

Take Five

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BRITISH COLUMBIA EDITION

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Welcome Efrat Arbel

We are pleased to announce the addition of Efrat Arbel to our team; with her remarkable background and outstanding achievements, she is an asset to both divisions of OnPoint.

Efrat graduated at the top of her UBC Law Class in 2004. After clerking at the British Columbia Supreme Court, she articulated and practised at Fasken Martineau in general litigation. She then went on to attend Harvard Law School, where she is now a Doctoral Candidate (expected June 2011).

Efrat has been busy while at Harvard. She has been a teaching assistant for the Graduate Program Writing Workshop, a research assistant to two law professors, and a volunteer clinician and researcher with the Harvard Law School Immigration and Refugee Clinic.

We are excited to have Efrat join us and look forward to involving her in a variety of research and litigation projects.

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The chambers judge ordered the appellant to refund the respondent additional taxes it had paid pursuant to revised tax assessments for the 2003-2006 taxation years. Section 33(7) of the *Corporation Capital Tax Act* (the “Act”) permits the Court of Appeal to hear an appeal with leave. At issue was the definition of “equity” in terms of whether certain shares issued by the respondent could be classified as “equity shares.” The appellant’s tax assessment of the respondent had concluded that the shares at issue were “equity” shares but the chambers judge disagreed and characterized them as “non-equity” shares not forming part of the capital stock of the respondent for tax purposes.

Coast Capital Savings Credit Union v. British Columbia, 2010 BCCA 187

Area of Law: Appellate Procedure
Under Appeal: Justice Grauer



Held: Leave to Appeal Granted

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The Appellate Court concluded that the proposed appeal raised a novel question of law and that there was a marked difference in opinion between the decision of the chambers judge below and the appellant. The Court also concluded that benefit would derive from the appeal because the correct interpretation of the term “equity” in the *Act* could have broader implications than just in relation to the respondent. Most notably, there could be implications for the capital requirements of credit unions and whether investors who purchase equity shares in a credit union are entitled to deposit insurance. Further, the definition of “equity” could potentially affect the definition in both the *Credit Union Incorporation Act* and the *Financial Institution Act*. The chambers judge noted other factors for consideration in determining leave to appeal from a statutory authority, including the extent to which the proposed appeal raises questions of general importance about the jurisdiction of the tribunal appealed from (not applicable in this case), whether there is some prospect of success on appeal, and whether the issue on appeal has been considered by a number of appellate bodies.

Mclvor v. Canada (Registrar of Indian and Northern Affairs), 2010 BCCA 168 (Supplementary Reasons to the decision indexed at 2009 BCCA 153)

Areas of Law: Constitutional; Aboriginal



The Court ruled in April 2009 that aspects of section 6 of the Indian Act (the “Act”) were unconstitutional, by virtue of their infringement on section 15 of the Canadian Charter. The Court’s ruling suspended the application of the impugned legislation for one year. This decision responds to the application by the appellants to extend the period of suspension until July 2010.

While the respondent did not challenge the application for an extension, he did seek an order from the Court granting his children immediate registration under the Act (“Status”). The substance of the April 2009 decision was that amendments in 1985 to address the gendered conferral of Status continued to operate in a discriminatory way, because some with Status, like the plaintiff respondent, were subject to a “Second Generation Cut-off” limiting their ability to pass Status on to their children. This cut-off is applicable to children born to mothers who, prior to the 1985 amendments, were ineligible for Status because of their marriage to a man without Status.

Held: Appeal dismissed

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The Court granted the application, extending the suspension to July 5, 2010. The Court considered the legislative actions taken by the Federal Government since the initial decision, noting a number of factors that led to the request for an extension. Though a bill was drafted, Parliament was prorogued and the bill was, before the House of Commons at the time of the application. The Court concluded that the appellants proceeded in a timely fashion without undue delay, and as such, an extension was appropriate. However, the Court declined to grant Status to the respondent’s children. While the both the BCSC and BCCA concluded that the provision in the Act that resulted in the children being ineligible for Status was unconstitutional, the ultimate remedy was left for Parliament to determine.

Gichuru v. British Columbia (Workers Compensation Appeal Tribunal),
2010 BCCA 191

Area of Law: Administrative Law

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THE ENTIRE JUDGMENT](#)

The appellant filed a complaint under the Human Rights Code (the “Code”) alleging the respondent discriminated against him by terminating his employment due to his race. The respondent dismissed the appellant after disagreements about his work and disrespectful conduct toward his colleagues. A member of the Human Rights Board (the “Board”) summarily dismissed the complaint without a hearing. In dismissing the complaint, the Board

member concluded that there was no reasonable prospect of success and that although she found certain conduct of the appellant improper she declined to find that the complaint was filed for an improper motive or made in bad faith. The appellant’s application for judicial review was dismissed. The chambers judge did not make an explicit finding as to the applicable standard of review, but determined that the Board member’s decision could be upheld on the less deferential standards of correctness and

reasonableness. The judge concluded that a finding of improper conduct was not unreasonable based on the evidence presented and that sufficient evidence existed to draw such a conclusion. The judge also concluded that no reviewable error was made by the Board member in dismissing the complaint summarily pursuant to the member’s discretionary authority to do so conferred by section 27(1)(c) of the Code.

Held: Appeal dismissed

The Court dismissed the appeal to the extent of finding that the chambers judge correctly concluded that the dismissal of the complaint was reasonable. However, the Court held that the Board member’s finding of improper conduct on the part of the appellant was both unnecessary and patently unreasonable. The Court evaluated the applicable standards of review. The exercise of discretion by the board Member to summarily dismiss the complaint was subject to a standard of patent unreasonableness. The Court rejected the appellant’s contention that the discretionary decision to decision to summarily dismiss includes a question of law reviewable on the correctness standard; namely, the determination of whether or not any specified criteria for dismissal as set out in section 27(1)(c) have been met. The Court’s reason for rejecting this submission was based on jurisprudence cautioning against parsing the decision-making process in judicial review.

Faculty Association of the University of British Columbia v. University of British Columbia, 2010 BCCA 189

Areas of Law: Labour Relations; Administrative Law

The appellant Faculty Association alleged that a policy put in place by the respondent University's Senate was in violation of their collective agreement. The policy related to student evaluations of teachers. Pursuant to the Labour Relations Code (the "Code"), an arbitrator heard the grievance. The respondent raised a preliminary objection to the jurisdiction of the arbitrator, stating that the jurisdiction did not extend to policies enacted by the Senate of the respondent University. The arbitrator concluded that the real issue for determination was, assuming a conflict arose between the collective agreement and the policy, whether he could determine that the collective agreement would govern. He concluded he could not. The appellant appealed this decision of the arbitrator pursuant to s.100 of the Code.

Held: Appeal dismissed

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The appeal was dismissed. One of the purported goals of the policy at issue was to provide data to the respondent on the quality of teaching which would be used to assess faculty for merit and performance to assist in determining salary, promotion, tenure and institutional recognition. The appellants argued that the collective agreement contained several provisions regarding student evaluations, including a provision requiring such evaluations to follow a formal procedure. The appellants argued that the policy at issue was insufficiently formal due the possibility of abuse and lack of transparency due to the anonymity of the evaluations.

The Court agreed with the arbitrator's decision that the Senate could not be bound by the terms of the collective agreement because the Board of the University was party to the collective agreement and the Board could not interfere with or bind policies promulgated by the Senate. The Senate's statutory jurisdiction pursuant to the *University Act* is to create policies in relation to academic governance and the Board is not entitled to interfere with such policy making. The Court concluded that the arbitrator correctly determined that he lacked jurisdiction to grant an award to the appellants which would interfere with or negate the policy created by the Senate.

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Vandenberg v. Olson, 2010 BCCA 204

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Areas of Law: Real Property

The respondent and appellant own parcels of property adjacent to one another, Lots 19 and 20, respectively. Next to Lot 20 are three more parcels, then a road. In 1974, Lot 19 was owned by a company that also owned the three parcels between Lot 20 and the road. That year, the owner of Lot 20 granted an access easement over the laneway on the rear of Lot 20 to the owners of Lot 19 to permit the owners of

Lot 19 to access their other properties and the road. The easement was granted in perpetuity. In 2008, the appellant requested that the easement be discharged on the grounds that it was no longer necessary because the owners of Lot 19 did not have easements over the three parcels between Lot 20 and the road which would enable them to lawfully access the road. Though there was no easement, in practice the owners

of these lots permitted the owners of Lot 19 to continue using the laneway to access the road. When the respondent resisted the discharge of the easement, the appellant began to obstruct the laneway to prevent the respondent from using it. The chambers judge determined that the easement still provided benefit to the respondent even though they had no legal right of way across the three parcels between Lot 20 and the road.

Held: Appeal dismissed

The appeal was dismissed, though the Court did amend the wording of the declaration of validity to apply only to Lot 19 because no other affected lot owners were joined in the action. The Court relied on s.35 of the *Property Law Act*, which enumerates grounds for the cancellation of an easement. Section 35(2), which listed the grounds, was found by the Court to constitute a complete code governing the cancellation of easements. Common law concepts such as abandonment cannot constitute grounds to order the cancellation of an easement. The Court considered the rules of statutory interpretation which provide that where a matter is comprehensively and in detail dealt with by legislation, the legislation will constitute an exhaustive code on the matter, precluding recourse to common law principles. The Court evaluated each ground listed in subsection (2), found none applicable or made out on the facts, and upheld the declaration of validity found by the trial judge and the injunction restraining the appellant from impeding access over the easement.