IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Parent obo The Child v. The School District*,
2019 BCSC 659

Date: 20190501
Docket: S186830
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

Between:

The Parent obo the Child

Petitioner(s)

And

The School District

Respondent(s)

Before: The Honourable Madam Justice DeWitt-Van Oosten

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated April 17, 2018 (*The Parent obo the Child v. The School District (No.2)*, 2018 BCHRT 89).

Reasons for Judgment

Counsel for the Petitioners:	L. Waddell S. Hanson
Counsel for Respondents:	D.J. Bell J.A. Bank K. So, Articled Student
Counsel for BC Human Rights Tribunal:	B. Korenkiewicz
Place and Date of Hearing:	Vancouver, B.C. April 5, 2019
Place and Date of Judgment:	Vancouver, B.C. May 1, 2019

Introduction

[1] On April 17, 2018, the British Columbia Human Rights Tribunal ("BCHRT") refused to accept the petitioner's complaint of discriminatory conduct on grounds that it was filed outside the six-month time limit under the *Human Rights Code*, R.S.B.C. 1996, c. 210 ("*Code*").

[2] The petitioner argued that the BCHRT should accept the late filing as an exception to the six-month limit in the public interest, pursuant to s. 22(3) of the *Code*. The argument was unsuccessful.

[3] The issue before this Court is whether the exercise of discretion to decline acceptance, and dismiss the entirety of the complaint under s. 27(1)(g), was patently unreasonable.

Background

[4] This discrimination complaint has a lengthy history, having previously made its way to the Court of Appeal. For present purposes, it will suffice to set out the background as summarized in *School District v. Parent obo the Child*, 2018 BCCA 136:

> ***Nature of the Complaint***
>
> [7] The complaint to the BCHRT concerns the education of the Child. For the first seven years of education, the Child attended school in the School District. The Child has been diagnosed with a complex psychological condition that requires a safe environment with certain accommodations, including a small teacher-to-student ratio and support and supervision in social interactions during unstructured school time.
>
> [8] The complaint alleges that the School District failed to provide the Child with a meaningful education due to the Child's mental disabilities, thereby contravening the *Code* by discriminating in the area of accommodation or service on the ground of mental disability.
>
> [9] From kindergarten to grade six, the Child was enrolled in school in the School District, with mixed but generally unsatisfactory results. In grades two and three, the complaint alleges that the Child did not receive adequate support and as a result attended school less than half the time. Grade four was much more successful, and the Child was able to attend school 100% of the time. Grades five and six, however, were not successful. The School District placed the Child in a mainstream classroom at one point, but the

placement only lasted a month. The Child was then placed in a different school in the School District, but that placement is alleged to have had significant detrimental effects on the Child.

[10] Finally, the Parent enrolled the Child in a private school in another school district for grade seven. On August 26, 2014, the Parent met with representatives of the School District to request that the School District pay the private school tuition since the School District had been unable to provide an appropriate educational program in the district.

[11] On November 10, 2014, the School District Superintendent advised the Parent that the School District would not reimburse the Parent for the tuition at the private school.

[12] On June 25, 2015, the Parent, on behalf of the Child, filed a complaint with the BCHRT under s. 8 of the *Code* alleging a contravention of the *Code*. The Child was in grade seven at the private school in another school district when the complaint was filed. On October 15, 2015, the BCHRT accepted the complaint for filing.

Application to Dismiss before the Tribunal

[13] On February 23, 2016, the School District applied under s. 27(1)(g) of the *Code* to dismiss the complaint on the ground that it was filed after the six-month time limit for filing.

…

[15] The School District argued that the last allegation which could constitute discriminatory conduct was the School District's decision of November 10, 2014, that the Parent would not be reimbursed for the private school tuition. That decision was communicated to the Parent more than seven months prior to the filing of the complaint.

[16] The Parent took the position that the complaint was timely because the nature of the discrimination was the School District's ongoing failure to accommodate the Child's disabilities, a failure that was continuing into the new school year.

[17] The Tribunal member recognized that the disposition of the School District's application required a consideration of s. 22 of the *Code*, which reads as follows:

> (1) A complaint must be filed within 6 months of the alleged contravention.
>
> (2) <u>If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.</u>

> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.
>
> [Emphasis added.]

…

[21] The Tribunal member held that s. 22(2) applied, but the continuing state of affairs itself rendered the complaint timely. He expressed his conclusion in this way:

> [100] … I find this complaint is about a continuing state of affairs and not a series of alleged single events, although the alleged specific events are integral to, and form part of, the continuing state. In that context, I find that the observation in [*JS and DS obo AS v. School District No. 40 and others*, 2009 BCHRT 71] that the contravention could extend to the end of the school year apt. I therefore find that the complaint constitutes a continuing contravention and, on that basis, it is timely. The School District's application to dismiss under section 27(1)(g) is denied.
>
> [Emphasis added.]

…

The Chambers Judgment

[23] The School District applied for judicial review of the decision of the Tribunal member, but the application was dismissed. The chambers judge recognized that there had been no instance of discrimination within the six-month period, stating that:

> [46] … There were no specific events or allegations which had occurred within six months of filing the complaint …

[24] She held, however, that the question to be answered by the Tribunal member was whether the complaint had alleged a continuing contravention:

> [62] The outcome of this petition depends, in large measure, on competing legal conceptions of what constitutes a "continuing contravention".
>
> [63] The District relies on a continuing contravention as being a succession or repetition of separate acts of discrimination of the same

> character – which does not include affirmations or reiterations of prior allegedly discriminatory decisions, or the consequences of prior alleged discriminatory conduct.
>
> [64] The Parent relies on the concept of a continuing contravention as being an "ongoing" or "continuous state of affairs".
>
> …
>
> [66] I have concluded that the Tribunal was correct in its assessment that the complaint as framed by the Parent and more particularly, when considered in light of the nature of the discrimination alleged and the right in issue, was about an ongoing or continuous state of affairs.
>
> [25] She concluded that the Tribunal member had been correct in characterizing the nature of the complaint as being akin to a case in which "a discriminatory policy remains in place or discriminatory conditions continue to exist" (at para. 73).
>
> [Emphasis in the original.]

[5] The Court of Appeal overturned the ruling of the chambers judge, finding that the complaint was filed outside the six-month time limit. It remitted the matter back to the BCHRT for consideration, specific to whether the complaint should be accepted as an exception to the six-month limit under s. 22(3) of the *Code*:

> [77] In the present case, the chambers judge on judicial review confirmed the erroneous approach of the Tribunal member that the complaint was timely for the sole reason that it constitutes a continuing contravention. This approach gives no effect to the words "the complaint must be filed within 6 months of the last alleged instance of the contravention". In my opinion, it reflects an erroneous interpretation of s. 22(2) and is an error of law.
>
> [78] Once it was determined that there had not been an instance of discrimination – in the sense of an example or event or discrete act capable of constituting a separate contravention – within the six-month period, s. 22(2) ceased to be available as a mechanism for acceptance of the complaint. The question whether there had been a continuing contravention should not have arisen in this case.
>
> …
>
> [81] In my opinion, the Tribunal member and the chambers judge erred in their interpretation of s. 22(2) of the *Code*. The error led directly to an erroneous conclusion on the School District's application to dismiss. The BCHRT had no jurisdiction under s. 22(2) to accept the Parent's complaint because it was not filed within six months of the last instance of the alleged contravention.

> [82] Whether the complaint could have been accepted under s. 22(3) was not an issue in this appeal, as the Tribunal member did not consider it necessary to address that issue because of the conclusion concerning s. 22(2).
>
> [83] I would allow the appeal and remit this complaint back to the BCHRT for determination whether to accept it under s. 22(3) of the *Code*.
>
> Per Hunter J.A. [Emphasis added.]

[6] Six days after the Court of Appeal's determination, the BCHRT (sitting as a single Tribunal member) issued its decision under s. 22(3), holding that it was not in the public interest to accept the late filing:

> Considering all of the circumstances, I am ultimately not persuaded that it is in the public interest to accept the Parent's late-filed complaint. Despite a brief delay in filing, I conclude that it is not [*sic*] the public interest to accept the late-filed complaint, having determined the various reasons for the delay offered by the Parent do not attract the public interest. In exercising my discretion, I also conclude there is nothing unique about this case sufficient to attract the public interest.
>
> *The Parent obo the Child v. The School District (No. 2)*, 2018 BCHRT 89 at para. 19.

[7] As a result of the ruling, the petitioner's complaint was dismissed, in its entirety, under s. 27(1)(g) of the *Code*.

Issue on Review

[8] The petitioner argues that the BCHRT's decision to dismiss his complaint following the s. 22(3) determination is patently unreasonable.

[9] The petitioner filed an affidavit with the BCHRT in which he explained the delay in filing, at least in part, on the basis of having received erroneous legal advice:

> Around the time we filed our appeal to the Superintendent of Achievement [with the School District], we consulted with a very experienced lawyer who specializes in human rights cases against schools for a failure to accommodate children with disabilities. The lawyer advised us that if we chose to file a human rights complaint, we should ensure that we file our complaint within 6 months from February 3, 2015 out of an abundance of caution. We relied on that advice.

[10] The BCHRT found this evidence lacking. The petitioner argues that in reaching its conclusion, the BCHRT applied an erroneous legal test to consideration of the evidence, and, in so doing, committed an error on an "extricable question of law" that resulted in a patently unreasonable outcome.

Analysis

A. Preliminary Question – Admissibility of June 2018 Affidavit

[11] Before turning to the substantive challenge, I must address the admissibility of an affidavit that the respondent School District asks me to consider on the petition for judicial review.

[12] The petitioner filed his petition for review of the April 17, 2018 decision on June 15, 2018. One of the stated grounds for review was an alleged denial of procedural fairness. The petitioner claimed it was unfair that before engaging in its consideration under s. 22(3) of the *Code*, the BCHRT did not provide the petitioner with an opportunity to supplement his original evidence on the reasons for delay in filing. The June 2018 petition included an affidavit attaching evidence of communications received from the lawyer who the petitioner consulted prior to filing the *Code* complaint.

[13] In response to the June 2018 petition, the respondent School District and BCHRT objected to the affidavit, arguing it was not admissible on judicial review because it had not been before the BCHRT at the time of the impugned decision.

[14] In January 2019, the petitioner (now represented by legal counsel), filed an amended petition and withdrew the procedural fairness argument. The respondent School District filed a response to the amended petition and, this time, sought to rely on the new affidavit, even though the petitioner was no longer putting it forward.

[15] The petitioner and BCHRT object to the admissibility of the affidavit. They argue that in the absence of the School District meeting one of three narrowly defined exceptions for the admission of fresh evidence, the affidavit is not admissible

and the only record available for review on the petition is the one before the BCHRT at the time it made its determination under s. 22(3) (and, thereby, s. 27(1)(g)).

[16] The fresh evidence exceptions cited by the petitioner and BCHRT are set out in *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33:

> [17] The court's power to admit evidence beyond the record of proceeding must be exercised sparingly, and only in an exceptional case. Such evidence may be admissible for the limited purpose of showing a lack of jurisdiction or a denial of natural justice …
>
> In addition, the court may, in rare circumstances, admit affidavit evidence to show that a tribunal made a factual finding incapable of being supported by the evidence. Such affidavit evidence must be restricted to necessary references to factual errors and must not draw conclusions or interpret the evidence forming the record of proceeding. Such affidavit evidence must not be used to convert an application for judicial review into a re-hearing of the merits.
>
> [Emphasis added. Internal references omitted.]

[17] In *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, the Court of Appeal cautioned against adopting a rigid, categorical approach to the admissibility of new evidence on a petition for judicial review. Instead, a "principled approach" is more appropriate, informed by the individualized context of the case:

> [39] In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court. Evidence that was before the tribunal is clearly admissible before the court. Evidence that casts light on the manner in which the tribunal made its decision will also be admissible within tight limits. Factual evidence setting out the procedures followed by the tribunal, or providing information showing that the tribunal was not impartial will also be admissible.
>
> [Emphasis added.]

[18] Applying this framework to the matter before me, the School District has not satisfied me that the affidavit is admissible. The School District asks the Court to consider the new affidavit on grounds that its content, as construed by the School District, does not support the petitioner's assertion of erroneous legal advice, confirming the reasonableness of the BCHRT's conclusion to reject erroneous

advice as a public interest basis for accepting the late complaint. From the School District's perspective, the affidavit shows that the consulted lawyer did not provide erroneous advice. Instead, the petitioner misunderstood the information that was relayed to him.

[19] This is not an appropriate basis on which to admit the affidavit. The petition does not raise jurisdictional issues, or matters of natural justice, and the affidavit does not "cast light on the manner in which the tribunal made its decision". No one alleges that the BCHRT made an unsupported factual finding or demonstrated bias in its determination(s).

[20] In my view, the School District is attempting to use the affidavit to "shore up the record by placing information before the court that the tribunal did not have the opportunity to consider": *Air Canada* at para. 43. Consistent with the ruling in *Air Canada*, I decline to consider the affidavit on that basis.

[21] At its heart, the School District asks that I assess the reasonableness of the BCHRT's approach to the petitioner's original evidence based on a fleshed out evidentiary record. Doing so would not be consistent with the "limited supervisory jurisdiction of the court": *Air Canada* at para. 39.

[22] Instead, it would require that I review, assess and make findings in relation to the second affidavit, and then apply those findings under s. 22(3) of the *Code*, amounting to the functional equivalent of a *de novo* hearing. This form of enquiry is not permissible on an application for judicial review: *Duhamel v. Financial Institutions Commission*, 2018 BCSC 962 at para. 18, citing *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272.

B. Merits of the Petition

Standard of Review

[23] The parties agree that the dismissal of a complaint under s. 27(1)(g) of the *Code* involves an exercise of discretion.

[24] Section 59(3) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 stipulates that a "discretionary decision" must not be set aside unless it is "patently unreasonable".

[25] A decision will be patently unreasonable if the discretion: (a) is exercised arbitrarily or in bad faith; (b) exercised for an improper purpose; (c) based entirely or predominantly on irrelevant factors; or (d) the decision fails to take statutory requirements into account: s. 59(4).

[26] The parties also agree that if an extricable question of fact or law is found to underlay the exercise of discretion, the Court must engage in a two-step analysis. As explained by counsel for the BCHRT, with reference to *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 at paras. 28-33:

> First, the extricable question is reviewed on the applicable standard [in this case, correctness]. Second, if an error is found, then the Court must determine whether the error renders the decision patently unreasonable within the meaning of s. 59(4) of the [Administrative Tribunals Act]. However, absent a clearly extricable question of fact or law, the Court will apply the single deferential standard of review to the Tribunal's decision as a whole.

Positions of the Parties

[27] As noted, the petitioner raises a discrete issue, namely, the BCHRT's approach to evidence tendered about legal advice that the petitioner received prior to filing a complaint under the *Code*. The petitioner does not challenge any other aspect of the Tribunal member's determinations under ss. 22(3) and 27(1)(g).

[28] The relevant passages of the impugned decision read:

> [13] In deciding whether there is anything that distinguishes this case from others regarding the pursuit of internal avenues of redress, I have considered the Parent's explanation that at the time he appealed the February 3, 2015 decision to the Superintendent of Achievement, a lawyer told him he had six months from the date of that decision to start a human rights complaint. Without naming the lawyer, the Parent says this lawyer specializes in human rights cases against schools for a failure to accommodate children with disabilities. The lawyer allegedly told the Parent that the complaint must be filed within six months of the February 3, 2015 decision out of an abundance of caution.

> [14] The Parent relies on *Ashrafinia v. Koolhaus Design (BC) Ltd.*, 2007 BCHRT 241, at para. 11, for the proposition that it is in the public interest to accept a complaint where a delay in filing is the result of an error by a complainant's counsel. As pointed out by the School District; however, in *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298, at para. 43, the court stated that attracting the public interest requires evidence to the effect that counsel for the complainant had erred and the error had been explained. In my view, in order for the Parent to rely on lawyer advice error as a reason for the delay, it would be necessary for him to identify the lawyer in question and have that lawyer confirm the advice he gave was made in error and explain how the error occurred. Without more evidence, I am unable to conclude counsel made an error in advising the Parent such that the public interest in allowing the late-filed complaint to proceed is engaged.
>
> [Emphasis added.]

[29] The petitioner argues that the underlined portions of para. 14 reveal an extricable question of law that was incorrectly decided by the tribunal. From the petitioner's perspective, the BCHRT wrongly instructed itself that a petitioner's reliance on erroneous legal advice cannot be considered under s. 22(3) of the *Code* unless the evidence tendered in support of the reliance includes the identity of the lawyer in question, confirmation from the lawyer that the advice was erroneous, and, an explanation from counsel as to how the error occurred.

[30] The petitioner says there are no such pre-requisites for considering erroneous legal advice under s. 22(3), and, in taking the approach that it did, the BCHRT not only misunderstood this Court's decision in *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298, but wrongly recast the decision as establishing mandatory criteria that govern the receipt and review of evidence on this point.

[31] Moreover, the petitioner argues that this error led to a patently unreasonable decision under s. 27(1)(g) of the *Code*. It rendered the decision arbitrary because it was not made in accordance with reason and principle; the BCHRT relied on irrelevant factors in rejecting the complaint (a need for confirmation of the erroneous nature of the advice); and, the error had a material impact on the decision to

dismiss. Among other things, it reduced the grounds available for consideration in assessing the public interest under s. 22(3).

[32] The respondent School District says the BCHRT did not apply a "wrong legal test in requiring some evidence from the [petitioner's] lawyer to explain her error". Instead, the Tribunal member correctly noted that if a complainant relies on erroneous legal advice as a reason for a late filing, he or she bears an evidentiary onus of showing that the advice was, in fact, wrong: *Adolphs*.

[33] The BCHRT held that on the evidence tendered in this case, the petitioner did not meet this onus, sufficient to justify accepting a late complaint under s. 22(3) of the *Code*. The School District says this was a reasonable conclusion for the Tribunal member to reach in light of the bare assertion made by the petitioner, without a supporting foundation.

[34] The School District reminds the Court that the BCHRT is entitled to a "high level of curial deference" in its discretionary decisions. In support of this argument, the School District cites *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220. There, it was held that when reviewing a decision made under s. 22(3), the question for the reviewing judge is whether there is a "reasonable basis, in law or on the evidence, for the [BCHRT's] conclusion that the late filing of the complaint should [or should not] be permitted in the public interest": at para. 48. The Court of Appeal went on to hold that:

> [49] … the Tribunal is entitled to a contextual review of its decisions on the principle of curial deference. The reviewing judge ought not to engage in an overly close reading of the Tribunal's decision. The Tribunal has been assigned the role of gatekeeper by the legislature. The legislation requires preliminary assessments of cases and the exercise of judgment with respect to whether a matter merits the time and expense of a full hearing … The Tribunal is assumed to know the law and must be taken to apply the appropriate test …
>
> [50] The notion of deference to administrative tribunal decision-making requires a respectful attention to the reasons offered or which could be offered in support of the decision …

> [51] The decision to permit a late-filed complaint to proceed does not require the Tribunal to make findings of fact at a full hearing but, rather, mandates a review of the complaint and consideration of the reasons for delay in the course of the exercise of discretion … It is in that context that the decision to permit the complaint to proceed should have been reviewed.
>
> [Internal references omitted.]

Extricable Question of Law

[35] On my reading of para. 14 of the April 17, 2018 decision, I agree with the petitioner that it raises an extricable question of law. Moreover, it is my view that the BCHRT decided the question incorrectly.

[36] I appreciate that the Court must not be "too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness": *J.J. v. School District No. 43 (Coquitlam)*, 2013 BCCA 67 at para. 28. In its submissions before me, the BCHRT appropriately emphasized this point. However, in the circumstances of this particular case, I am satisfied that the question of law is readily discernible from the impugned passages.

[37] For ease of reference, I will repeat the controversial portion of para. 14 and underline the wording that has led me to this conclusion:

> … In my view, <u>in order for the Parent to rely on lawyer advice error as a reason for the delay, it would be necessary</u> for him to identify the lawyer in question and have that lawyer confirm the advice he gave was made in error and explain how the error occurred. Without more evidence, <u>I am unable to conclude counsel made an error</u> in advising the Parent <u>such that the public interest in allowing the late-filed complaint to proceed is engaged</u>.

[38] In my view, para. 14 indicates that the Tribunal member viewed identification of the lawyer, confirmation of the erroneous nature of the advice provided, and an explanation as to how the error occurred, as necessary pre-conditions to a complainant asserting and relying on erroneous legal advice as a factor for consideration in the public interest under s. 22(3) of the *Code*.

[39] Moreover, from the last sentence of para. 14, it appears the Tribunal member understood that the public interest will only be "engaged" on grounds of "lawyer

advice error", and weigh in favour of accepting a late filing, where the advice has been shown, in fact, to be wrong.

[40] This Court has not established mandatory pre-requisites for advancing an assertion of erroneous legal advice as a reason for delay in filing under s. 22(3) of the *Code*. More particularly, the Court has not said that this form of explanation is only available for consideration where the complainant first identifies the lawyer that provided the advice, obtains confirmation from the lawyer that the advice was erroneous, and the lawyer explains how the error occurred.

[41] Nor has this Court held that the public interest under s. 22(3) will only be appropriately engaged where the legal advice is shown, in fact, to be wrong.

[42] In my view, the case cited by the BCHRT as authority for the approach it took, *Adolphs*, does not support those propositions.

[43] In *Adolphs*, the BCHRT refused to accept a complaint that had been filed two days after expiry of the six-month time limit, finding it was not in the public interest to do so. The complainant in that case did not offer an explanation for the delay. On review, the petitioner argued that the BCHRT should have inferred an explanation from the record, namely, that the delay resulted from an error on the part of the petitioner's then lawyer: at para. 42.

[44] Justice Weatherill acknowledged that an error by legal counsel may appropriately engage the public interest under s. 22(3) of the *Code* and warrant acceptance of a late filing. However, he noted that in cases where this has occurred, "evidence was proffered to the effect that counsel for the complainant had erred and the error had been explained": at para. 43.

[45] In *Adolphs*, no evidence was tendered explaining the delay and the Court concluded that to ask the BCHRT to infer an explanation of lawyer error from the record, would invite the Tribunal to engage in speculation:

> [46] The petitioner bore the burden of establishing it was in the public interest for the Complaint to be accepted late, regardless of the length of the

> delay. She was obliged to explain the reason for the delay. The Tribunal was not obliged to and indeed should not have speculated or engaged in conjecture as to what the reason may have been … Nor was the Tribunal obliged to ask for further submissions regarding the reason for the delay. The fact that there was no explanation for the delay forthcoming despite the petitioner having had an opportunity to provide one in the Complaint form itself as well as in the Time Limit Reply Form militates strongly against the petitioner on this application.
>
> [Emphasis added. Internal references omitted.]

[46] I do not read *Adolphs* as holding that evidence of erroneous legal advice, when put forward as an explanation for a late filing, is only open for consideration under s. 22(3) if it identifies the lawyer, includes an admission that the lawyer provided erroneous advice, and the lawyer explains how that came to be. Nor does *Adolphs* hold that the public interest under s. 22(3) is only engaged where the legal advice is shown, in fact, to be wrong.

[47] Instead, in my view, Justice Weatherill was simply making the point, in contrast to the record before him, that in cases where erroneous legal advice has been found to warrant an exercise of discretion in favour of a late filing, the explanation for delay was supported by evidence relevant to that issue. As there was no evidence tendered in *Adolphs*, the petitioner fell short.

[48] To adopt the approach taken by the Tribunal member, as made manifest in para. 14 of the impugned decision, would unduly narrow the circumstances in which a complainant might advance lawyer error as an explanation (and thereby justification) for a late filing.

[49] It would exclude, for example, cases in which the advice provided by legal counsel was not in error, but the complainant honestly but mistakenly believed that she was told something different. It would also exclude cases in which language or other barriers genuinely impeded a complainant's ability to appreciate what was required in filing a complaint, including what she had been told by a lawyer.

[50] Indeed, as pointed out by the petitioner, *Libonao v. Honeywell*, 2009 BCHRT 184 provides a good example. In that case, the *Code* complaint was filed two weeks

beyond the six-month time limit. The complainant explained the delay with reference to legal advice:

> [27] With respect for the reason for the delay, Mr. Libonao states that he retained legal counsel within six weeks of the termination of his employment. However, his former counsel did not advise him of his right to file a human rights complaint, nor of the six-month time limit for filing such a complaint.
>
> [28] Mr. Libonao states that he sought a second legal opinion on January 27, 2009, where he was advised of his human rights and ability to file a human rights complaint. The complaint was filed within two days after retaining new counsel.
>
> [29] Mr. Libonao states that he retained and paid for the services of legal counsel and trusted that he was being properly advised and represented. He states that he was born in the Philippines, and his first language is Tagalog. His English language skills are limited. He should not be penalized because his prior legal counsel failed to properly advise him of his legal rights.

[51] The BCHRT found the explanation reasonable:

> [33] I find Mr. Libonao's reasons for not filing a complaint reasonable in all of the circumstances. It is clear that Mr. Libonao did seek out information with respect to his potential avenues of recourse following his termination. It appears that he was provided with incomplete information in this regard. As an individual with limited English language skills, and no legal expertise, it was not unreasonable for Mr. Libonao to rely on advice provided by his counsel. Further, once he obtained a second opinion, Mr. Libonao filed his human rights complaint without delay.

[52] There is no suggestion, in *Libonao*, that before considering a complainant's reliance on erroneous legal advice under s. 22(3) of the *Code*, the BCHRT requires evidence identifying the lawyer who gave the advice; confirmation that erroneous advice was, in fact, provided; and, an explanation of how that came to be.

[53] The petitioner has also raised a practical concern with the approach taken by the Tribunal member. If a complainant can only advance lawyer error as a reason for delay when coupled with confirmation of the error, what does the complainant do when the lawyer declines to provide the confirmation? This is not something within the complainant's control.

[54] The assessment of the public interest under s. 22(3) is done on an individualized basis, contextually driven and involves a fact specific enquiry,

informed by the unique circumstances of each case. As noted in *Hoang v. Warnaco and Johns*, 2007 BCHRT 24, "[t]he list of potentially relevant factors is not closed and nor will every factor be important in every case": at para. 26, cited in *Mzite* at para. 53.

[55] In my view, para. 14 of the BCHRT's decision introduces a set of pre-requisites for the consideration of lawyer error as asserted under s. 22(3) of the *Code* that is too rigid, not supported by the jurisprudence and inconsistent with the generally-accepted analytical approach brought to bear under this provision.

Patent Unreasonableness

[56] However, that is not the end of the matter. The parties agree that even if the Court finds that the BCHRT erroneously answered an extricable question of law, I must go on to determine whether the error rendered the decision to dismiss the complaint under s. 27(1)(g) patently unreasonable within the meaning of s. 59(4) of the *Administrative Tribunals Act*.

[57] See also *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 at para. 28; *Chen v. Surrey (City)*, 2015 BCCA 57 at para. 29.

[58] The patent unreasonableness standard was explained in *Yaremy v. British Columbia (Human Rights Tribunal)*, 2015 BCCA 228:

> [19] The standard of patent unreasonableness is a highly deferential standard. It was described in the following terms by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20:
>
> > [52] The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam [Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748], at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963 64, per Cory J.; *Centre*

> *communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> [Emphasis added.]

[59] In its April 2018 decision, the BCHRT recognized the broad-scoped and flexible nature of the enquiry under s. 22(3) of the *Code*:

> [8] Whether it is in the public interest to accept a late-filed complaint is a multi-faceted analysis. The enquiry is fact and context specific, and assessed in accordance with the purposes of the *Code*: *Hoang v. Warnaco and Johns*, 2007 BCHRT 24 at para. 26. The Tribunal considers a non-exhaustive list of factors, including the length of the delay, the reasons for the delay, and the public interest in the complaint itself: *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 [*Mzite*] at para. 53. These are important factors, but not necessarily determinative: *Goddard v. Dixon*, 2012 BCSC 161 at para. 152; *Mzite* at para. 55.

[60] The Tribunal member also appreciated that the petitioner's six-week delay in filing is "considered brief" within the context of the Tribunal's own jurisprudence: at para. 9.

[61] The petitioner advanced a number of different reasons for the late filing. The BCHRT reviewed and considered each of them, including: two internal appeals of the Board of the School District's decision to not reimburse the petitioner for private school tuition; attempts to "work with the School District to come up with a solution"; advice from a lawyer that the *Code*'s six-month time limit for filing ran from February 3, 2015 (the School District's first denial of an appeal); and, various "stressors" that were said to be impacting the petitioner at the relevant time:

> [15] The Parent also set out various stressors that were occurring at the relevant time. These included making the transition to send the Child to a school in another city, suffering the severe financial strain of paying for the Child's private education, making lengthy weekly commutes to work in another city, and navigating the School District's appeal process. The Parent elaborated on what was happening by noting the sale of the family home occurred to pay for the private schooling and his inability to support his wife in caregiving for the Child during the weekdays when he was away working in another city.

[62] The BCHRT also considered whether there is "anything particularly unique, novel, or unusual about the [petitioner's] complaint that has not been addressed in other complaints", such that resolution of the issue(s) raised by him is in the public interest: at para. 17. For example, a novel issue on behalf of a vulnerable group, or matters for which there is a "gap" in the BCHRT's jurisprudence, such that a precedent in that area would prove beneficial: at para. 17.

[63] Ultimately, after considering "all of [these] circumstances", the Tribunal member was not persuaded:

> [19] … that it is in the public interest to accept the Parent's late-filed complaint. Despite a brief delay in filing, I conclude that it is in not the public interest to accept the late-filed complaint, having determined the various reasons for the delay offered by the Parent do not attract the public interest. In exercising my discretion, I also conclude there is nothing unique about this case sufficient to attract the public interest.
>
> At para. 19. [Emphasis added.]

[64] In light of the conclusion reached on the public interest component of the s. 22(3) analysis, the BCHRT considered it unnecessary to address the second question under that provision, namely, whether there would be "substantial prejudice" in allowing the complaint to proceed.

[65] It is clear from para. 19 of the April 17, 2018 decision that the BCHRT's consideration (and rejection) of the petitioner's reasons for the delayed filing was material to the public interest analysis. The Tribunal member found that none of the reasons proffered by the petitioner "attract the public interest". This includes, of course, the petitioner's claim that he relied on legal advice in calculating the allowable timeframe for filing a complaint under the *Code*.

[66] I have found that the Tribunal member's rejection of this latter explanation was predicated on an erroneous self-instruction that a complainant cannot "rely on lawyer advice error as a reason for the delay" in the absence of identifying the lawyer; obtaining confirmation from the lawyer that the advice was erroneous; and, having the lawyer explain the error.

[67] The School District argues that the BCHRT was "fully entitled to require something more in the way of evidence" from the petitioner, and not obliged to "accept the [petitioner's] bald assertion that he relied on erroneous legal advice from experienced counsel". I agree with this statement as a general proposition. However, I am satisfied, unique to the wording of para. 14, that this is not what the Tribunal member did. Instead, I find that rather than weighing the sufficiency of the evidence, as presented, within the context of the matter as a whole, the BCHRT assumed that the evidence was insufficient at law, and not open for consideration, because the affidavit material tendered on behalf of the petitioner did not cover certain pre-requisites that the Tribunal considered mandatory.

[68] I note there is no indication, from the April 2018 decision, that the Tribunal member questioned the credibility of the petitioner's assertion or otherwise doubted the asserted reliance. In my view, the rejection of the lawyer advice explanation for delay was squarely grounded in the BCHRT's misunderstanding that certain requirements must be met before this kind of evidence can be considered (and weighed) under s. 22(3).

[69] In *Envirocon*, the Court of Appeal held that a discretionary decision will be arbitrary within the meaning of s. 59(4) of the *Administrative Tribunals Act* if it is "grounded on an erroneous conclusion with respect to a material consideration": at para. 34.

[70] Applying this principle to the case before me, I am satisfied that the petitioner has shown the April 2018 decision of the BCHRT to be patently unreasonable. Using the language of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, at para. 52, the flaw in the Tribunal's rejection of the petitioner's lawyer advice explanation for delay is obvious, can be explained "simply and easily" and, in my view, leaves "no real possibility of doubting that the decision is defective".

Disposition

[71] For the reasons provided, I find that the BCHRT's April 17, 2018 decision to dismiss the complaint under s. 27(1)(g) of the *Code* is patently unreasonable.

[72] Accordingly, the decision is set aside and the matter is remitted back to the Tribunal member for reconsideration of whether the petitioner's complaint should be accepted outside the six-month filing time limit pursuant to s. 22(3).

[73] Costs on the petition are awarded to the petitioner, payable by the respondent School District.

"DeWitt-Van Oosten J."