy dispute

[2] Laura Monner, *Residential Tenancy: Dispute Resolution Report 2008/09-2012/13* (23 July 2014) at 9 [Monner, *RTB 2008/09-2012/13*].
[3] Provincial Court of BC, *Annual Report 2013-14*, (31 March 2014) online: Provincial Court of BC <www.provincialcourt.bc.ca> at 44.

than a small claims civil dispute and, by extension, find themselves seeking to enforce or defend their housing rights before an administrative decision-maker instead of a judge.

In addition to being common legal issues that everyone may experience, the types of legal issues set out above reflect incredibly important interests for the individual involved, often touching on basic economic and social inclusion that can impact security of the person or fundamental equality rights. Adjudication of these kinds of issues may very well impact or determine a person's long-term health and wellbeing.

Because of their connection to fundamental rights, these kinds of legal issues are more likely to be experienced by people living in poverty. Legal issues relating to precarious employment, unsecure housing, or public benefits are often inextricably connected with a person's socioeconomic status. In other words, not only are people living in poverty more likely to experience the justice system through an administrative decision-maker instead of a court, but when they do it may very well be a situation where their most fundamental rights are at stake.[4] With such important rights at stake, and with so much on the line for an individual, basic accountability mechanisms become essential to make sure parties leave their experience with an administrative decision-maker feeling like their case has been taken seriously.

The usual accountability measures for administrative decision-makers typically include statistics on budget, annual caseload, outcomes, and timelines for a case from start to completion. While these statistics are important, they fail to tell us much about how well the tribunal is actually preforming its duties. More meaningful accountability mechanisms might include reviewing whether a tribunal is meeting

[4] Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2013) 211 at 212 [Sossin, "Access to Administrative Justice"] [Sossin].

its statutory mandate, accurately applying its legislation, meeting basic procedural fairness standards, or issuing decisions that allow the individuals involved to feel that their issue has been determined fairly and professionally. However, the kinds of comprehensive audits that would be required to assess a decision-maker's functioning in a more meaningful way are complex and costly. Perhaps for this reason, more meaningful accountability mechanisms for administrative decision-makers are elusive and rarely used.[5]

It is in this context that this article will explore a number of current trends in administrative justice in BC, with a focus on those that are most likely to impact low income people: (1) an increase in the reliance on technology to replace face-to-face hearings; (2) an increase in the deference awarded to tribunals by reviewing courts; and (3) a narrowing of the court's jurisdiction to review the decisions of specific tribunals.[6]

These trends have been qualitatively identified through the authors' experiences in a high volume community law clinic working on legal issues that impact the wellbeing of low income people. Taken on their own, the trends are simply note-worthy, but this article explores how these trends may have a negative impact on the experiences of low income people as they interact with the justice system and have their fundamental rights determined. It is difficult to tell whether these consequences are unfolding without more meaningful accountability mechanisms for the administrative tribunals involved. In our view, the trends and potential consequences further underline the need for such mechanisms to ensure meaningful access to justice for low income people.

[5] For more on this topic, see Lorne Sossin, "The Elusive Search for Accountability: Evaluating Adjudicative Tribunals" (2010) 28 Windsor Y.B. Access Just. 343.
[6] For simplicity, we will use the term "tribunal" in this article to refer to adjudicative administrative decision-makers.

Trend #1: Reduction in face-to-face hearings

One key goal of governments when they create most administrative tribunals is to provide efficient, accessible and specialized access to justice while maintaining basic fairness and the rule of law. Efficiency and accessibility can often mean the streamlining of procedural protections in order to simplify the tribunal process. While efficiency and simplification are valid and important considerations when determining important rights and benefits, the need to balance those considerations with basic procedural protections becomes paramount to maintain confidence in the system.[7] Increasing efficiency with the aim of cost savings has the potential to seriously threaten basic procedural fairness before tribunals.[8]

We have identified a trend towards an increased focus on efficiency, and particularly an increased reliance on communications technology, in adjudicative hearings at many administrative tribunals that determine important rights. Examples of that trend are set out below. While teleconference or video conference hearings can be more accessible for some participants, particularly those with physical limitations or those who reside in rural areas, they can also create accessibility difficulties for participants with different kinds of barriers related to language, hearing or cognition, and can threaten both the actual fairness and the appearance of fairness of a hearing. Technological problems may arise, hearings may be more difficult to control, credibility may be harder to asses, and it may be more challenging to deal with documentary or physical evidence.

[7] For a discussion of the importance of ensuring basic fairness and the appearance of fairness at an administrative decision-maker with relaxed procedures, see *Kikals v. British Columbia (Residential Tenancy Branch)*, 2009 BCSC 1642 at paras. 27 and 37.

[8] Sossin, "Access to Administrative Justice", *supra* note 4 at 218-219.

BC's Residential Tenancy Branch

As set out in the introduction, BC's Residential Tenancy Branch determines over 18,000 applications per year, with exclusive jurisdiction over almost all residential tenancy matters under the monetary limit of $25,000. In recent years, that has been a clear trend in Branch operations to focus on high volume, informal decision-making.

The *Residential Tenancy Act*[9] provides that disputes before the Branch may be adjudicated by oral hearing or in writing. There is no requirement for consent from the parties when the form of hearing is determined. The vast majority of originating disputes are still determined via an oral hearing. However, in recent years the Branch has become heavily reliant on conference call technology for oral adjudication. In 2006 the Branch held 44% of its hearings via face-to-face oral hearings.[10] In 2013, the Branch determined 1% of its files via a face-to-face hearing, 94% via teleconference, and the remainder in writing.[11] Currently, oral hearings occur by teleconference by default and the option to request a face-to-face hearing is not transparent in most of the Branch's information materials.

Since the increase in reliance on teleconference technology, there have been a number of judicial reviews in BC that have identified the unfairness than can arise in a teleconference hearing that would not occur with face-to-face hearings.[12] These include cases where the court has set aside a Branch arbitrator's decision because:

- One party was unable to connect to the teleconference, and all or part of the hearing went ahead in their absence;[13]

[9] S.B.C. 2002, c. 78.
[10] Mohammad Shojaei & Laura Monner, *Residential Tenancy: Dispute Resolution Report 2006 - 2010* (17 March 2011) at 20.
[11] Monner, *RTB 2008/09-2012/13*,*supra* note 2 at 20.
[12] For a greater discussion in this issue, see: Jessie Hadley and Kendra Milne, *On Shaky Ground: Fairness at the Residential Tenancy Branch* (Community Legal Assistance Society, October 2013) at 33-37.
[13] *Ross v. British Columbia*, 2008 BCSC 1862; *Ganitano v. Metro Vancouver Housing Corp*., 2009 BCSC 787.

- An arbitrator conducted a hearing without ensuring both parties had received the same set of documentary evidence that was being considered to adjudicate the dispute;[14] and
- An arbitrator abruptly terminated the teleconference call, seemingly in an effort to gain control of the hearing, and did not allow the parties to finish presenting their evidence and submissions.[15]

Social Security Tribunal

In April 2013, the federal government dissolved four federal tribunals and replaced them with a single tribunal called the Social Security Tribunal (the "SST"). The SST is tasked with adjudicating appeals brought under the *Employment Insurance Act*[16], the *Canada Pension Plan*[17], and the *Old Age Security Act.*[18] In other words, the SST has jurisdiction to determine appeals in claims related to regular employment insurance benefits, maternity benefits, sickness benefits, federal disability benefits, and federal retirement benefits, all of which are fundamental to the basic income security of many people.

A stated goal of the SST is to provide a "simplified, effective and efficient appeal process that will improve the administration of justice."[19] Under the former system, first level appeals went before a decision-making panel of three people, generally by face-to-face hearing. Second level appeals went before at least one decision-maker who was often a retired federal judge, again often by face-to-face hearing. Parties at the SST are no longer guaranteed the option of an oral hearing. In fact, parties are no longer guaranteed a hearing at all. Tribunal members have the authority to determine an appeal based on the documents and submissions filed. Even if a

[14] *Fernandez v. Sakr*, 2012 BCSC 1024.
[15] *Johnson v. Patry*, 2014 BCSC 540.
[16] S.C. 1996, c. 23.
[17] R.S.C. 1985, c. C-8.
[18] R.S.C. 1985, c. O-9.
[19] Employment and Social Development, News Release, "Government of Canada announces appointment of additional Social Security Tribunal members" (27 November 2014) online: Government of Canada News Releases <http://news.gc.ca>.

hearing does take place, it may now be conducted by written questions from the tribunal member, telephone or videoconference. While information about the operations of the SST is difficult to find, media reports based on freedom of information requests have noted:

- The SST has been working to reduce the number of face-to-face hearings, instead relying on teleconference and video conference technologies;[20]
- Appellants before the SST are less likely to succeed if their case is heard via teleconference instead of a face-to-face hearing;[21] and
- The SST's 2013/14 annual budget was $13.6 million, a significant reduction from the total budgets of the four tribunals it replaced, which was $42.4 million as recently as 2010/11.[22]

While the SST is new and additional measures are being taken to reduce a large backlog of appeals, so far the new tribunal has not been more efficient. In late 2014, media reports noted a backlog of over 11,000 appeals and increasing delays for many trying to access benefits.[23]

BC's Civil Resolution Tribunal

British Columbia's new Civil Resolution Tribunal (the "CRT") will be Canada's first online administrative tribunal. Created by legislation passed in 2012 and expected to be up and running in 2015, the CRT will have the following jurisdiction:

- To start, the CRT will focus on small claims disputes, and disputes between strata corporations and strata property owners up to the BC small claims

[20] Leanne Goodman, "Fewer in-person hearings being heard by social security tribunal", Winnipeg Free Press (18 December 2014) online: Winnipeg Free Press <http://www.winnipegfreepress.com>.
[21] *Ibid*.
[22] Leanne Goodman, "Social Security Tribunal saving money, but hearing fewer appeals", The Star (22 September 2014) online: The Star <http://www.thestar.com>.
[23] Leanne Goodman, "Ottawa's Social Security Tribunal Backlog Shortlists 11,000 People", The Canadian Press (1 December 2014) online: <www.thecanadianpress.com>.

court limit of $25,000.[24] The enabling legislation for the CRT allows for the expansion of its jurisdiction at a later date.[25]

- The enabling legislation allows the CRT to gain jurisdiction via the consent of the initiating party and either the consent of the responding party or a statutory requirement under another statute.[26] To start, consent will be required from all parties except strata corporations, which are required to participate in the CRT process if a strata owner voluntarily opts in.[27]
- The CRT's final decision is binding on parties who have either consented to the CRT process or who are required to participate under another statute.[28]
- Parties are required to represent themselves except in specific circumstances.[29]

The CRT is intended to be a timely, flexible, accessible, affordable, and efficient means to determine legal disputes, with online dispute resolution services available 24 hours a day. The Chair of the CRT has described the tribunal as an important development for access to justice, and one that challenges what she has described as the legal profession's resistance to change that impedes necessary reforms to the legal system.[30] The legal profession has indeed expressed concerns about protecting the right to legal counsel, power imbalances and a sacrifice of procedural protections in order to save costs.[31] It is yet to be seen whether these concerns are warranted, but certainly a new and experimental tribunal like the CRT highlights the necessity of meaningful accountability mechanisms.

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[24] Bill 44: *Civil Resolution Tribunal Act*, 4th Sess., 39th Parl., 2012, s. 3 and Schedule (not yet in force).
[25] *Ibid*., s. 13 of the Schedule (not yet in force).
[26] *Ibid*., ss. 4-7 (not yet in force).
[27] *Ibid*., ss. 6-7; ss. 6-7 of the Schedule (not yet in force).
[28] *Ibid*., s. 8 (not yet in force).
[29] *Ibid*., s. 20 (not yet in force).
[30] Shannon Salter, "B.C.'s Civil Resolution Tribunal" (Paper *originally presented at the Osgoode Forum on Administrative Law and Practice, Toronto 23-24 October 2014 and the CLEBC Administrative Law Conference, Vancouver 30 October 2014) online: Civil Resolution Tribunal* < http://www.civilresolutionbc.ca>.
[31] Jean Sorensen, "B.C. lawyers worried about exclusion from new civil resolution tribunal", Canadian Lawyer Magazine (2 September 2013) online: Canadian Lawyer Magazine <http://www.canadianlawyermag.com>.

BC's Employment and Assistance Appeal Tribunal

BC's Employment and Assistance Appeal Tribunal (the "EAAT") determines appeals when the provincial government has refused, reduced or discontinued income assistance, disability assistance or a supplement under the *Employment and Assistance Act*[32] or the *Employment and Assistance for Persons with Disabilities Act*.[33] It also determines appeals under the *Child Care Subsidy Act*[34] related to the refusal, reduction or discontinuance of a low income child care subsidy.

The EAAT has the power to determine appeals by oral hearing or, with the consent of both parties, in writing. Historically, the vast majority of oral hearings were held face-to-face by a tribunal panel of one to three members. As recently as 2008, 86% of EAAT's oral hearings were held in person, or with at least one member of the tribunal panel present in person, and the remaining 14% via teleconference.[35] In recent years, the EAAT has increasingly relied on teleconference for its oral hearings, with only 64% held face-to-face and 36% held via teleconference.

While there is no evidence to show that the two trends are related, the increasing use of teleconference hearings is particularly concerning given that the rates of success for appellants appealing to the EAAT have plummeted over the same time period. From the EAAT's creation in 2002 and until 2009/10, success rates for appellants appearing before the tribunal hovered between 27% and 40%.[36] Starting in 2010/11, there has been a steep decline in rates of success. In 2013/14, only 6% of appellants appearing before the EAAT were successful in their appeal.

Increasing availability of communications technology is a positive step for the accessibility of tribunals, but only for some participants. There is no question that a

[32] S.B.C. 2002, c. 40.
[33] S.B.C. 2002, c. 41.
[34] R.S.B.C. 1996, c. 26.
[35] Email from Alanna Valentine, Director, Policy and Appeals Management, 19 January 2015.
[36] Employment and Assistance Appeal Tribunal. Annual Report, 2002/03, 2003/04, 2004/05, 2005/06, 2006/07, 2007/08, 2008/09, 2009/10, 2010/11, 2011/12, 2012/13, and 2013/14.

hearing convened by teleconference or video conference is less costly than a face-to-face hearing convened in the participant's home community. However, heavy reliance on technology to replace face-to-face hearings, particularly when used without express consent or without transparent procedures for requesting in-person hearings, creates a significant risk for access to justice at administrative tribunals. Without effective accountability mechanisms to ensure that this increasing reliance is not undermining the experience of participants or the substantive outcomes of the adjudication process, we cannot guard against that risk.

Trend #2: Increased deference from reviewing courts

The second trend our office has identified is an increase in the deference awarded to administrative tribunals by superior courts on judicial review. In particular, recent case law from the Supreme Court of Canada related to the adequacy of reasons issued by a tribunal appears to have substantially changed the BC Supreme Court's willingness to exercise its reviewing jurisdiction and quash tribunal decisions.

Adequate reasons allow a court to review the tribunal's decision, they support careful and well thought-out decision-making,[37] and they enhance confidence in the justice system:

In a now famous address, Sir Robert McGarry, Vice-Chancellor of England, has reminded judges that the most important person in a lawsuit is not the judge, sitting in elevated dignity on the dais, nor the lawyers, however eminent they might be; it is the losing party [citation omitted]. In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a

[37] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 38-39 [*Baker*].

decision be stated, and stated in language that the party who has been dealt the blow can comprehend.[38]

These outcomes are particularly important in tribunals designed to be time and cost efficient while adjudicating the fundamental rights of low income people. Effective reasons allow the parties to be confident that, despite informal procedures or hearing methods, their case has been decided with a level of care and attention that is appropriate given the interests at stake.

In 1999, the Supreme Court of Canada determined that the adequacy of a tribunal's reasons was a matter of procedural fairness. In some situations, inadequate reasons could provide a stand-alone basis for a court to exercise its jurisdiction to quash a decision on judicial review.[39] In recent years, a body of case law highlighting the necessity of fulsome written reasons for decisions of administrative tribunals developed in BC.[40] In those cases, the reviewing judges were willing to set aside tribunal decisions based on inadequate reasons alone as a breach of procedural fairness, because the tribunal:

- failed to deal with all the issues that were material to the application;
- failed to provide any reasoning to show a basis for the arbitrator's factual and/or legal conclusions; or
- failed to explain negative credibility findings.

[38] *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Ont.H.C.) at 310-311.

[39] *Baker*,, *supra* note 37.

[40] See for example: *Harley v. Employment and Assistance Appeal Tribunal,* 2006 BCSC 1420; *Ross v. British Columbia*, 2008 BCSC 1862; *Mochizuki v. Whitworth Holdings Ltd*., 2008 BCSC 802; *Doughty v. Whitworth Holdings Ltd.,* 2008 BCSC 801; *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal),* 2009 BCSC 1461; *Chartrand v. 0810867 B.C. Ltd* (24 March 2009), Nanaimo 55039 (B.C.S.C.); *Wiebe v. B&D Stinn Enterprises Ltd.* (4 May 2010) Vancouver S100134 (B.C.S.C.); *Clements v. Gordon Nelson Investments,* 2010 BCSC 31; *Falc v. Mainstreet Equity Corp*., 2009 BCSC 410; *Lobo v. 568570 B.C. Ltd.*, 2011 BCSC 1474; *Collard v. British Columbia (Residential Tenancy Act Dispute Resolution Officer),* 2011 BCSC 136; *Andree v. Bentley*, 2011 BCSC 641.

In 2011, the Supreme Court of Canada decided *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,[41] finding that insufficient reasons are not, on their own, a basis to set aside the decision of an administrative tribunal. Instead, the Court said that a reviewing judge should look at the reasons for a decision together with the outcome to determine whether a decision is reviewable. A tribunal need only provide reasons that allow a reviewing court to understand why it made the decision and whether the final outcome was justifiable, even if the court has to go outside the tribunal's reasons and complete its own review of the evidence to make that determination. The Court endorsed the notion that a reviewing court may supplement the reasons of the tribunal as part of a deferential analysis.[42]

Since 2011, the Supreme Court of Canada has continued to reiterate its comments in *Newfoundland and Labrador Nurses' Union*.[43] In the authors' experience, this has led to an increase in the level of deference provided to administrative tribunals. That deference has been illustrated by cases in which the BC Supreme Court has dismissed petitions for judicial review where:

- the tribunal provided no reasoning on an element of the legal test being applied;[44]
- the tribunal acknowledged there were two competing interpretations the legal provision being applied and provided no reasoning for why one way was chosen over the other;[45] and
- the decision-maker made no mention of the law or policy relevant to the claim at hand.[46]

[41] 2011 SCC 62 [*Newfoundland and Labrador Nurses' Union*].

[42] *Ibid.* at paras. 12-18.

[43] See for example: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34; *Agraire v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[44] *Garbutt v. British Columbia (Social Development)*, 2012 BCSC 1276.

[45] *Samji v. HFBC Housing Foundation*, 2012 BCSC 1367.

[46] *Ashurwin Holdings Ltd. v. British Columbia*, 2012 BCSC 1408.

This trend is concerning because the court appears to be moving away from the view that reasons are important to enhance confidence in a tribunal's decision-making process and to allow the parties to understand why a decision has been made. It appears that now a tribunal decision may well meet the standard set out in the *Newfoundland and Labrador Nurses' Union* case because the *outcome* is within the range of rational outcomes, even if the *reasons* may not provide assurance of care and attention by explaining how that outcome was reached.

For example, a court reviewing a decision of the Residential Tenancy Branch upholding a tenant's eviction will no longer review whether the reasons allow the tenant to understand why she is being evicted, or leave her feeling that her right to stay in her home has been carefully adjudicated. While the court will still review decisions for patently unreasonable substantive errors of fact or law,[47] such a high standard of review often does not correlate with the parties' perception of whether the Branch fairly considered their case.

Many administrative tribunals that determine the rights of people living in poverty are already afforded a deferential standard of review.[48] The increase in deference that comes with the elimination of a stand-alone review of a tribunal's written reasons highlights the needs for other kinds of accountability mechanisms. Efficiency and accessibility often necessitate that tribunals use abbreviated procedures that may not mirror the formality and detail of a court proceeding, but access to justice requires that we also ensure that parties leave tribunal proceedings understanding the decision and why it was made.

[47] In BC, the applicable standard of review for many administrative tribunals is legislated in the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which continues to the standard of patent unreasonable for some tribunals.
[48] The *Administrative Tribunals Act* mandates that a patently unreasonable standard of review applies to findings of fact and law within the exclusive jurisdiction of the Employment Assistance Appeal Tribunal, the Residential Tenancy Branch, the Employment Standards Appeal Tribunal and the Workers' Compensation Appeal Tribunal, among others.

Trend #3: Narrowing of superior court jurisdiction

The third trend our office has identified is the narrowing of superior court jurisdiction to engage with legal issues that arise in areas governed by administrative schemes. Since 2011, superior courts in British Columbia have issued several decisions which purport to narrow the scope of judicial review of administrative decisions and eliminate altogether an equitable remedy the court has granted for centuries. This trend has serious implications for tenants, in particular, who may find themselves without recourse if they lose their Residential Tenancy Branch hearing.

The scope of judicial review

In 2011, the BC Court of Appeal released its decision in *Auyeung,*[49] in which the Court considered the proper subject of judicial review in an administrative scheme where there is an internal review or reconsideration process. In administrative law, parties are generally required to exhaust all internal remedies before applying for judicial review. In *Auyeung,* the appellant Union was unsuccessful at the Labour Relations Board (the "LRB"). Under the *Labour Relations Code*,[50] a party who is unsatisfied with a LRB decision may apply for leave to have the decision reconsidered.

The *Code* sets out specific grounds for reconsideration. However, the grounds are fairly broad. They are: 1) the original decision is inconsistent with principles expressed or implied in the *Code* or another Act dealing with labour relations; 2) a denial of natural justice; or 3) new evidence has emerged that is likely to have a material and determinative effect on the original decision.[51] To obtain leave, an

[49] *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* 2011 BCCA 527 [*Auyeung*].
[50] R.S.B.C. 1996, c. 244 [*Code*].
[51] *Auyeund*, *supra* note 49 at para. 28.

applicant must demonstrate a good arguable case of sufficient merit on one or more of these grounds.

In *Auyeung,* the Union was denied leave to reconsider the original LRB decision. The Union then applied for judicial review of both the original LRB decision and the decision denying leave. However, the Court of Appeal found the original decision to be outside the permissible scope of judicial review.

The Court held that the Legislature has limited the scope of review of LRB decisions to the grounds for reconsideration, and that it could not expand this scope on judicial review. If the LRB concludes the original decision is not inconsistent with the principles expressed or implied in the *Code* or in any other Act dealing with labour relations, a court on judicial review is entitled to determine whether that conclusion is patently unreasonable, unfair or incorrect. If it is not, the matter should end there. A court is not permitted to review the original decision.[52]

Since 2011, this decision has been applied to a number of other administrative schemes including employment standards [53], workers' compensation [54] and residential tenancy.[55] From an access to justice perspective, the latter application of *Auyeung* has the most serious implications.

Unlike the *Code,* the *Residential Tenancy Act*[56] establishes a very narrow internal review process for decisions of the Residential Tenancy Branch. A decision or order of the Residential Tenancy Branch may only be reviewed on one or more of the following grounds: 1) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control; 2) a party has new and relevant evidence that was not available at the time of the

[52] *Ibid*. at para. 33.
[53] *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2013 BCSC 1499.
[54] *Pistell v. British Columbia (Workers' Compensation Appeal Tribunal),* 2012 BCSC 463.
[55] *Hudon v. British Columbia (Residential Tenancy Act, Dispute Resolution Officer),* 2012 BCSC 253.
[56] S.B.C. 2002, ch. 78 [*Residential Tenancy Act*].

original hearing; and 3) a party has evidence that the decision or order was obtained by fraud.[57]

Importantly, the grounds do not include the traditional grounds for judicial review, including serious errors in fact, law or an exercise of discretion, or a breach of procedural fairness. The internal review process does not address situations where parties believe:

- they did not get a fair hearing at the Branch;
- their arbitration decision doesn't make sense or doesn't deal with all the issues raised in the arbitration; or
- the arbitrator has applied the law improperly, or has made factual findings that cannot be supported by the evidence.[58]

Despite the limited nature of the internal review mechanism at the Residential Tenancy Branch, the Court of Appeal in *Sereda v. Ni*[59] followed *Auyeung* and held that in the residential tenancy context the proper subject of judicial review is the review decision and not the original decision.

The implication of this recent decision for tenants is serious. If a tenant applies for internal review of their original decision, even if the Residential Tenancy Branch does not have jurisdiction to decide issues of fairness or errors in fact or law, the tenant may be precluded from raising these arguments on judicial review. Original decisions may be effectively immunized from review.

What makes this consequence particularly concerning is the prevalence of fairness issues at the Residential Tenancy Branch that have the potential to go unremedied. These issues were studied in the report, "On Shaky Ground: Fairness at the Residential Tenancy Branch." One methodology used in the report was the review

[57] *Ibid*., s. 79(2).
[58] Hadley *supra* note 12 at 22.
[59] 2014 BCCA 248.

of a sample of Residential Tenancy Branch decisions for key indicators of basic fairness; for example: stating the legal test to be applied, correctly applying the legal test or applicable policy guideline, and providing at least some analysis to explain key findings. In over 70% of the decisions reviewed, the authors identified at least one objective problem with basic fairness.[60]

This finding is fairly consistent with the rate of success in residential tenancy judicial reviews in recent years. Between 2008 and 2011, between 60% and 78% of residential tenancy judicial reviews were successful.[61] The most common reasons relied on by courts to set aside an arbitrator's decision were: unfairness (35%), inadequate reasons (22%), and serious errors in the application of legislation (30%).[62]

In 2012, the rate of successful residential tenancy judicial reviews dropped to 29%.[63] Without accountability mechanisms in place it is impossible to know for certain what caused that drop. However, the authors suspect it had more to do with the *Newfoundland and Labrador Nurses' Union* decision released in 2011 than a drastic improvement in fairness at the Branch. It will be interesting to see whether there will be another drop in success rates following the Court of Appeal's recent decision in *Sereda*.

The court's equitable jurisdiction

For centuries, courts have exercised the equitable jurisdiction to relieve against the forfeiture of a tenancy for non-payment of rent on its due date. Under the common law, a landlord has the right to immediately terminate a tenancy agreement if the tenant does not pay rent when it is due. However, courts of equity would often grant tenants equitable relief where they had subsequently paid their rent on the

[60] Hadley, *supra* note 12 at 28-29.
[61] *Ibid*. at 25-26.
[62] *Ibid*. at 27.
[63] *Ibid*. at 26.

basis that it would be unjust for a landlord who has been adequately compensated to take advantage of the right to forfeit the tenancy.[64]

In British Columbia, the court's equitable jurisdiction to grant relief from forfeiture was first codified in legislation in 1897. It is now found in section 24 of the *Law and Equity Act*. The *Law and Equity Act* casts the court's equitable jurisdiction broadly and mandates that it be applied in all courts in British Columbia.[65] Consistent with this direction, British Columbian courts have long held that in proper cases the court has the power to order relief from forfeiture of a tenancy.[66]

However, that changed last year when the Court of Appeal released its decision in *Ganitano v. Metro Vancouver Housing Corporation.* Ms. Ganitano is a single mother of limited financial means who had lived in her rental unit for over 29 years. Because of her difficult financial circumstances, Ms. Ganitano was late paying her rent approximately once per year. However, she always paid her rental arrears and in other respects was a good tenant.[67]

On one occasion of late payment, Ms. Ganitano's housing provider issued her a Notice to End Tenancy for non-payment of rent. Under the *Residential Tenancy Act,* a tenant who has been issued such a notice has 5 days to either pay the arrears or challenge the validity of the notice. If she does neither, then she is "conclusively presumed to have accepted that the tenancy ends" and must vacate the unit by the date set out in the notice.[68] Ms. Ganitano paid 75% of her rent within five days of receiving the notice. She paid the remainder seven days later. However, having missed the five-day deadline, the Residential Tenancy Branch upheld Ms. Ganitano's eviction.

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[64] *Hill v. Barclay* (1811), 18 Ves. Jun. 56 (Ch.), at 58, 60-61; *Howard v. Fanshawe,* [1895] 2 Ch. 581, at 586, 588; *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.(E.)) at 723.
[65] R.S.B.C. 1996, c. 253, ss. 1 and 24.
[66] *Huntting v. MacAdam* (1907), 13 B.C.R. 426 (S.C.), at 436; aff'd (1908), 13 B.C.R. 426 (F.C.), at 439-40; *Orpheum Theatrical Co. v. Rostein* (1923), 32 B.C.R. 251 (S.C.) at 264.
[67] *Ganitano v. Metro Vancouver Housing Corporation,* 2012 BCSC 1308 at paras. 4-6, 10, 12, 14, 68, 74 [*Ganitano 2012*].
[68] *Residential Tenancy Act*, supra note 56, s. 46.

Ms. Ganitano brought a judicial review of the Residential Tenancy Branch decision and successfully requested that the court grant her relief from forfeiture of her tenancy. Her housing provider appealed that decision to the Court of Appeal.

Last January, the Court of Appeal released its decision, finding that courts no longer have the equitable jurisdiction to grant relief from forfeiture of tenancies governed by the *Residential Tenancy Act*. The Court found the *Residential Tenancy Act* to provide a comprehensive scheme for dealing with matters relating to the non-payment or late-payment of rent in residential tenancy situations. According to the Court, a tenant's obligation to pay rent is no longer merely a matter of contract but an obligation imposed by statute. The Legislative Assembly has clearly and expressly stated that a tenant's failure to respond within the statutory time limits to a notice given in accordance with the *Act* will, by operation of law, bring a tenancy to an end and entitle the landlord to regain possession of the rental unit. Such a termination was found to be a statutory forfeiture and beyond the reach of the *Law and Equity Act*.[69]

Ms. Ganitano sought leave to appeal this decision to the Supreme Court of Canada, but leave was denied.[70]

This decision has serious implications for both tenants and the jurisdiction of superior courts. For tenants, the loss of the right to seek relief from forfeiture has the potential to leave unremedied the harsh and disproportionate results that may flow from late payment of rent.

Over 30% of British Columbia's households rent their living accommodations[71] and, at least in Vancouver, low-cost housing is not readily available.[72] It is not

[69] *Ganitano v. Metro Vancouver Housing Corporation,* 2014 BCCA 10 at paras. 42-44.
[70] *Ganitano v. Metro Vancouver Housing Corporation,* [2014] S.C.C.A. No. 98.
[71] Hadley, *supra* note 12 at 6.

uncommon for a tenant facing financial difficulties to fail to pay rent on time but be in a position to pay shortly after it was due. In such circumstances, an application for relief from forfeiture may be the only way of averting sudden eviction.

The availability of such a remedy was of particular significance in jurisdictions like British Columbia where residential tenancy decision-makers have no discretion to depart from or extend the strict statutory timelines governing late payment of rent or applications for dispute resolution.[73] The rigidity of this scheme has the potential to lead to a number of unfortunate and disproportionate results. For example, tenants may be evicted with no recourse even where:

- they are late paying rent (even for the first time) because of circumstances beyond their control;
- they are short in paying their rent one time only by a few dollars;
- they repay all arrears within six days of receiving a notice to end tenancy (i.e., one day late); or
- they do not pay the alleged arrears because they honestly believe there is no rent owed.

Without the jurisdiction to grant relief from forfeiture, courts will be unable to remedy inequities that arise by operation of the *Residential Tenancy Act* in situations like those above. Tenants will have one fewer avenue to protect their housing security, and any perceived unfairness in the decision-making process will be compounded by the absence of an effective remedy.

Without this important recourse, meaningful accountability mechanisms for decision-makers like BC's Residential Tenancy Branch become important in order to determine whether the Branch is truly meeting its intended policy goals. While in this example, true accountability mechanisms might reveal that the Branch is functioning as well as it can within its governing legislation, accountability

[72] *Ganitano 2012*, *supra* note 67 at para. 74.
[73] *Residential Tenancy Act*, *supra* note 56, s. 66.

mechanisms focused on actual outcomes for those involved in the system may highlight problems with the legislation itself.

Conclusion

The last several years have seen important changes to tribunals across Canada. Reduced cost and increased efficiency have become the priorities of the day with little analysis about the impact on the quality of decision-making or the fairness of the administrative process. One application of those priorities is the trend discussed in this paper of increased reliance on teleconference technologies and the reduction in face-to-face hearings. However, there are others. Take for example the reliance on short hearings and quick decisions at the Residential Tenancy Branch. Branch statistics show that between 2007 and 2012, between 92% and 94% of all hearings annually took place in less than an hour, and 68% to 70% took place in less than 30 minutes.[74] Although arbitrators are given 30 days to issue a decision, in 2011/12 the average time between a Branch dispute resolution hearing and the issuing of a decision was 1.1 days, including both urgent and non-urgent disputes.[75] Given that most full-time arbitrators handle 14 disputes per week, including writing decisions, it is little wonder that each dispute gets limited time.[76]

At the same time that tribunals are becoming more informal and efficient, traditional methods of oversight in the form of review by superior courts are being eroded. As discussed in this article, the scope of judicial review has been narrowed to statutorily circumscribed review or reconsideration decisions and even those decisions are reviewed on an increasingly deferential standard. As well, residential tenants no longer have the option of invoking the equitable jurisdiction of the court to relieve against the forfeiture of their tenancy where there is no relief available

[74] Hadley, supra note 12 at 33, which notes that at the time of the writing of that report, arbitrators completed 15 hearings per week. Since the writing of *On Shaky Ground*, we have been told verbally by the Director of the Residential Tenancy Branch that the number of hearings per week has been reduced to 14 and may soon be reduced to 13.
[75] *Ibid*. at 47-48.
[76] *Ibid*. at 47.

under the *Residential Tenancy Act.* The result is that fundamental legal issues that may very well impact a person's long-term health and wellbeing are being decided quickly and informally with limited avenues for review or oversight.

Unfortunately, any negative consequences of the trends identified in this paper will disproportionately impact low income people. Low income people are more likely to be tenants, more likely to claim welfare or disability assistance, and more likely to have to rely on legislated minimum employment standards. They are more likely to have to enforce their legal rights through an administrative scheme rather that the court.

The fact that it is often administrative decision-makers adjudicating fundamental rights that may have long-term and significant impacts on an individual's health and wellbeing means that we need to take care to ensure that those administrative decision-makers are properly resourced and operate effectively and respectfully. With such essential rights at stake, and with such great potential for risk to the individual if these rights are not dealt with appropriately, accountability mechanisms become essential. Access to representation and the courts remains incredibly important, but meaningful access to justice for low income people necessitates more. It requires access to administrative decision-makers that are effective in exercising their statutory and broader policy duties with a level of accuracy, fairness, professionalism and respect that leaves people living in poverty with the understanding that their legal rights are important enough to be taken seriously.