IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andreasen v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2025 BCSC 1294

Date: 20250710
Docket: S245413
Registry: Victoria

Between:

Amy Andreasen

Petitioner

And

Workers' Compensation Appeal Tribunal, Malahat Nation, Joshua Handysides and Lauren Krull

Respondents

Before: The Honourable Justice Chan

Reasons for Judgment

The Petitioner, appearing in person:	A. Andreasen
Counsel for the Respondent Workers' Compensation Appeal Tribunal:	T.J.H. Martiniuk
Counsel for the Respondent Malahat Nation:	K.D. Lee
Counsel for the Respondents Joshua Handysides and Lauren Krull:	M.D. Wehrung
Counsel for the Attendee Attorney General of British Columbia:	J.G. Penner
Place and Dates of Hearing:	Victoria, B.C. June 2–6, 2025
Place and Date of Judgment:	Victoria, B.C. July 10, 2025

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Introduction

[1] Amy Andreasen was employed from June 2015 at the band office of Malahat Nation on reserve lands near Mill Bay on Vancouver Island. In January 2016, she was promoted to the position of director of finance. She was assaulted at work during an incident with a band member on March 25, 2019. She went on leave on July 29, 2019 and has not returned to work. Ms. Andreasen submitted compensation claims to the Workers' Compensation Board (the "Board") which were accepted. She began receiving benefits pursuant to the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 [*WCA*] starting in November 2019.

[2] Ms. Andreasen started an action against Malahat Nation in Supreme Court on August 28, 2020. In June 2022, Joshua Handysides, the chief administrative officer for Malahat Nation, and Lauren Krull, the director of finance for Malahat Nation, were added as defendants to the Supreme Court action.

[3] The defendants Malahat Nation, Mr. Handysides and Ms. Krull sought certification from the Workers' Compensation Appeal Tribunal ("WCAT") pursuant to s. 311 of the *WCA.* Pursuant to s. 311, if a court action is commenced based on a personal injury, death or a disability caused by occupational disease, a party may ask WCAT to make a determination and certify it to the court. Pursuant to s. 127 of the *WCA*, there is a statutory bar to a court action where the action or conduct of the employer or another worker that caused the breach of duty of care arose out of and in the course of employment within the scope of the compensation provisions.

[4] WCAT determined on January 5, 2024 that at the time the causes of action arose, the parties were workers, and any injury Ms. Andreasen suffered arose out of and in the course of her employment: WCAT Decision A2002601 (the "WCAT Decision"). Ms. Andreasen brings this petition seeking judicial review of the WCAT Decision.

Factual Background

[5] Ms. Andreasen was assaulted at work on March 25, 2019 by an intoxicated Malahat Nation community member Jared Harry who smashed a whisky bottle in the reception area and spoke to Ms. Andreasen in a derogatory manner. Ms. Andreasen sustained small particles of glass in her right eye from the assault. She did not report to work on July 29, 2019 and has been off work since. She submitted a claim with the Board, which issued a decision in November 2019, accepting her claim for a mental disorder under now s. 135(1) of the *WCA*.

[6] Ms. Andreasen received wage loss benefits starting from July 29, 2019 to July 2020 from the Board. She also received vocational rehabilitation benefits, and later she received permanent disability benefits. However, initially she was denied some of these benefits and had to seek reviews with the Board. She was unsuccessful in the first review, but successful in a later review. Some of these benefits were paid to her retroactively. She argues from September 2020 to December 2021, she did not receive any benefits from the Board, though as I understand it, she was paid later for benefits relating to this period.

[7] Ms. Andreasen continued to receive pension and non-pension benefits from Malahat Nation after she went on leave in July 2019. She received pension benefits until June 2021, and she received non-pension benefits until July 2021. Ms. Andreasen asked Malahat Nation to cease the payment of these benefits.

[8] Ms. Andreasen was determined in December 2021 to be entitled to wage loss benefits from September 2020 to February 2021, which were paid to her retroactively. These wage loss benefits ceased in February 2021. In August 2021, the Board determined she was entitled to a loss of function permanent disability benefit for her adjustment disorder with anxiety, and she received permanent disability benefits from the Board, retroactive to July 2020. Her claim for benefits for post-traumatic stress disorder ("PTSD") and major depressive disorder ("MDD") was also accepted by the Board. Her entitlement to benefits was reassessed and increased due to the additional

diagnosis. I understand Ms. Andreasen continues to receive this permanent disability benefit.

[9] While Ms. Andreasen was away from work, Malahat Nation eventually offered her position as director of finance to Ms. Krull. Ms. Andreasen's view is she was constructively dismissed, while Malahat Nation argues she repudiated her employment contract. On August 28, 2020, Ms. Andreasen filed her first notice of civil claim in Supreme Court, alleging constructive dismissal. She brought an application to further amend her pleadings and to add Mr. Handysides and Ms. Krull as defendants, while the defendants brought an application to strike her pleadings.

[10] These applications were heard by Justice Veenstra, who released his ruling in March 2022, indexed as *Andreasen v. Malahat Nation*, 2022 BCSC 363. Justice Veenstra struck out the amended notice of civil claim ("ANOCC"), with leave to Ms. Andreasen to provide a revised amended notice of civil claim in accordance with the reasons for judgment. She was granted leave to add the defendants Mr. Handysides and Ms. Krull. On June 10, 2022, Ms. Andreasen filed her Revised Amended Notice of Civil Claim ("RANCC").

[11] In June 2022, the defendants asked WCAT to proceed with their application for a s. 311 certification. In June and July 2022, Ms. Andreasen wrote to WCAT and provided her position that this matter was *ultra vires* the WCAT, as Malahat Nation is a federally regulated workplace. On July 11, 2022, WCAT deputy registrar wrote to Ms. Andreasen, advising that WCAT was not summarily dismissing the application and the matter would be considered by a vice chair. WCAT set a timetable for the exchange of submissions.

[12] On August 19, 2022, Malahat Nation provided its submissions to WCAT.

[13] On September 9, 2022, Mr. Handysides and Ms. Krull provided their submissions to WCAT.

[14] On October 17, 2022, Ms. Andreasen provided her submissions to WCAT.

[15] On November 23, 2022, Mr. Handysides and Ms. Krull provided their reply submissions to WCAT.

[16] On November 30, 2022, Malahat Nation provided its reply submissions to WCAT.

[17] On December 15, 2022, Ms. Andreasen provided a further submission to WCAT.

[18] On January 5, 2024, WCAT issued its decision and certificate.

[19] On March 4, 2024, Ms. Andreasen filed her petition for judicial review of the WCAT Decision.

Certification and the Statutory Bar in the *Workers Compensation Act*

[20] There are limitations on the right to sue an employer or other workers in the *WCA*, set out in s. 127. A party may seek a determination from WCAT pursuant to s. 311 that an injury is related to employment. If a s. 311 certification is provided, it can be filed with the court, who will decide the effect of the certificate on the action: *Clapp v. Macro Industries Inc.,* 2007 BCSC 840 at para. 36. I set out below ss. 127 and 311 of the *WCA*:

> **Limitation on legal proceedings against employers or workers**
>
> **127** (1) Subject to subsection (2),
>
> (a) the compensation provisions are in place of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker or a dependant or family member of the worker is or may be entitled against
>
> (i) the employer of the worker,
>
> (ii) an employer within the scope of the compensation provisions, or
>
> (iii) any other worker,
>
> in respect of any personal injury, disablement or death of the worker arising out of and in the course of employment, and
>
> (b) no action lies in respect of such an injury, disablement or death.

(2) Subsection (1) applies only if the action or conduct of

(a) the employer or the employer's servant or agent, or

(b) the other worker,

that caused the breach of duty of care arose out of and in the course of employment within the scope of the compensation provisions.

…

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.

…

The WCAT Decision

Jurisdiction

[21] The WCAT Panel dealt first with Ms. Andreasen's claims that WCAT did not have jurisdiction pursuant to s. 311 of the *WCA* to make a determination and to certify it to the court. Ms. Andreasen argued that since Malahat Nation is a First Nation employer, the *Canada Labour Code,* R.S.C., 1985, c. L-2 [*CLC*], the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 [*CHRA*], and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*] apply.

[22] The WCAT Panel considered Ms. Andreasen's arguments based on her analysis of the division of powers between the federal and provincial governments and the doctrine of paramountcy. The WCAT Panel considered the submissions of the defendants, who argued Ms. Andreasen was challenging the constitutional validity of the *WCA* and did not provide the required notice pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 [*CQA*] to the Attorney General of Canada and the Attorney General of British Columbia. The defendants argued in any event, as Ms. Andreasen applied for and received benefits under *WCA*, she has attorned to WCAT's jurisdiction.

[23] Malahat Nation submitted that s. 239.1(2) of the *CLC* requires every employer to subscribe to a plan to provide wage replacement to a worker who misses work due to work related illness or injury, and Malahat Nation has chosen to enroll as an employer with the Board in order to meet this obligation. Malahat Nation adduced evidence that it has been registered since July 1994 with the Board and was registered at the time of the assault in March 2019. Malahat Nation argued that by enrolling for no fault insurance for workers, Malahat Nation is entitled to protection from legal action, based on the "historic trade-off", as described in *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2012 BCCA 392 at paras. 23, 29–30.

[24] The WCAT Panel referred to *Isaac v. British Columbia (Workers' Compensation Board),* 47 B.C.A.C. 108, 1994 CanLII 1444 (BCCA) [*Isaac v. WCB (BC)*], which held that the *WCA* applies uniformly throughout the province, including to an Indian Band on reserve land. In *Isaac v. WCB (BC)*, the Board refused to pay survivor benefits to the widow and children of Mr. Isaac, a member of an Indian Band who was employed by the band in logging operations on reserve land in British Columbia. Mr. Isaac died due to an accident resulting from the course of his employment with the band. The Court of Appeal determined that the Board's coverage policy, read correctly, should apply uniformly and compulsorily to an Indian Band on reserve land. The Court provided the following rationale at paras. 94–95:

> 94 The Act by its terms applies uniformly throughout the province. Neither purpose nor policy requires it to be applied in a manner which could impair the status or capacities of a particular group.

> 95 But I do not think this is the significant feature as I am of the view the Act applies, and has applied since 1916, at least as to its compensation aspect, *ex proprio vigore*, that is, of its own force, to employers and employees in circumstances like those in the case at bar.

[25] In the case at bar, the WCAT Panel noted its own *Manual of Rules and Practice and Procedure*, which requires in item 5.1.6.4 that parties who seek to challenge the constitutional validity or applicability of a provision of the *WCA*, regulations, or policy, or obtain a constitutional remedy as defined by the *CQA* must comply with the notice requirement set out in s. 8 of the *CQA*. If a party fails to comply with s. 8 of the *CQA*, the WCAT panel may decline to consider the constitutional issue; adjourn a hearing to give a party time to comply; or comply with s. 8 on its own initiative.

[26] In considering whether to exercise its discretion to give the required notice, WCAT will consider whether the party has identified the specific provision of the *WCA*, regulations or policy they intend to challenge; identified the specific constitutional provisions they intend to rely on; identified any right or freedom alleged to have been infringed under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*]; given particulars necessary to show the point to be argued; and explained why they are unable to provide the notice required by s. 8 of the *CQA*.

[27] The WCAT Panel stated its conclusion on this issue at para. 22 of the WCAT Decision:

> I have chosen not to exercise my discretion in giving the required notice under section 8 of the CQA because Andreasen, at the very least, has not explained why she was unable to do so. Moreover, I am of the view, based on the arguments put forth by the applicant and the respondents, that the merits and justice of this application do not require me to address Andreasen's challenge to the constitutional validity or applicability of the Act. I find that section 311 of the Act is applicable in this application.

Claim for Personal Injury

[28] The WCAT Panel next determined Ms. Andreasen's legal action was based on a personal injury. The WCAT Panel noted Ms. Andreasen's RANCC alleged breach of contract, the tort of defamation, the tort of unlawful interference with economic

relations, the tort of intentional infliction of mental stress, the tort of negligent infliction of mental stress, and the tort of conspiracy to injure. The WCAT Panel considered that Ms. Andreasen has alleged to have suffered various personal injuries, including mental distress, humiliation, anxiety, insomnia, fear and anxiety, depression, severe ongoing distrust, serious injury to her character, credit and reputation, and loss of dignity. The WCAT Panel noted the defendants conceded Ms. Andreasen's claims for wrongful or constructive dismissal are exempt from certification. As I understand it, the concession was based on the fact that wrongful or constructive dismissal is not a cause of action based on a personal injury, and thus not a claim which can be certified pursuant to s. 311 of *WCA*.

[29] With respect to all her other claims as pleaded in the RANCC, the WCAT Panel found they are based on a personal injury such that WCAT has jurisdiction to provide a certificate: WCAT Decision at para. 29.

Status of Ms. Andreasen, Mr. Handysides and Ms. Krull

[30] The WCAT Panel referenced at para. 30 the definition of "worker" under the *WCA*, as well as its policy item #AP1-1-5 of the *Assessment Manual*, which set out that the term "workers" includes individuals who are paid on an hourly, salaried or commission basis. The WCAT Panel referenced a statement of October 15, 2019, from Ms. Andreasen at the time she applied for compensation, stating she had worked for Malahat Nation since June 2015 and was the Director of Finance. The WCAT Panel referenced that Ms. Andreasen had been paid approximately $64 per hour. The WCAT Panel found at para. 33 that Ms. Andreasen was a worker of Malahat Nation at the time the causes of action arose.

[31] The WCAT Panel found at para. 37 that Mr. Handysides and Ms. Krull were also workers at Malahat Nation at the time the causes of action arose. The WCAT Panel referenced their affidavits, where they deposed to their jobs at Malahat Nation, and that the only contact they had with Ms. Andreasen was through their employment.

[32] The WCAT Panel then considered if the causes of action were employment related. The WCAT Panel referenced policy item C3-14.00 of the *Rehabilitation*

Services and Claims Manual, Volume II, for the policy that provides guidance on whether or not an injury has arisen out of and in the course of a worker's employment. Policy item C3-14.00 explains that "arising out of a worker's employment" generally refers to the cause of the injury or death, whereas "in the course of a worker's employment" refers to whether the injury or death happened at a time and place, and during an activity that is "consistent with, and reasonably incidental to, the obligations and expectations of the worker's employment".

[33] The WCAT Panel referenced the list of factors listed under policy item C3-14.00 to determine if an injury or death has arisen out of and in the course of a worker's employment:

- Did the injury or death occur on the employer's premises?
- Did the injury or death occur while the worker was doing something for the benefit of the employer's business?
- Did the injury or death occur in the course of action taken in response to instructions from the employer?
- Did the injury or death occur while the worker was using equipment or materials supplied by the employer?
- Did the injury or death occur while the worker was in the process of receiving payment or other consideration from the employer?
- Did the injury or death occur during a time period in which the worker was being paid a salary or other consideration, or did the injury or death occur during paid working hours?
- Was the injury or death caused by an activity of the employer or of a fellow employee?
- Did the injury or death occur while the worker was performing activities that were part of the worker's job?

- Did the injury or death occur while the worker was being supervised by the employer or a representative of the employer having supervisory authority?

[34] The WCAT Panel stated at para. 56 of the WCAT Decision: "I accept for the purposes of this application, based on the August 5, 2022 letter from Malahat Nation's counsel and the July 13, 2021 affidavit of Joshua Handysides, Andreasen was still considered to be an employee of Malahat Nation until August 5, 2022".

[35] The WCAT Panel then examined the causes of action in the RANCC. The WCAT Panel described these causes of action as "the workplace assault on March 25, 2019, followed by Malahat Nation, through the efforts of Ms. Krull, Mr. Handysides, and Ms. Henry having to deal with Canada Life, Eagle Bay Financial Services Ltd., or the Board in terms of Andreasen's benefit entitlement once she chose to go on leave from her employment with Malahat Nation in late July 2019": WCAT Decision at para. 58. The WCAT Panel found that each of her allegations, other than wrongful or constructive dismissal, against the defendants was "either related to the workplace assault on March 25, 2019 or some other aspect of Andreasen's employment".

[36] The WCAT Panel found that Ms. Andreasen's injuries as outlined in her RANCC arose out of and in the course of her employment within the scope of the compensation provisions of *WCA*. The WCAT Panel found that the action or conduct of Mr. Handysides and Ms. Krull which caused the alleged breach of duty of care, arose out of and in the course of their employment within the scope of the compensation provisions of *WCA*.

Status of Malahat Nation

[37] The WCAT Panel found that Malahat Nation was an employer engaged in an industry within the meaning of the compensation provisions of the *WCA* at the time the causes of action arose.

The Certification

[38] The WCAT Panel determined at para. 64 of the WCAT Decision that at the time the causes of action arose, between March 25, 2019 and August 5, 2022:

1. Ms. Andreasen was a worker within the meaning of the compensation provisions of the *WCA*;

2. Any injury suffered by Ms. Andreasen arose out of and in the course of her employment within the scope of the compensation provisions of the *WCA*;

3. Mr. Handysides was a worker within the meaning of the compensation provisions of the *WCA*;

4. Any action or conduct of Mr. Handysides which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of the compensation provisions of the *WCA*;

5. Ms. Krull was a worker within the meaning of the compensation provisions of the *WCA*;

6. Any action or conduct of Ms. Krull which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of the compensation provisions of the *WCA*; and

7. Malahat Nation was an employer engaged in an industry within the meaning of the compensation provisions of the *WCA*.

Ms. Andreasen's Petition for Judicial Review

[39] Ms. Andreasen made wide-ranging arguments that were difficult to follow. I have tried to categorize her arguments into groups. As I understand it, her arguments on judicial review can be grouped in the following manner:

- She argues the standard of review is correctness, as the WCAT Decision misapplied the "essential character test" which is a general question of law;

- She argues the WCAT Panel did not have jurisdiction to make the determination pursuant to s. 311 of the *WCA*. Her argument is that federal legislation applies, as Malahat Nation is a federally regulated workplace. She

argues the *CLC* applies, specifically s. 168(1); the *CHRA* applies; and First Nation law applies;

- She argues the WCAT Decision was an abuse of process;
- She argues the WCAT Decision was procedurally unfair to her; and
- She argues the WCAT Decision was unreasonable.

[40] Ms. Andreasen seeks:

1. to set aside the WCAT Decision;
2. a declaration that WCAT's decision is *ultra vires* of the *WCA* and intrudes on the Canada Industrial Relations Board, First Nation law, the Canadian Human Rights Tribunal, and the jurisdiction of the Supreme Court of British Columbia;
3. an order replacing the WCAT Decision with this court's decision;
4. an order replacing WCAT's Decision on whether a contract of employment existed at time the causes of action arose;
5. an order remitting the certification back to WCAT for redetermination;
6. an interim order staying the WCAT Decision until the final disposition of this judicial review;
7. alternatively, if the WCAT Decision is not set aside, an order requiring the WCB to provide her benefits that would otherwise be available to her under the *CLC* related to retaliation and reprisal; and
8. costs.

Standard of Review

[41] The *WCA* contains an express privative clause:

> **Exclusive jurisdiction of appeal tribunal**
>
> **308** The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:
>
> (a) all appeals from review decisions as permitted under section 288 *[review decisions that may be appealed]*;
>
> (b) all appeals from Board decisions or orders as permitted under section 289 *[other Board decisions that may be appealed]*;
>
> (c) all matters that the appeal tribunal is requested to determine under section 311 *[request for certification to court]*;
>
> (d) all other matters for which a regulation under section 315 *[regulations respecting this Part]* permits an appeal to the appeal tribunal under this Part.
>
> **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.

[42] Section 58(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] states:

> **Standard of review with privative clause**
>
> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must

> be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable, …
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
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> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

[43] Due to the privative clause, WCAT must be considered to be an expert tribunal over all matters within its exclusive jurisdiction. Pursuant to s. 308(c) of the *WCA*, findings of fact or law or exercises of discretion in respect of s. 311 application for certification are within the exclusive jurisdiction of the WCAT.

[44] Pursuant to s. 58(2)(a) of the *ATA*, the standard of review is patent unreasonableness. The standard of review of findings of fact, law, or discretionary decisions, is that of patent unreasonableness. This standard requires that a tribunal's decision be accorded a high degree of deference. It is the most deferential standard of review known to Canadian law, lying at the constitutional limit of deference to a tribunal: *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 130.

[45] The standard of patent unreasonableness has been described as a decision that is "openly, clearly, evidently unreasonable": *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at paras. 41–42. The Supreme Court of Canada has

also determined that the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28, citing *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609 at para. 18. In *Manz v. Sundher*, 2009 BCCA 92, our Court of Appeal discussed the "patently unreasonable" standard of review:

> [39] The standard of review was that of patently unreasonable. When applied to findings of fact or law the *Administrative Tribunals Act* does not define that term. (Section 58(2)(a) refers to a finding of fact or law or an exercise of discretion, but s. 58(3) is said to apply only to discretionary decisions). Accordingly, the well understood meaning of that phrase in relation to factual matters applies, is as described in *Speckling* [*v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80]:
>
> > [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.

[46] The role of this court is not to consider whether it agrees with the decision of the WCAT, but to assess the decision as a whole and determine if there is any rational or tenable line of analysis supporting the decision, such that it is not clearly irrational. Absent a finding of patent unreasonableness or procedural unfairness, the WCAT Decision is entitled to deference.

[47] Ms. Andreasen disagrees the standard of review is patent unreasonableness. She argues the WCAT Panel misinterpreted the "essential character test", which is a question of law of central importance to the legal system, reviewable on the standard of correctness.

[48] I do not agree the WCAT Panel misapplied the "essential character test", or that the standard of review is correctness. To decide whether WCAT's findings are to be reviewed on a standard of patent unreasonableness or a standard of correctness,

the court must determine whether the matter under consideration falls within the tribunal's "exclusive jurisdiction under a privative clause": *Kerton v. Workers' Compensation Appeal Tribunal,* 2011 BCCA 7 at para. 24. In this case, s. 308(c) of the *WCA* clearly states that a s. 311 determination is within the exclusive jurisdiction of the WCAT. As such, s. 58(2) of the *ATA* establishes the appropriate standard of review of such requests for certification to court is patent unreasonableness.

[49] In any event, I do not find the WCAT Panel misapplied the "essential character test". Ms. Andreasen's argument was difficult to understand. Ms. Andreasen appears to refer to the essential character test when she argues WCAT did not have jurisdiction to make this s. 311 determination. She relies on *Lewis v. Westjet Airlines Ltd.*, 2019 BCCA 63 at para. 40:

> [40] The essential character test is applicable where there is a jurisdictional contest between statutorily created bodies, as in *Regina Police*, or between the courts and a statutory adjudicator, as in *Weber*. The jurisdictional conflict arises from the competing exclusive jurisdictions. In those circumstances, the test is deployed to assign jurisdiction to one exclusive forum or another. The purpose of the test is not to oust jurisdiction but to assign jurisdiction to one of the mutually exclusive fora. The existence of a jurisdictional contest must be demonstrated before the test is applicable. It is not a means to create a contest.

[50] Ms. Andreasen argues WCAT misapplied the essential character test, which as per *Lewis v. Westjet Airlines Ltd.*, only arises when two competing forums both have exclusive jurisdiction, to determine which forum should be assigned jurisdiction. She argues WCAT did not properly consider which federal legislative body, and not WCAT, properly had jurisdiction over each of her claims. Her argument that the WCAT Panel misapplied the essential character test relates to her argument on jurisdiction.

[51] I do not find the WCAT Panel misapplied the essential character test. The WCAT Panel decided it had jurisdiction to make the s. 311 determination: para. 10 of WCAT Decision. The WCAT Panel decided not to exercise its discretion to hear Ms. Andreasen's constitutional arguments about lack of jurisdiction due to non-compliance with the *CQA*: para. 22 of WCAT Decision. While the WCAT Panel did use the words "essential character" at para. 25 of the WCAT Decision, the words were not used in the same context as they were used in *Lewis v. Westjet Airlines*. At paragraph 25, the

WCAT Panel was not discussing competing forums with exclusive jurisdiction, but the essential character of Ms. Andreasen's claims—i.e., whether her claims had to do with a personal injury. It was a discussion about whether her claims were for personal injury such that a s. 311 certification could be granted. In my view, the WCAT Panel did not apply the essential character test as understood in *Lewis v. Westjet Airlines Ltd.*, but simply determined the nature of the claims to assess if they were claims for a personal injury.

[52] I find the standard of review of the WCAT Decision is patent unreasonableness.

Jurisdiction

[53] As I understand it, Ms. Andreasen's arguments on judicial review that the WCAT Panel did not have jurisdiction to make the s. 311 determination are the same arguments she made to the WCAT Panel (as outlined at paras. 21–27 of these reasons). She repeats her arguments that Malahat Nation is a federally regulated workplace, so the *WCA* does not apply; that the *CLC* specifically s. 168 applies, which supports her right to advance an action in court; that First Nation law applies; and that the *CHRA* applies, over which the WCAT Panel does not have jurisdiction.

[54] The WCAT Panel found that Ms. Andreasen, by raising these arguments, was challenging the constitutionality of the *WCA*. Though not stated explicitly, it appears Ms. Andreasen is arguing the provincial government does not have jurisdiction over federal workplaces. She is arguing division of powers means that federal legislation ought to have paramountcy where there is a conflict with provincial legislation. I accept these arguments to the effect that certain provisions of the *WCA* ought to have no force or effect due to a conflict with federal legislation, go to the constitutionality of the *WCA*.

[55] As Ms. Andreasen had not complied with the notice requirements of the *CQA,* and had provided no explanation for why she did not do so, the WCAT Panel exercised its discretion not to, on its own initiative, provide the required notice: WCAT Decision at para. 22. The WCAT Panel referenced item 5.1.6.4 of the *Manual of Practice and Procedure* which set out the following:

5.1.6.4 Compliance with the Constitutional Questions Act

The Constitutional Question Act, R.S.B.C., 1996, c. 68 (CQA) requires notice where the constitutional validity or applicability of any law (including a regulation) is challenged, or where an application is made under section 24(1) of the Charter. Notice is not required where the remedy consists of the exclusion of evidence.

Practice Directive: A party to an appeal, who seeks to challenge the constitutional validity or applicability of a provision of the Act, regulations, or policy, or obtain a constitutional remedy as defined by the CQA, must comply with the section 8 of the CQA. In particular, the party raising the constitutional issue or seeking the constitutional remedy must prepare and serve notice on the Attorney General of Canada and the Attorney General of British Columbia in accordance with section 8 of the CQA. Additionally, the party raising the constitutional question must promptly provide to WCAT a copy of the notice together with proof of service on the Attorney General of Canada and the Attorney General of British Columbia.

WCAT determines whether the notice complies with section 8 of the CQA. If the party fails to comply with section 8 of the CQA, the WCAT panel may:

a) Decline to consider the constitutional issue or provide a constitutional remedy;

b) Adjourn a hearing to give the party time to comply with section 8 of the CQA; or

c) Comply with section 8 of the CQA on its own initiative.

In considering whether to exercise its discretion to give the required notice, WCAT will consider whether the party seeking to raise the constitutional question has, when indicating their intention to raise a constitutional question:

a) Identified the specific provision of the WCA, regulations or policy they intend to challenge,

b) or the Charter remedy they seek;

c) Identified the specific constitutional provision(s) they intend to rely on;

d) Identified any specific Charter right or freedom alleged to have been infringed or denied;

e) Given particulars necessary to show the point to argued on appeal; and

f) Explained why they are unable to provide the notice required by section 8 of the CQA.

[56] In my view, the decision not to consider the constitutional question based on lack of notice is not patently unreasonable. The requirement to provide notice is clearly set out in the practice directive, and the factors to consider by WCAT whether to exercise its discretion to provide the required notice on its own accord are set out. There is no dispute before the WCAT Panel that Ms. Andreasen did not provide notice,

and she did not provide any explanation as to why. At the judicial review, nothing had changed: she still had not provided notice to the Attorney General of Canada, and still has not provided an explanation as to why. The parties to be served with the notice are clearly set out.

[57] The WCAT Panel did set out Ms. Andreasen's arguments on jurisdiction, and, as noted above in these reasons, found that "based on the arguments put forth… that the merits and justice of this application do not require me to address Andreasen's challenge to the constitutional validity or applicability of the [*WCA*]". As I note above, the WCAT Panel found at para. 22 of the WCAT Decision that it was unnecessary to address Ms. Andreasen's challenge "to the constitutional validity or applicability of the [*WCA*]". The WCAT Panel subsequently considered the merits of Ms. Andreasen's arguments on jurisdiction at paras. 23–29. I will set them out below:

Malahat Nation is a federal workplace

[58] The WCAT Panel considered s. 239.1(2) of the *CLC* which provides as follows:

> **239.1 (2)** Every employer shall subscribe to a plan that provides an employee who is absent from work due to work-related illness or injury with wage replacement, payable at an equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence.

[59] Malahat Nation had been registered with the Board since July 25, 1994 and was registered at the time of the assault on March 25, 2019. Malahat Nation chose to enroll with the Board to meet its obligations to provide compensation to employees for workplace injuries pursuant to s. 239.1(2) of the *CLC*. Malahat Nation's employees are subject to the compensation provisions of the *WCA*. The WCAT Panel referenced the "historic trade-off" of workers' compensation schemes—providing workers with compensation for injuries with no consideration of fault, in exchange for employers being protected from lawsuits for work-related injuries: *Downs Construction Ltd.* at para. 23.

[60] The compensation provisions of the provincial workers' compensation scheme apply to federal undertakings operating within the province, but not the occupational

health and safety provisions: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at para. 27, citing *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at 763, and *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at paras. 5–6.

[61] In my view, the compensation provisions of the *WCA* apply to Malahat Nation, and WCAT had jurisdiction to decide this s. 311 application for certification.

Applicability of the *Canada Labour Code*, s. 168

[62] Ms. Andreasen argues the occupational health and safety provisions of the *CLC* apply to Malahat Nation. She references s. 168 of the *CLC*:

> **Saving more favourable benefits**
>
> **168 (1)** This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[63] Ms. Andreasen argues s. 168 means her right to sue is protected. However, whatever protection s. 168 may offer, they operate only in relation to "this Part", which is "Part III, Standard Hours, Wages, Vacation and Holidays". Occupational health and safety provisions are found in Part II of the *CLC*. Thus, s. 168 does not assist Ms. Andreasen in her argument that her right to sue for reprisal actions taken by the employer due to her raising safety issues at work is protected.

Applicability to First Nations

[64] The WCAT Panel referenced the decision of *Isaac v. WCB (BC)* at paras. 94–95 (cited at para. 24 of these reasons), in which the Court of Appeal held that the *WCA* applies to First Nations employers and employees.

[65] Ms. Andreasen has referred to no caselaw which challenges this finding. I find the compensation provisions of the *WCA* apply to Malahat Nation.

Applicability of the *Canadian Human Rights Act* and other federal legislation

[66] The WCAT Panel acknowledged it did not have jurisdiction to apply the *CHRA*: WCAT Decision at para. 13. The WCAT Decision did not decide any issues which are within the jurisdiction of the Canadian Human Rights Tribunal (the "CHRT"). Ms. Andreasen has filed a complaint with the CHRT which has not yet been heard.

[67] To the extent that Ms. Andreasen referenced other federal legislation such as *PIPEDA*, the WCAT Decision does not prevent Ms. Andreasen from advancing claims under those enactments. In my view, the WCAT Decision did not oust the jurisdiction of any of these other legislative bodies.

Was the WCAT Decision an Abuse of Process?

[68] As I understand it, Ms. Andreasen argues the WCAT Decision is an abuse of process as the WCAT Panel certified causes of action (interference with economic relations and conspiracy to injure) which she was permitted by this court to add: 2022 BCSC 363. She argues WCAT's certification that Mr. Handysides and Ms. Krull are workers is also a collateral attack on the decision of Veenstra J. in 2022, permitting her to add them as defendants.

[69] With respect, Ms. Andreasen misunderstands the effect of s. 311 certification. The statute provides WCAT the exclusive jurisdiction to provide the certification, but the effect of that certification on a court action is for the court to decide: *Clapp v. Macro Industries Inc*., 2007 BCSC 840 at paras. 33–36; *Hommel v. Cooke*, 2005 BCSC 658 at paras. 36–37. Whether Ms. Andreasen will be barred from advancing her claims in the RANCC has not been decided. That question will be decided in British Columbia Supreme Court.

Was the WCAT Decision Procedurally Unfair?

[70] The standard of review for procedural fairness has been described as "simply a standard of 'fairness'": *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc*., 2013 BCCA 55 at para. 52.

[71] Ms. Andreasen argues the WCAT proceeding was procedurally unfair to her. She argues her mental disability, her medical conditions of PTSD and MDD were not accommodated. She argues the decision was unfair to her as the WCAT Panel failed to consider the evidence she submitted and relied on the defendants' evidence.

[72] I do not find the proceedings were procedurally unfair to Ms. Andreasen. WCAT corresponded with both Ms. Andreasen and the defendants, advising of information about s. 311 certification applications available online, and providing contact information if any of the parties had any questions about the process. Ms. Andreasen was advised of the WCAT *Manual of Rules and Practice and Procedure* and where it could be found online. She did not seek an oral hearing, and she did not seek to subpoena any witnesses. She was provided with a timeline for submissions. Ms. Andreasen requested an extension of time for her submissions which was granted by WCAT. Ms. Andreasen chose to provide her evidence not in affidavit form, which was accepted by WCAT. When additional affidavit evidence was provided by Malahat Nation, Ms. Andreasen was provided a further opportunity to respond. There is no evidence that Ms. Andreasen sought accommodations from WCAT that were denied.

[73] As for Ms. Andreasen's arguments that the proceedings were unfair to her as the WCAT Panel did not consider her evidence and relied on the defendants' evidence, there is no evidence the WCAT Panel did not consider her evidence and submissions. To the contrary, the WCAT Panel understood one of the main themes of Ms. Andreasen's submissions—that she was wrongfully or constructively dismissed when her job was given to Ms. Krull—by recognizing that these allegations were "clearly in dispute": WCAT Decision at para. 55. The WCAT Panel is entitled to decide how much weight to put on each piece of evidence. That the conclusion is not in her favour is not evidence of bias or procedural unfairness. In my view, while Ms. Andreasen is disappointed in the result of the WCAT Decision, these are not sufficient grounds to find the proceedings were unfair to her.

Was the WCAT Decision Patently Unreasonable?

[74] The WCAT Decision found that Ms. Andreasen was a worker; that her allegations of personal injury arose out of and in the course of her employment; that Mr. Handysides and Ms. Krull were workers and any alleged breach of a duty of care by them towards Ms. Andreasen arose out of the course of their employment; and that Malahat Nation was an employer.

[75] As I understand it, Ms. Andreasen argues many of her causes of action occurred later, after she was off work and while she was at home. She argues these causes of action—defamation, conspiracy against her, intentional interference with economic relations and others—occurred after July 2019 when she was no longer working and not getting paid by Malahat Nation. As such, she claims it was unreasonable for the WCAT Panel to find her claims of personal injury were work-related.

[76] In my view, there was evidence to support the findings of the WCAT Panel. Ms. Andreasen's claims are in relation to her workplace assault, or in relation to her trying to obtain benefits after she left work or related to allegations she says were made against her by her former employer to various people, including her professional regulator and the WCB. The allegations all arise out of her employment with Malahat Nation. The WCAT Panel considered policy item C3-14.00 in determining whether her alleged injuries arose out of her employment. The factors listed are not exhaustive. Whether Ms. Andreasen was being paid by Malahat Nation at the time the causes of action arose is only one of the factors to consider.

[77] There was evidence before the WCAT Panel to support the conclusion that Ms. Andreasen's claims of personal injury all arose from her job at Malahat Nation. The WCAT Panel's reasoning that Malahat Nation was an employer, that Mr. Handysides and Ms. Krull were workers, that Ms. Andreasen was a worker, and that her injuries arose out of her employment with Malahat Nation is rational and tethered to the evidence. The findings are not patently unreasonable. The WCAT Panel's findings are not clearly irrational.

Change to style of cause

[78] The style of cause is corrected to read "Workers' Compensation Appeal Tribunal".

Conclusion

[79] Ms. Andreasen's petition for judicial review is dismissed. I dismiss her claims for relief, as I do not find the WCAT Decision is patently unreasonable. As for her alternative claim that this court order the Board to provide her with benefits that would otherwise be available to her under the *CLC* related to retaliation and reprisal, I note the Board was not a party to these proceedings and no order can be made against it.

[80] In my view, as the successful parties, Malahat Nation, Mr. Handysides and Ms. Krull are entitled to costs of this judicial review at the ordinary scale.

[81] WCAT and the Attorney General of British Columbia do not seek costs. No costs are awarded to them.

"Chan J."