IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dr. Aref Tabarsi Inc. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2025 BCSC 1115

Date: 20250509
Docket: S246651
Registry: Vancouver

Between:

Dr. Aref Tabarsi Inc.

Petitioner

And:

Workers' Compensation Appeal Tribunal and Vancouver Island Health Authority

Respondents

Before: The Honourable Justice Giltrow

On judicial review from: An order of the Workers' Compensation Appeal Tribunal, dated July 31, 2024 (A2301449)

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	A. Sharon
Counsel for the Respondent Workers' Compensation Appeal Tribunal:	D. Morrison
Counsel for the Respondent Vancouver Island Health Authority:	O.E. Startup N.V. Tzemis
Place and Date of Hearing:	Vancouver, B.C. April 14 & 15, 2025
Place and Date of Judgment:	Vancouver, B.C. May 9, 2025

[1] **THE COURT:** This is my ruling in the two applications that were before me.

[2] The first application is an application brought by Vancouver Island Health Authority ("Health Authority"), to strike the petition for judicial review from a Workers' Compensation Appeal Tribunal ("Tribunal") jurisdictional decision ("Jurisdictional Decision"). The petition is brought by Dr. Aref Tabarsi Inc. The second is an application for a stay of the WCAT certification proceedings brought pursuant to s. 311 of the *Workers Compensation Act*, R.S.B.C. 2019, c.1 [*WCA*] pending determination of a judicial review brought by the petitioner.

[3] The Tribunal issued the Jurisdictional Decision as a first-stage decision, addressing what it referred as the preliminary issue as to whether the Tribunal has jurisdiction to provide a certificate under s. 311 of the *WCA* in this arbitration proceeding. The Tribunal determined that it did have jurisdiction. That is the jurisdictional issue at issue in the petition, and the certification proceeding is to come.

[4] The Tribunal's Jurisdictional Decision at issue involved two determinations:

a) First, the Tribunal determined that for the purposes of s. 311 of the *WCA*, the terms "court" and "action" under the *WCA* respectively include an arbitrator appointed, and proceeding brought, under the *Arbitration Act*, S.B.C. c. 2;

b) Second, that the claims brought by Dr. Tabarsi Inc. in the arbitration proceeding at issue include a claim based on personal injury such that the requirements of s. 311(1) of the *WCA* are met, and the Tribunal has jurisdiction to certify this arbitration proceeding.

[5] The petitioner seeks judicial review of both aspects of the Jurisdictional Decision.

[6] The petitioner acknowledges that if the Health Authority's application to strike is granted, then the application for a stay of the WCAT certification proceeding must be dismissed. However, if the application to strike is dismissed, the Court must nevertheless determine whether the Tribunal proceeding should be stayed pending determination of the judicial review.

[7] For the reasons I will explain, I am of the view that:

a) The application to strike should be dismissed, and the judicial review should be permitted to proceed.

b) The application for the stay of the WCAT proceeding pending determination of the judicial review should be granted.

[8] These are my reasons.

Motion to Strike Petition for Judicial Review

[9] The Health Authority seeks an order that:

> the whole of the Petition be struck, without leave to amend, and dismissed as premature.

[10] In its application to strike, the Health Authority does not argue that the petition is based on improper grounds, but rather that it should be struck on the basis that it is brought prematurely, which the Health Authority says:

a) violates either or both of *Supreme Court Civil Rules*, B.C. Reg. 168/2009 sections 9-5(1)(a) and (b):

> **Rule 9-5 — Striking Pleadings**
>
> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious.

b) The Health Authority further submits the petition may be struck pursuant to the inherent jurisdiction of the Court, although it was not clear in argument what additional ground to strike this added.

[11] I understand the Health Authority's argument to be that the petition is unnecessary, as it is premature, running afoul of the principle that a party must generally exhaust all statutory administrative-review procedures before bringing a petition for judicial review: citing *Baun v. British Columbia (Workers' Compensation*

Appeal Tribunal), 2024 BCCA 195 at paras. 54–55, and that it should be struck on that basis.

[12] The Health Authority says that the application for judicial review should not be brought until the WCAT certification proceeding has completed, at which time the Health Authority would not object to the threshold jurisdictional question being judicially reviewed along with any other issues that are at that time properly subject to judicial review.

[13] The Health Authority says that the Supreme Court of Canada's decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*], establishes a presumption against early intervention in administrative proceedings on decisions made at the outset of and during those proceedings. Only in exceptional circumstances should the Court exercise its discretion to allow review of a jurisdictional question before the administrative proceeding has run its course, citing *Halifax,* which in turn cites *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61. The factors the Court is to consider in determining whether exceptional circumstances exist were set out by the B.C. Court of Appeal in *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174.

[14] The Health Authority further argues that *Halifax* establishes that questions of jurisdiction will never amount to exceptional circumstances, and that the Court need go no further in the analysis to dispose of the application to strike and need not consider the *Chu* factors for exceptional circumstances.

[15] In the alternative, the Health Authority says the *Chu* factors establish that the circumstances of this petition are not exceptional, and the petition should accordingly be struck as premature.

[16] In my view, *Halifax* guides courts to show restraint in exercising their discretion to intervene on judicial review before an administrative proceeding is complete: see *Halifax* at para. 35. But it does not establish that preliminary jurisdictional decisions do not, or should never, amount to the exceptional circumstances that warrant intervention.

[17] Accordingly, I must consider whether in the circumstances of this case it is appropriate for the Court to exercise its discretion to hear the judicial review before

the administrative proceeding has run its course.

[18] Counsel for the petitioner submits that the analysis is this:

1. If the decision is a final, as opposed to an interim or interlocutory decision, the presumption is the Court should hear the judicial review--subject only to the Court's residual case-management discretion as to when to hear it, but in any event, the Court should not strike the judicial review.

2. If the Court determines that the Jurisdictional Decision is an interim or interlocutory decision, then the Court is to consider whether exceptional circumstances are present that warrant hearing the judicial review before the WCAT proceeding is complete.

[19] The petitioner argues that the articulation of the presumption that a judicial review from a final decision will be heard before the administrative proceeding is completed, without needing to establish exceptional circumstances, finds its roots in the Federal Court of Appeal's decision in *C.B. Powell Limited* which was cited with approval by the Supreme Court of Canada in *Halifax,* and again subsequently by the B.C. Court of Appeal in *Chu* at para. 65. The key passage from *C.B. Powell Limited* states at para. 35:

> ... absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[20] The petitioner says that the Jurisdictional Decision is a final decision and that the available effective remedies for it within the administrative scheme are exhausted.

[21] Both parties are of the view that the Court's need to consider exceptional circumstances arises only in the alternative to their primary position.

a) The Health Authority says that because this is a jurisdictional question, *Halifax* establishes that early intervention should not be entertained, without the need to examine exceptional circumstances.

b) The petitioner says that because the Jurisdictional Decision is a final decision, the presumption should be that the Court will hear it despite

> the ongoing administrative process, without need to examine exceptional circumstances.

Analysis on Motion to Strike

[22] For the reasons set out below, I am satisfied that the Jurisdictional Decision is a final decision. Furthermore, I am of the view that this is a case in which early intervention is appropriate, having consideration of the factors set out by the Supreme Court of Canada in *Halifax,* and the B.C. Court of Appeal in *Chu*. By early intervention I mean judicial review of the Jurisdictional Decision before the administrative proceeding is complete.

Chu Factors

[23] The factors to be considered in determining whether the Court should intervene early were set out by the Court of Appeal in *Chu*:

> [66] Factors to consider in determining whether the Court's discretion to intervene early, which have been described under the rubric of "special" or "exceptional circumstances", may include hardship or prejudice to the applicant; waste of resources; delay if judicial review proceeds; fragmentation of proceedings; the strength of the case; and the statutory context: *Thielmann v. Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8, at para. 50; *ICBC v. Yuan*, 2009 BCCA 279, [*Yuan*] at paras. 23–24. The analysis is flexible and does not necessarily turn on a single factor: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, [*Hill*] at para. 36; *Thielmann* at para. 49.
>
> [Emphasis added.]

Statutory Context

[24] I will begin by considering the statutory context, as this relates both to whether the Jurisdictional Decision is a final decision with the administrative scheme, as well as to whether the circumstances warrant the Court's intervention on judicial review at this stage of the administrative proceeding.

[25] The Tribunal decision at issue was rendered pursuant to s. 311(1) of the *WCA*, which states:

> **Request for appeal tribunal certification to court**
>
> 311(1) If a court action is commenced based on
>
> (a) a personal injury,
>
> (b) death, or

> (c) a disability caused by occupational disease,
>
> the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.
>
> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
>
> (a) a person was, at the time the cause of action arose, a worker,
>
> (b) a worker's injury, death or disability arose out of, and in the course of, the worker's employment,
>
> (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of the compensation provisions.
>
> (3) This Part, except section 306 (4) [time for making final decision], applies to proceedings under this section as if the proceedings were an appeal under this Part.

[26] In this case, the petitioner, Dr. Tabarsi Inc., entered into a services contract with the Health Authority in 2020. The contract provided that Dr. Tabarsi Inc. would provide clinical pathology services to the Health Authority. Under the agreement, Dr. Tabarsi is responsible to provide and perform and fulfill all obligations that cannot be performed or fulfilled by his medical corporation. A dispute arose between the parties as to whether the Health Authority was meeting its obligations under the agreement to provide a safe work environment for the physician.

[27] Underlying the dispute was the petitioner's allegation that the Health Authority had failed to properly address issues related to alleged “aggressive, abusive, and inappropriate conduct” by another physician at the hospital, thereby breaching the Health Authority's obligation under the contract to provide a safe work environment, which was an issue fundamental to any consideration of renewal of the petitioner's contract to continue to provide pathology services to the Health Authority.

[28] The impact of the other physician's conduct on the work environment had led Dr. Tabarsi to giving the Health Authority notice that he was unable to return to work at the hospital until the issues were resolved.

[29] The contract was not renewed in 2021, and pursuant to the contract, the petitioner filed a notice to arbitrate on May 9, 2023:

> [seeking] damages from the [Health Authority] for breach of contract and for failing to negotiate a renewal of the agreement in good faith, moral damages on the basis that the [Health Authority]'s failure to address [another physician's] conduct caused Dr. [Tabarsi] mental distress, and punitive damages. (Jurisdictional Decision at para. 13)

[30] After receiving the petitioner's notice to arbitrate, the Health Authority applied to the Tribunal for certification under s. 311, requesting two determinations: first that Dr. Tabarsi was a worker, and his alleged injuries arose out of and in the course of employment; and second, that the Health Authority was an employer and engaged in an industry within the meaning of the compensation provisions at the material time.

[31] The Health Authority's application for certification to court lists:

a) the worker as Dr. Aref Tabarsi; and

b) the employer as Dr. Tabarsi Inc.

[32] The name of the court action is listed as *Dr. Aref Tabarsi Inc. v. VIHA VanIAC*. File No: 181022-DCA. This is an International Arbitration Centre ("IAC") file and not a court file.

[33] The Tribunal's assessment officer considered that the dispute between the parties did not concern a court action and was not based on a personal injury and advised the parties of their intention to recommend that the Health Authority's applications for certification be dismissed. The assessment officer requested that the parties provide written submissions on this jurisdictional question, which both did.

[34] The Tribunal issued its decision on the jurisdictional issue on July 31, 2024, determining it had jurisdiction to make the s. 311 certification in respect of the notice to arbitrate on two bases:

a) That "court" and "action" under the *WCA* were statutorily interpreted respectively to include an arbitrator and a proceeding brought under the *Arbitration Act.*

b) Based on the allegations set out in the notice to arbitrate, the Tribunal stated at para. 98 of the Jurisdictional Decision that it:

> ... [has] jurisdiction to certify with respect to any personal injury claimed by Dr. P, in relation to which Dr. P Inc. is seeking damages.

[35] As the Tribunal stated in its letter to the parties issuing the Jurisdictional Decision "The enclosed WCAT decision is final and conclusive pursuant to s. 309 of the *Act*". This accords with the *WCA* s. 309::

> **Appeal tribunal decision or action final**
>
> 309(1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.
>
> (2) Proceedings by or before the chair or appeal tribunal under this Part must not
>
> (a) be restrained by injunction, prohibition or other process or proceeding in any court, or
>
> (b) be removed by certiorari or otherwise into any court.
>
> (3) The Board must comply with a final decision of the appeal tribunal made in an appeal under this Part.
>
> (4) A party in whose favour the appeal tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the Supreme Court.
>
> (5) A final decision filed under subsection (4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

[36] This privative clause brings the Tribunal Jurisdictional Decision under s. 57 of the *Administrative Tribunals Act*, S.B.C. 2004, c.45 [*ATA*] which required the petitioner to seek judicial review within 60 days of its issuance:

> **Time limit for judicial review**
>
> 57(1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.
>
> (2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

[37] Accordingly, the statutory scheme itself contemplates:

a. the decision is final and conclusive with no mechanism for review within the administrative scheme. Nor will the Jurisdictional Decision be reconsidered or amended if the determination and certification proceeding proceeds. It is a final decision; and

b. the petitioner must seek judicial review of the Jurisdictional Decision as a final decision within 60 days of its issuance.

[38] This case is distinct from *C.B. Powell Limited* in which the Federal Court of Appeal found the petitioner had not exhausted the administrative processes for determination and review set out in the statute. There was no role for the courts within those processes, which had yet to be exhausted.

[39] In this case, the Tribunal, on its own motion, has created a two-stage process, with the first being the substantive determination of jurisdiction. The Tribunal decision-maker has completed its task on the merits of the substantive issue and has issued its Jurisdictional Decision. The petition for judicial review at this stage is exactly what is prescribed under the *ATA*, and the *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241. Unlike in *C.B. Powell Limited* at this stage there is no other path for consideration of the Jurisdictional Decision. The Court in *C.B. Powell Limited* stated:

> [28] Under the Act, Parliament has established an administrative process of adjudications and appeals in this area. This administrative process consists of initial CBSA decisions or deemed assessments under section 58, further determinations by CBSA officials under section 59, additional determinations by the President of the CBSA under section 60 and appeals to the C.I.T.T. under subsection 67(1). The courts are no part of this. Allowing the courts to become involved in this administrative process before it is completed would inject an alien element into Parliament's design.
>
> [29] In addition to designing an administrative process without courts, Parliament, for good measure, has gone further and has forbidden any judicial interference. At every stage of this administrative process, in subsections 58(3) [as am. by S.C. 1997, c. 36, s. 166] and 59(6) [as am. *idem*] and section 62 [as am. *idem*], Parliament has specified that the only permissible reviews, re-determinations or appeals are found in the administrative process described in the Act:
>
> **58.** …
>
> Review of determination
>
> (3) A determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the

	extent and in the manner provided by sections 59 to 61.
	…
	59. …
Review of re-determination or further re-determination	(6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.
	…
No review	**62.** A re-determination or further re-determination under section 60 or 61 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.

The principle of judicial non-interference with ongoing administrative processes

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706, at paragraphs 38-43; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paragraphs 14–15, 58 and 74; *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, at paragraphs 1–2; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257, at paragraphs 38–55; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its

> course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[40] In this sense, the Jurisdictional Decision is a final decision. It is similar to the final decision in *Ontario Human Rights Commission v. Ontario Teachers' Federation*, 19 O.R. (3d) 371, 1994 CanLII 10578 (S.C.), (and see in particular the discussion at paras. 8–11.) The tribunal has "finished its work in relation to the specific issue in question,": *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 [*Mzite*] at para. 37.

[41] Moreover, the statutory scheme contemplates that the judicial review of the Tribunal's decision must be brought now, not later: s. 57, *ATA*.

[42] I need not determine, as the petitioner argues, whether determining this to be a final decision is sufficient in itself to dispose of the application to strike without the need to consider the *Halifax* and *Chu* factors respecting early intervention, as I am also of the view that considering the statutory context as a whole, which *Chu* directs, this is an appropriate stage at which to judicially review the Jurisdictional Decision.

[43] The appropriateness of early intervention in this case accords with the stage at which the jurisdiction decision was issued within the statutory scheme. On its own motion, the Tribunal decided to address its jurisdiction under s. 311 before proceeding with the determination and certification proceeding.

[44] This case is similar in many ways to the facts of *Mzite*, which was decided by the B.C. Court of Appeal after *C.B. Powell Limited* and *Halifax* and in which the Court of Appeal held it was appropriate for the judicial review to proceed at the time it was filed and before the administrative proceeding was complete. The Court in *Mzite* stated that:

> [41] The decision under review was, however, a substantive, rather than a procedural decision. The resolution of the question is of significant value to the parties. Its resolution prior to the hearing of the substantive complaint could potentially result in a saving of significant time and expense on the part of all parties. The decision arose out of a distinct preliminary process

> and the petition was brought before the substantive hearing had commenced, during an interval in proceedings. It cannot be said that the petition so interfered with the process of the Tribunal that it ought not to have been heard.
>
> [42] In no event will the Tribunal receive further evidence with respect to the timeliness of the complaint. If the judge had refused to hear the petition and remitted the complaint to the Tribunal, it would remain open to the Minister, following the hearing of the complaint on the merits, to seek judicial review of the decision to permit the complaint to proceed. That issue would ultimately be determined on the same evidence that was before the judge. There is no reason to expect that on judicial review following final determination by the Tribunal there would be a different or better evidentiary record.
>
> [43] Nor will there be any further, or more considered, decisions from the Tribunal on the question of timeliness, to which to defer. In contrast to the situation in Abbotsford, the Tribunal here has finally answered the question whether the complaint should be allowed to proceed despite delay, in the public interest.
>
> [44] All of the features of the decision in this case made it appropriate for judicial review when the petition came on for hearing, despite the fact the Tribunal had not finished its work. While the exercise of the discretion to engage in preliminary review should be rare, it cannot be said that the judge in this case erred in exercising that discretion.

[45] This case shares many of those features:

a) The Jurisdictional Decision is a substantive rather than a procedural decision. The resolution of the question of jurisdiction is of significant value to the parties.

b) Resolution by judicial review prior to the hearing of the substantive certification proceeding could potentially result in a saving of significant time and expense on the part of all parties, as I will discuss below.

c) The Jurisdictional Decision arose out of a distinct preliminary process, and the petition was brought before the substantive hearing had commenced.

d) In no event will the Tribunal receive further evidence with respect to, at least, the first threshold question relating to the statutory interpretation of "court" and "action." There is no reason to expect that on judicial review following final determination by the Tribunal there would be a different or better evidentiary record on this first question.

e) Nor will there be any further or more considered decisions from the Tribunal on the first question of pure statutory interpretation to which the Court can defer. The Tribunal here has finally answered this question.

[46] I am not persuaded that this is equally so, however, with respect to the second question, that is:whether the arbitration proceeding is commenced based on a personal injury. Were that the sole determination being challenged on judicial review, it might well be that the Court's discretion should be exercised so as to await the completion of the full administrative proceeding on the s. 311(2) determination on a full evidentiary record. However, that is not the case here. Both aspects of the decision are being challenged.

[47] This case is distinct from *Halifax* and *Chu* both of which involve preliminary screening decisions that engage the Tribunal's administrative function rather than its adjudicative function. The Court distinguishes between assertions by a party that a judicial review was brought on "jurisdictional grounds" from true threshold jurisdictional questions.

[48] In fact, in *Halifax* the Supreme Court of Canada expressly rejected that the administrative decision in that case was a jurisdictional question that the complaint fell within the purview of the *Human Rights Act*. Instead, the Court held that the Commission's decision was an initial screening decision to move the matter forward by establishing an independent board of inquiry, and it would be that board which would resolve a jurisdictional matter:

> [18] The chambers judge applied the correctness standard of review because he thought that the Commission had made a determination that "the complaint fell under the [Act] and therefore under its jurisdiction" (para. 53). The Court of Appeal disagreed with this characterization of the Commission's decision. Rather than making a decision about its jurisdiction, the Commission had "simply decided to advance the complaint to the next level by establishing an independent Board of Inquiry" (para. 35).
>
> [19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.
>
> ….
>
> [23] What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the

> board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication.

[49] By contrast, the Jurisdictional Decision in this case was an adjudicative decision about whether the proceeding falls within the purview of the *WCA*.

[50] If the petitioner's judicial review is successful, at least on the question of whether private arbitration falls within the meaning of "court proceedings" under the *WCA*, which goes to whether the matter falls within the purview of the *WCA*, the Court will not simply issue a correction to the decision of the Tribunal. The Tribunal's Jurisdictional Decision will be set aside, and the Tribunal process will not proceed.

Delay if judicial review proceeds

[51] It is important to note that the WCAT certification does not end the court or arbitration proceeding under the *WCA*. Once certification is made, it remains for the court or arbitrator to consider the certification and determine whether any claims advanced in the proceeding are statute barred under the *WCA*.

[52] Accordingly, in this case if the Tribunal proceeding is allowed to run its course, yet the threshold jurisdictional issue has yet to be judicially reviewed, the arbitration proceeding will have to be delayed until there is a determination on judicial review of whether the arbitrator should be receiving and considering the Tribunal certification.

[53] The Health Authority has said it will not object to a judicial review brought on jurisdictional grounds at that stage. If the certification survives the judicial review, it will still be for the arbitrator to decide the effect of the certification on the arbitration. If the certification does not survive judicial review, then the arbitration will proceed without any need for the arbitrator to consider the certification.

[54] Ultimately, the only potentially unnecessary delay of determination of this matter on its merits between the parties arises from allowing a potentially unnecessary (because it is unlawful) certification proceeding to proceed. Accordingly, in this case considerations of delay favour allowing the judicial review to proceed now before the Tribunal process is complete.

[55] Allowing the petitioner to proceed with judicial review now would not appear to cause net delay in the overall proceedings that lay ahead for these parties, and indeed allowing it to proceed now may reduce and save litigation time spent between the parties by obviating the need for the certification proceeding.

[56] For these reasons I do not consider delay to weigh against allowing the judicial review to proceed now. No hardship or prejudice to the applicant

[57] Nor do I consider that allowing the judicial review to proceed at this stage causes hardship or prejudice to the applicant, the Health Authority.

[58] I am not persuaded that the delay to the Tribunal proceeding if the judicial review proceeds (which I note is contingent upon this Court granting the stay sought by the petitioner) is prejudicial to either party, as the fundamental question is whether the Tribunal proceeding should proceed at all. If the Jurisdictional Decision is patently unreasonable and the Tribunal is found to have no jurisdiction in an arbitration proceeding under the *Arbitration Act*, then delay to a proceeding that should never start is no prejudice.

[59] In the context of this final decision that will be unaffected by any further aspect of the proceeding under s. 311, I see no waste or risk of fragmentation or duplication by allowing the judicial review to proceed now.

[60] The Health Authority submits that stage 2 of the WCAT certification proceeding will likely require only one further written submission, will not be elaborate, nor cause significant additional burden on the parties even if it is ultimately determined to have been undertaken without jurisdiction.

[61] However, no complete procedural direction has been given by the Tribunal for phase 2 of this proceeding at this stage. The Tribunal procedural rules indicate that multiple rounds of submissions may be required. Interested parties may be invited to participate, and an oral hearing may be ordered.

[62] Phase 1 of the Tribunal proceeding took a year from the date the Health Authority filed its application for certification to the date of the phase 1 decision. In my view, the possibility of wasted time and resources weighs in favour of early judicial review to determine whether the Tribunal has jurisdiction to undertake this proceeding at all.

Strength of case

[63] As I set out below with respect to the stay application, in my view there is a serious issue to be determined on the judicial review, at least with respect to the question of statutory interpretation and the Tribunal's jurisdiction to issue certified determinations to an arbitrator in a proceeding brought under the *Arbitration Act*.

[64] Economy of resources militates in favour of allowing the whole of the petition to proceed at once, (rather than bifurcating it), including judicial review of Tribunal's determination that the Tribunal has jurisdiction to certify with respect to any personal injury damage claimed by Dr. Tabarsi in relation to which Dr. Tabarsi Inc. is seeking damages: (referring to para. 98 of the Jurisdictional Decision).

[65] In my view, these are circumstances in which a judicial review should be allowed to proceed before the administrative proceeding has run its course.

[66] Accordingly, the application to strike the judicial review is dismissed.

Application for Stay of the Tribunal certification proceeding

[67] I turn now to the application for the stay of the WCAT certification proceeding pending determination of the judicial review. This application is brought pursuant to s. 10 of the *Judicial Review Procedure Act*.

[68] In this case, the questions are intricately related, as the application to strike was based on prematurity. I have found that in these particular circumstances, it is not premature to hear the petition before completion of the administrative proceeding. This means that the petition need not wait until the completion of the Tribunal proceeding to be heard. It does not necessarily follow, though, that the Tribunal proceeding should be stayed to first allow the hearing and determination of the petition.

[69] The traditional three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117, guides the Court's analysis in determining whether a stay is appropriate:

a) is there a serious issue to be tried?

b) will the applicant suffer irreparable harm without a stay?

c) does the balance of inconvenience favour granting a stay?

[70] These factors are not a checklist, each of which must be satisfied before injunctive relief may be granted. The "three parts of the test are not intended to be separate watertight compartments, but factors that 'relate to each other', such that 'strength on one part of the test ought to be permitted to compensate for weakness on another'": *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19.

[71] This inter-related framework is helpful in this case where the petitioner will meet the most onerous standard of review on judicial review, patent unreasonableness, pursuant to s. 58 of the *ATA*.

[72] There has been some discussion in the case law as to what happens when the stay framework is applied to a case in which the merits will be evaluated on the onerous standard of review of patent unreasonableness. Counsel for the Health Authority submits that the standard for the stay in such a case and in this case is "strong *prima facie* case" rather than "serious question to be tried" following *Community Social Services Employers' Association of B.C. (Re)*, 2014 BCSC 1719 [*Community Social Services*] at para. 8. However, as Justice Macintosh observed in *Community Social Services* :

> [11] In my view, whether an applicant must show a strong *prima facie* case or, instead, a serious argument that the decision below is patently unreasonable, makes little difference. Both formulations of the test are formidable. Needing to show either test, a strong *prima facie* case, or a serious question that the decision is patently unreasonable, leads to the same difficult place for an applicant.

[73] In *Beach Place Ventures Ltd. v. British Columbia (Employment Standards Tribunal)*, 2020 BCSC 327, Justice MacDonald, having considered *Community Social Services* and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, applied the "serious question to be tried" standard to a decision to be reviewed on a standard of patent unreasonableness in the statutory context of the case before her. She also noted:

> [65] In any event, like Macintosh J. I find it makes little difference whether the higher threshold at the first part of the test survives *RJR MacDonald*. The parties agree the standard of review for questions of fact and law on the judicial review is patent unreasonableness. The burden to establish a decision is patently unreasonable is high. The strength of the case must be measured against this standard.

[74] I am of the view that the appropriate question for the Court to ask in this case is whether there is a "serious question to be tried", recognizing that that question will be assessed on judicial review on a patent unreasonableness standard.

[75] In my view, there is a serious question to be tried in this case.

[76] There are two "gateway" questions the Tribunal needed to decide in order to determine whether the Tribunal should certify the proceeding pursuant to s. 311 of the *WCA*:

a) Do the terms "court" and "action" under the *WCA* respectively include an arbitrator appointed under and proceeding brought under the *Arbitration Act*, and

b) Does the arbitration proceeding include a claim of disability caused by personal injury?

[77] Both are significant questions regarding WCAT's jurisdiction. The first is a question of first instance that goes to the fundamental interpretation of the jurisdiction granted to the Tribunal under the *WCA*. It is based upon a direct interpretation of the *WCA*, without reference to the facts of the case. The second question engages an issue that has been addressed by two lines of reasons in decisions of the Tribunal: should the Tribunal, in considering a s. 311 certification request, restrict itself to the narrow approach focusing on how a cause of action is framed by a claimant, or should the Tribunal assess the substance of the facts asserted in a claim, to determine whether the Tribunal has jurisdiction to certify the matter under s. 311?

[78] These questions will be assessed on a "patent unreasonableness" standard on judicial review. In *Shuster v. British Columbia (Residential Tenancy Branch)*, 2024 BCCA 282, the Court of Appeal explained:

> [50] Patent unreasonableness is the standard that is most deferential to the decision maker. If a decision maker's interpretation is not unreasonable, it is also not patently unreasonable: *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211, at paras. 28–29.
>
> [51] In assessing the reasonableness of a tribunal's statutory interpretation, the reviewing court must first undertake its own statutory interpretation. If the statutory provision at issue is capable of more than one reasonable interpretation, the interpretation of the tribunal, if reasonable, will prevail.

> However, if the reviewing court determines that there is only one reasonable interpretation, the interpretation of the tribunal will be unreasonable if it failed to adopt it: *Simon Fraser University v. British Columbia (Assessor of Area #10 – Burnaby)*, 2019 BCCA 93, at para. 55.
>
> [52] It is not for the court on review or appeal to re-weigh evidence or second guess conclusions drawn from the evidence and substitute different findings. A decision will be patently unreasonable only where there is no evidence to support the findings or the decision is "openly, clearly, evidently unreasonable": *Maung* at para. 42.

Serious Question to be Determined

[79] In my view, on the first of the two questions, on the patent unreasonableness standard, there is a serious question to be determined as to whether the definitions of "court" and "action" include an arbitrator and arbitration proceeding brought under the *Arbitration Act*.

[80] The Tribunal found that arbitration proceedings "would not be characterized as involving a court action in terms of the traditional meaning of court,": Jurisdictional Decision at para. 68.

[81] However, in finding that the terms "court" and "action" respectively include an arbitrator and proceeding under the *Arbitration Act*, the Tribunal placed significant analytical weight on the fact that in 2018, the legislature amended the *WCA* to include the definitions in question, specifically stating "'action' includes proceedings brought in the civil resolution tribunal under the *Civil Resolution Tribunal Act*" and "'court' includes the civil resolution tribunal under the *Civil Resolution Tribunal Act"*: para. 17 of the Jurisdictional Decision.

[82] The Tribunal viewed these statements as significant, as they changed the statutory context from that considered by the Tribunal in WCAT-2009-03147, in which the Tribunal found that it does not have jurisdiction to certify to the Court in the context of a Human Rights Tribunal proceeding.

[83] In my view, there is a reasonable possibility that in undertaking its own statutory interpretation, in accordance with the principles affirmed in *Sayyari v. Provincial Health Services Authority*, 2023 BCCA 413, the reviewing Court may determine that the 2018 amendments extend the definition of "court" and "action" only to the Civil Resolution Tribunal and proceedings before it, and no further

beyond the "traditional meaning of a court." This is a serious issue to be tried, even on a patent unreasonableness standard in light of the approach directed by the Court of Appeal in *Shuster*.

[84] In light of this, I need not determine whether the second question rises to the level of a serious question to be tried on a patent unreasonableness standard. I would direct that both questions on judicial review be determined together in order to secure the just, speedy, and inexpensive determination of the proceeding on its merits.

[85] Even if the first jurisdictional question did not meet the high threshold required in this case on the first branch of the stay analysis, I would nevertheless grant the stay in light of the other factors informing the analysis.

Irreparable harm

[86] The alleged harm to the applicant in this case is the cost of delay and expense arising from a potentially unnecessary WCAT certification proceeding.

[87] While these are losses quantifiable monetarily, they are not necessarily recoverable. In the ordinary course, costs will not be awarded in Tribunal proceedings: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494. Damages are not recoverable in judicial review proceedings. They may be recoverable in the arbitration proceeding if amendment is permitted.

[88] I do not place significant weight on this factor in the circumstances of this particular case. The salient factors in this case are the serious question to be tried on the statutory interpretation question and the balance of inconvenience, to which I turn now.

Balance of Inconvenience

[89] In my view, much of the analysis with respect to the special or extraordinary circumstances on the prematurity application applies with respect to the balance of inconvenience in this case.

[90] I have already found that given the final nature of the preliminary Jurisdictional Decision, there is no risk of fragmentation or duplication of

proceedings or prejudice to the Health Authority for the judicial review to proceed before the Tribunal proceeding is complete.

[91] In my view, the risk of wasted time and resources for both parties weighs against allowing the Tribunal proceeding to proceed before its jurisdiction over the matter is confirmed on judicial review.

[92] It took a year between the Health Authority's request for a s. 311 certification and the Tribunal's preliminary decision in this matter that it had jurisdiction to consider the request.

[93] Dr. Tabarsi Inc. filed its notice to arbitrate in May 2023. As the petitioner puts it, he is no closer today, two years later, as he was then to having the matter determined and addressed on its merits.

[94] I am also mindful that the Tribunal does not have jurisdiction to stay its own proceedings, and they are currently stayed pursuant to consent of the parties. Accordingly, short of consent of the parties, this Court is the only adjudicative body with the authority to stay the Tribunal proceedings to allow the judicial review to proceed in advance of those proceedings.

[95] In my view, that is warranted in this case to prevent the expenditure of time and expense on the certification proceeding until it is determined that the Tribunal has jurisdiction to continue with that proceeding. Accordingly, the petitioner's application to stay the Tribunal proceeding as set out at paragraph 1 of the notice of application is granted.

[96] Costs shall be to the petitioner in the cause on both applications.

"Giltrow J."