IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sekyer v. British Columbia (Medical Services Commission),* 2025 BCSC 1434

Date: 20250725
Docket: S245532
Registry: Victoria

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

Between:

Darrel Sekyer

Petitioner

And:

Medical Services Commission and Provincial Health Services Authority dba BC Cancer Agency

Respondents

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for Petitioner:	M. Scherr R. Rogers
Counsel for Respondent, Medical Services Commission:	A. Bjornson J. Gibson G. Termuende, Articling Student
Counsel for Respondent, Provincial Health Services Authority dba BC Cancer Agency:	R. Hrabinsky
Place and Date Hearing:	Victoria, B.C. June 26 & 27, 2025
Place and Date of Judgment:	Victoria, B.C. July 25, 2025

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Introduction

[1] The petitioner was diagnosed with prostate cancer in 2016 and applied for out-of-country funding for proton bean therapy ("PBT") in February 2017. The funding was rejected on the basis that the application was not complete and lacked the necessary medical recommendations within BC.

[2] The petitioner obtained PBT between April and July 2017 at a cost of $73,000 USD.

[3] The petitioner seeks review of the decision of the Medical Services Commission (the "Commission") to deny coverage for out of country treatment on the basis that the Commission has improperly delegated its decision-making function to the BC Cancer Agency and in doing so has failed to meet its responsibilities under the *Medicare Protection Act,* [RSBC 1996] Chapter 286 (the "*Act*").

[4] The Commission submits that the petition should be dismissed for the following reasons:

a) the petitioner did not exhaust his adequate alternative remedies;

b) there have been unreasonable delays in bringing this petition forward; and

c) the decision to deny funding was reasonable, compliant with the Guidelines under the *Act,* and consistent with the treatment recommendation provided by the BC Cancer Agency.

[5] The Commission denies that its decision relied entirely on the recommendation it received from the BC Cancer Agency and says that the decision was based on the totality of the record.

BC Cancer Agency

[6] During the hearing, the parties advised that the relief sought against the respondent, Provincial Health Services Authority dba BC Cancer Agency, was to be dismissed by consent and without costs. The order was granted.

The Medical Services Plan, the Medical Services Commission & the OOC Program

[7] The Medical Services Plan ("MSP") is the public health insurance in British Columbia and is governed by the *Act* and its regulations.

[8] The Commission is continued pursuant to s. 3 of the *Act*, and manages the MSP on behalf of the government. The Commission consists of nine members made up of three representatives from each of the government, the Doctors of BC, and the public.

[9] The Commission has authority pursuant to s. 29 of the *Act* and s. 35 of the *Medical and Health Services Regulation,* B.C. Reg 426/97 and their regulations to give prior written approval for non-emergency medically necessary out-of-country medical care (the "OOC Program").

[10] Section 29 of the *Act* provides as follows:

> 29(1) In this section, "medical practitioner" includes a medical practitioner or dentist who is authorized to practise medicine or dentistry in the jurisdiction where the services were rendered.
>
> (2) If a beneficiary receives a service from a medical practitioner outside British Columbia that would be a benefit if rendered in British Columbia, the beneficiary may apply to the commission, in the manner required by the commission, to have payment made for the service in the amount the commission determines.
>
> (3) If a beneficiary receives a service outside British Columbia from a medical practitioner that would not be a benefit if rendered in British Columbia, the beneficiary may apply to the commission to

> determine if the cost of this service should be paid, and, if so, the amount to be paid for the service.
>
> (4) A beneficiary is entitled to have payments made under subsection (2) or (3) if the commission considers the service was medically required and
>
> (a) the need for the service arose unexpectedly while the beneficiary was outside British Columbia, or
>
> (b) the regulations respecting out of British Columbia services have been complied with.
>
> (5) If the government has made, with the government of another jurisdiction of Canada, an agreement that provides for arrangements to pay for medically required services rendered in that other jurisdiction, the agreement applies.

[11] The OOC Program is administered by the Beneficiary and Diagnostic Services Branch & Out-of-country Services of the Ministry of Health, on behalf of the Commission. The delegation of this decision making is not the subject matter of this judicial review.

[12] The Commission has established the Out of Province and Out-of-Country Medical Care Guidelines (the "*Guidelines*") to administer the OOC Program. The *Guidelines* are established pursuant to s. 5(1) of the *Act* which provides that the Commission may, among other things:

> (d) determine the manner by which claims for payment of benefits rendered in or outside British Columbia to beneficiaries are made;
>
> (e) determine the information required to be provided by beneficiaries and practitioners for the purpose of assessing or reassessing claims for payment of benefits rendered to beneficiaries;

[13] The preamble of the *Guidelines* read, in part, as follows:

> The purpose of these Guidelines is to clarify the criteria used when considering provincial funding for emergency or elective out of country medical services. The underlying objective of the Guidelines is to ensure funding decisions do not encourage beneficiaries or physicians to bypass appropriate and acceptable medical services in BC and elsewhere in Canada. The Guidelines are administered in a manner consistent with the *Medicare Protection Act,* the Medical and Health Care Services Regulations, the *Hospital Insurance Act* and the Hospital Insurance Act Regulations.
>
> In order for elective out of country medical care to be funded, prior written approval must be provided by MSB. In cases where out of country funding is appropriate, the pre-approval process enables

> MSB to negotiate a reasonable and fair compensation rate from out of country service providers prior to the provision of the service.

[14] Elective (non-emergency) out of country medical care requests are covered in Clause C of the *Guidelines*. Funding requests are to be made by application by the attending medical specialist pursuant to the application process in *Appendix 2.*

[15] Paragraph 1 of Clause C of the *Guidelines* provides, in part, that MSB may consider "whether the treatment is recommended by the medical profession in BC and/or elsewhere in Canada."

[16] Paragraph 2 of Clause C of the *Guidelines* provides the circumstances where funding approval will not be granted:

> 2. Funding approval will not be granted in the following circumstances:
>
> a) the application is incomplete;
>
> b) the application is for services that are not medically necessary;
>
> c) appropriate and acceptable medical care is available in BC or elsewhere in Canada;
>
> (i) If an appropriate and medically acceptable treatment (standard of care) for a beneficiary's condition is available in BC or elsewhere in Canada, funding for out of country medical services will not be approved;
>
> (ii) If appropriate and medically acceptable treatment for a beneficiary's condition is not available in BC or elsewhere in Canada because of significant medical controversy, and the appropriate specialist recommends out of country medical care that is of proven value,* and when prior approval is given, funding may be approved at a negotiated usual and customary rate (U&C)*.
>
> (iii) The appropriate specialist making application on behalf of a beneficiary must provide documented evidence showing the requested out of country medical care will result in a significant difference in success or mortality rates for the patient's condition.
>
> (iv) The existence of a wait-list in BC or elsewhere in Canada for the requested care will not be accepted as evidence that the care is not available in BC or elsewhere in Canada. The existence of a wait-list will only be taken into account in considering whether delay in the provision of medical care available in BC or elsewhere in Canada can be shown to be immediately life-threatening or result in medically significant irreversible tissue damage.

> d) the delay in the provision of medical care available in BC or elsewhere in Canada cannot be shown to be immediately life threatening or result in medically significant irreversible tissue damage;
>
> (i) The existence of a wait-list in BC or elsewhere in Canada for the requested care will only be taken into account in the context of determining whether there is evidence that the delay caused by the wait-list can be shown to be immediately life threatening or to result in medically significant irreversible tissue damage.
>
> e) the application has been made without a referral from the appropriate specialist* involved in the beneficiary's care in BC;
>
> (i) Except as noted in these Guidelines, the referral or opinion of a specialist from outside of BC will not be accepted in support of an application for out of country funding.
>
> f) the medical care or service applied for is unproven, experimental, or in the early stages of development;
>
> (i) Funding is not provided for unconventional, experimental or developmental* treatment, emerging treatments or diagnostic processes or clinical trials where the efficacy of the service is not known.
>
> (ii) The appropriate medical specialist making application on behalf of a beneficiary for pre-approval of out of country new or emerging medical services and treatment under this provision must provide documentation of reputable clinical trials beyond Phase III, published in peer reviewed medical literature.
>
> g) an application for services that are not considered benefits under the *Medicare Protection Act*, the Medical and Health Care Services Regulations or the *Hospital Insurance Act* and Regulations. Such services include travel and related accommodation costs, ambulance fees, out of hospital drug costs and services provided by non-physician professionals; or
>
> h) an application for supplementary benefits* to be provided by a health care practitioner.*

[17] Clause D of the *Guidelines* provides some additional guidelines related to elective (non-emergency) out of country care. Applicable here are the guidelines listed under para. 6 for oncology services:

> a) Any service that is considered the responsibility of the British Columbia Cancer Agency (BCCA), because the modality of treatment is delivered by the BCCA or its programs, requires a

> written recommendation by the Medical Director of the BCCA. The attending specialist must include the BCCA recommendation with the application for pre-approval of funding for out of country medical treatment. Such treatments include chemotherapy, radiation or surgery.
>
> b) It is the responsibility of the attending medical specialist to provide written documentation of a review and recommendation from the appropriate conference or team review of the BCCA regarding the referral for out of country treatment.
>
> c) If medically necessary cancer treatment is not available in Canada, a negotiated U&C* rate will apply for out of country treatment.

[18] Appendix 2 of the *Guidelines* provides that applications must be submitted by an appropriate specialist actively involved in the beneficiary's care in BC and sets out that an "appropriate specialist" is one with the most knowledge in the proposed service and/or speciality that will be provided out of country. Section C addresses documentation and provides that where appropriate or required, a written recommendation from the tertiary care centre or appropriate agency responsible for standards of care in BC regarding the proposed out of country medical care is to be submitted with the application. Section D provides that only complete application will be considered and that an "incomplete application" is one that does not include a recommendation from the appropriate attending medical specialist and/or does not include the required documentation or written recommendation from a tertiary care centre or the appropriate agency responsible for the medical standard of care in BC.

[19] Lastly, Section E of Appendix 2 sets out the decision-making process, including the following three stages:

> Stage 1 – Consideration and decision by Medical Services Branch: the completed application for funding approval is considered by MSB or its designate and a decision is made as to whether or not funding for out of country care will be provided and the beneficiary is notified in writing of the decision.
>
> Stage 2 – Administrative Review by Medical Services Branch: the beneficiary may request an administrative review of a Stage 1 denial. The request the administrative review, the beneficiary must supply Medical Services Branch with additional relevant information from the appropriate specialist. A Stage 2 Review must be requested within 6 months following the Stage 1 denial. Again, the decision following the Administrative Review is sent to the beneficiary in writing.
>
> Stage 3 – Formal Review by Medical Services Commission: following a denial of funding at Stage 2, the beneficiary may request a formal review by a MSC Panel which consists of one representative from each of the

> Ministry of Health Services, the British Columbia Medical Association and the general public. The following guidelines apply in Stage 3:
>
> (a) Beneficiaries may request an MSC Review Panel hearing only after an application for coverage has been through the regular application process and an administrative review has been completed by MSB.
>
> (b) The request for a formal review by the MSC of the administrative review decision must be made by the beneficiary within six months after the date of the administrative review decision. If the request for the forma review is not made within six months, a formal review will not take place.
>
> (c) Incomplete out of country funding applications and applications that are deemed abandoned by MSB are not eligible for review by the MSC Review Panel.
>
> (d) MSC Review Panel hearings may be conducted through written submission, teleconference (depending on location) or in person. Travel, accommodation and other ancillary costs such as legal fees are the responsibility of the beneficiary or his or her legal representative.
>
> (e) The MSC Review Panel will notify MSB and the beneficiary of their decision within 90 working days of the hearing unless otherwise agreed to by both parties.

[20] On the Out-of-country Health Services Funding Application Form there is a box which requires the physician to answer whether the treatment is for cancer. If "yes" is selected the Form requires a copy of the medical recommendation from the BC Cancer Agency to be attached. This Form also includes the following statement on the top of page one:

> FORM MUST BE COMPLETED BY THE *ATTENDING BC SPECIALIST* AND MUST INCLUDE THEIR SIGNATURE OR IT IS CONSIDERED TO BE INCOMPLETE

Chronology of Events and Decision on Review

[21] On December 7, 2016 Dr. Vrabec (urologist) ordered a 6 core-biopsy and on December 19, 2016, the petitioner was diagnosed with prostate cancer.

[22] A February 21, 2017 memo prepared by K. Braithwaite, the Out of Country Coordinator for the Out of Country Program, details a conversation between her and "Julie" at Dr. Hargeaves' office:

> Explained to her we cannot review request yet until the BC specialist completes and signs application. Also require a recommendation from the BCCA.
>
> She understood. We will HOLD request.

[23] An Out-of-country Health Services Funding Application dated February 22, 2017 was submitted to the Medical Services Branch by Dr. Vrabec, the petitioner's urologist. The February 22, 2017 application consisted of three pages, the first being a cover page and the next two consisting of the application. No additional information was provided, including a recommendation from the BC Cancer Agency.

[24] On March 1, 2017, K. Braithwaite writes to Dr. Vrabec acknowledging the funding application. Dr. Vrabec is informed that the application for out-of-country cancer treatment services is incomplete as the medical recommendations from the Medical Director of the BC Cancer Agency have not been received.
Ms. Braithwaite confirms that funding has not been authorized for the out-of-country medical care.

[25] On March 6, 2017, Dr. Hargreaves writes to Ms. Braithwaite on the petitioner's behalf asking if MSP coverage would be eligible on a retroactive basis as the petitioner had a limited time window to seek the out-of-country treatment.

[26] On March 22, 2017, Dr. Michael McKenzie reports to Dr. Hargreaves following a medical conference held on that same day of the BC Cancer Agency to discuss treatment recommendations for the petitioner. Portions of the conference notes include:

> ... Dr. Miller indicated that Mr. Sekyer has been quite keen to consider proton therapy in the United States. The conference felt actually that any form of external beam radiation therapy is not in Mr. Sekyer's best interest. His prostate has been significantly under sampled. At some point along the way, with the size of his prostate, he is likely to need a TURP or perhaps even radical prostatectomy depending on what is ultimately found with respect to his prostate cancer. Any radiation therapy now would increase risk associated with any of that. It was felt reasonable to consider placing him on a 5-alpha-reductase inhibitor and repeat the MRI in a number of months down the line. At that time, it is recommended that fusion directed trans ultrasound-guided repeat prostate biopsies be considered. Overall, it is not clear that Mr. Sekyer actually requires treatment for prostate cancer, pending those repeat biopsies.
>
> Dr. Miller indicated she has referred Mr. Sekyer to be seen by Dr. Cleave at the Prostate Centre at VCH.

[27] On June 29, 2017, Dr. Ivan Namihas, Radiation Oncologist of the Loma Linda University Radiation Medicine Department, writes to the BC Cancer Centre seeking an appeal of the denial for proton beam therapy.

[28] On July 6, 2017, Ms. Braithwaite writes to the Appeals Review Nurse at Loma Linda University and among other things advises as follows:

> ...
>
> The BSB reviews applications for provincial coverage under the direction of the Commission. The Commission states that a request for provincial coverage for cancer treatment services outside Canada must be received from the patient's attending oncologist in BC and the oncologist must include medical recommendations from the Medical Director at the tertiary provincial cancer treatment centre, the BC Cancer Agency.
>
> The Out-of-Country Health Services Funding Application (the Application) dated February 10, 2017, was submitted by Dr. G. Vrabec (Urologist). The Application reviewed and the letter to Dr. Vrabec dated March 1, 2027, referred to the provincial legislation and advised Dr. Vrabec coverage was not approved as the Application did not include medical recommendations from the attending radiation oncologist in BC and the BC Cancer Agency (BCCA), Medical Director.
>
> …
>
> If you wish, you may want to send the medical documents that were included in the appeal to Mr. Sekyer's attending oncologist and the oncologist may contact the BCCA for assistance. The Beneficiary Services Branch would be able to review the request for provincial coverage, when the medical recommendations from the oncologist are complete and include the documentation from the BCCA.
>
> ...

[29] On July 12, 2017, Dr. Scott Tyldesley, Provincial Lead of Radiation Therapy, writes to the Appeals Review Nurse of Radiation Medicine at Loma Linda University on BC Cancer Agency letterhead. The letter is copied to the petitioner and Ms. Brathwaite. The relevant portions of Dr. Tyldesley's letter read as follows:

> ...
>
> Mr. Sekyer had been seen by videolink consultation by Dr. S. Miller and his case was reviewed at the British Columbia Cancer Agency Genitourinary tumor board rounds, at which time general management and the use of proton therapy was discussed. There was no support for proton radiotherapy in Mr. Sekyer's case.
>
> In general, proton radiotherapy is not considered a standard option for the management of prostate cancer in BC, as it has not been demonstrated to be meaningfully superior to modern photon based radiotherapy techniques. **As such, this treatment is not eligible for provincial funding.**

> …
>
> I recognize the news will be disappointing to him, and as I understand from the Ministry of Health, there are mechanisms for appeal.
>
> ...
>
> [Emphasis added].

[30] Central to the petitioner's argument is the statement in bold made by Dr. Tyldesley.

[31] On September 20, 2017, Ms. Braithwaite writes to the petitioner confirming the decision to deny funding for out-of-country medical treatment. The relevant portions of that letter are reproduced here:

> Thank you for your letter dated August 1, 2017 (received August 15, 2017) regarding your request for a review of the Out-of-country Health Services Funding Application (the Application) from Dr. G. Vrabec and the decision concerning provincial coverage for medical treatment (proton beam therapy) at the Loma Linda University Cancer Center, in Loma Linda, CA.
>
> …
>
> The Branch noted the Application was for radiation oncology treatment; however, the Application was completed by Dr. Vrabec, the attending urologist in BC. The Application did not include medical documentation or the medication recommendation from the attending radiation oncologist in BC and the written recommendation from the BC Cancer Agency, Medical Director.
>
> The Branch reviewed the Application and in the letter to Dr. Vrabec (copy to you) dated March 1, 2017, the Branch advised provincial coverage was not approved for out-of-country medical treatment.
>
> The Loma Linda, Department of Radiology appealed the decision and a review of the medical recommendation was coordinated by Dr. Scott Tyldesley, the Provincial Lead for Radiation Therapy at the BC Cancer Agency. In his letter to Loma Linda (copy to you) dated July 12, 2017, Dr. Tyldesley confirmed the medical details were reviewed and as the appropriate standard of care was available in BC, the BC Cancer Agency did not "retroactively support proton therapy for his case."
>
> In summary, the Branch carefully reviewed the Application; the directions provided by the Commission in the Guidelines and the medical recommendation from the BC Cancer Agency and has confirmed the decision to deny provincial coverage for proton beam therapy in the Unites States has not changed.
>
> If you wish, you may request an Administrative Review of the decision. Please note the Application must be completed by the appropriate specialist (attending radiation oncologist) in BC and the specialist must include medical documentation. The Guidelines detail the documents that are required for the Administrative Review.
>
> …

[32] On January 3, 2018, Ms. Braithwaite responds to Dr. Hargreaves and confirms the March 1, 2017 decision and provides the additional information:

> …
>
> As Mr. Sekyer traveled to obtain medical treatment, an application for provincial coverage is required from the appropriate, attending specialist in BC. The application that was received was from Dr. G. Vrabec, the attending urologist. Medical documentation and recommendations were not included from the appropriate specialist(s), the attending oncologist(s) in BC an dthe BC Cancer Agency, Medical Director. The letter to Dr. Vrabec dated March 1, 2017, (copy to Mr. Sekyer and Dr. Hargreaves) confirms medical documentation is required to review the application.
>
> The BC Cancer Agency was asked to review the medical information and the review summary confirmed proton radiotherapy has not been demonstrated to be meaningfully superior to modern photon based radiotherapy techniques. The review did not support proton therapy for treatment in Mr. Sekyer's case and the BC Cancer Agency noted Mr. Sekyer was aware of the recommendation prior to his treatment in California.
>
> The letter to Mr. Sekyer dated September 20, 2017, confirmed the application was reviewed and the decision to deny provincial coverage for treatment in California. No further medical documents were submitted to appeal the decision.
>
> ….
>
> In summary, the review carefully considered the provincial legislation, the Guidelines, the application and the medical information. As the medical documentation does not support the medical necessity for treatment outside Canada and as the legislation does not state limited or partial coverage for out-of-country medical treatment may be approved, I regret reimbursement equal to the cost of treatment in BC has not been approved.
>
> ...

[33] On January 24, 2018, the petitioner emails the Ministry of Health, sending additional documentation. The body of the petitioner's email reads as follows:

> I am sending you some of My Documentation that you will need to get started on My File. As You can imagine there is a lot more that I can get to You if needed. (Medical info, CT Scans, Bloodwork etc.)
>
> Thank You for talking with Me today, as I am very frustrated with the way this has played out. I thought it was only right to talk with your office before I go the Media and File a lawsuit, as I am ready to proceed with both.

[34] On February 27, 2018, Beverlee Sealey, Director of Operations and Policy of the Beneficiary Services Branch, writes to the petitioner advising that the application completed by Dr. Vrabec and the appeal submitted by Loma Linda

University Medical Centre were reviewed by the cancer treatment specialists at the tertiary provincial program, the BC Cancer Agency in Vancouver, who concluded that proton radiotherapy is not considered a standard option for the management of prostate cancer. The letter further reads:

> ...
>
> In summary, the Application is incomplete as Dr. Vrabec was the attending urologist; however, the Application for proton therapy is required from the appropriate, attending specialist in BC, the attending radiation oncologist. The Application did not include the medical consultation records and peer reviewed medical articles from the appropriate, attending specialist(s) that were consulted in BC or elsewhere in Canada.
>
> The reply from the BC Cancer Agency to Loma Linda confirms the treatment recommendation was reviewed; however, the cancer treatment experts in BC did not support the recommendation for proton therapy.
>
> At this time, the review is unable to approve provincial coverage for proton therapy at Loma Linda as the Application and medical documentation is incomplete. The review could rely solely on the directions from the BC Cancer Agency, however you may need time to review the Application with your specialist(s) and your specialist(s) in BC may wish to submit medical documentation for review.
>
> ...

[35] On March 7, 2018, Dr. Stacy Miller, Radiation Oncologist, writes to the petitioner further to a call they had the day before. Dr. Miller advises that they are unable to advocate on the petitioner's behalf for reimbursement and confirms that the petitioner's case was discussed at the Multidisciplinary Tumour Board Conference on March 22, 2017 with the treatment not being supported as it was not a standard treatment option in BC.

[36] On May 7, 2018, Mr. Scherr writes to Beverlee Sealey. The relevant portions of that correspondence are reproduced as follows:

> ...
>
> We have read your letter of February 27, 2018 and are endeavouring to assemble the information you have requested. As the request involves seeking reports or medical consultations from specialists in radiation oncology, we anticipate several months will be required to assemble the documents. We ask that you keep the matter open as we endeavour to assemble the required information. Please direct all future correspondence to the writer.
>
> ...

[37] On May 24, 2018, the petitioner receives a further email from the Ministry of Health (copied to Mr. Scherr) confirming the coverage request for treatment was not approved and refers to the *Guidelines* for medical documents that are required to support an application. The email further states:

> ...
>
> To allow for additional time for you to send new medical documents, the review was scheduled to close May 31, 2018. However, a letter from Mr. Michael R. Scherr dated May 7, 2018 (copy to you) states that you have retained Mr. Scherr as legal counsel and he requests additional time to assemble documents for the appeal. To assist your appeal, the closing date has been extended to July 31, 2018.

[38] There is no further communication between the Commission and the petitioner between May 24, 2018 and March 20, 2024, when the petition was filed.

Analysis

Should the petition be dismissed on the basis of delay?

[39] The decision to deny funding was issued in September 2017. The petitioner acknowledged he was prepared to litigate this matter in January 2018 and had retained legal counsel by May 2018. The petition is not filed until May 24, 2024.

[40] The Commission submits that the delay has been substantial – over six years.

[41] The petitioner says that the petition was delayed as he was attending to his medical needs and exploring other avenues for resolution, including a complaint filed with the BC Ombudsperson. The petitioner submits that there is no time limit for judicial review applications and relies on s. 11 of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 (the *"JRPA*").

[42] Section 11 of the *JRPA* states:

> 11 An application for judicial review is not barred by passage of time unless
>
> (a) an enactment otherwise provides, and
>
> (b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

[43] Section 11(a) does not apply in this case.

[44] Judicial review is a discretionary remedy, and a court may dismiss a judicial review because of unreasonable delay, even if the relief sought would otherwise have been granted: *Speckling v. British Columbia (Labour Relations Board),* 2008 BCCA 155 at para. 15 and *Lowe v. Diebolt,* 2014 BCCA 280 [*Lowe*] at para. 4

[45] Section 8(1) of the *JRPA* provides that the court retains the discretion to dismiss a petition for judicial review for undue delay:

> (1) If, in a proceeding referred to in section 2, the court had, before February 1, 1977, a discretion to refuse to grant relief on any ground, the court has the same discretion to refuse to grant relief on the same ground.

[46] The Court of Appeal in *Lowe* considered when delay will be an absolute bar to judicial review:

> [45] Fortunately, it is unnecessary, for the purposes of the case before us, to fully decipher the intent of s. 11. As I read the section, it is an attempt to place an absolute bar on judicial review proceedings in certain limited situations. That absolute bar, whatever its breadth, does not serve to eliminate the discretionary bars to judicial review that are preserved by s. 8 of the *JPRA*. As McLachlin J.A. (as she then was) put it in *Re Carpenter and Vancouver Police Board* (1986), 1986 CanLII 841 (BC CA), 34 D.L.R. (4th) 50 at 75, "[d]elay alone is insufficient to permit the court to refuse a remedy under the *Judicial Review Procedure Act*. What must be shown is 'unreasonable delay.'"
>
> [46] What is "unreasonable" will depend on a constellation of factors. The court must consider the underlying administrative scheme – how does it operate and what are its objectives? To what extent might those objectives be undermined by delay? The court must also consider the interests of the parties – is the issue brought forward on the judicial review of critical importance to one or the other party? On the other hand, will the delay result in hardship, prejudice, or injustice? Because judicial review is concerned with matters of public law, the effect of proceeding with the judicial review or of terminating it on the proper functioning of an administrative regime must also be considered.
>
> ...
>
> [60] This general concern over delay in administrative law is merely a starting point for analysis. A court considering whether it is appropriate for a judicial review application to proceed despite delay must consider the administrative process that is under review. The statutory scheme will be of importance; where the provisions of the statute emphasize the need for decisions to be made quickly, it will be an indication that there should be very limited tolerance for delay. The subject matter of the administrative regime is also of importance; a court must assess whether, from a public administrative standpoint, there will be serious negative consequences if delay is allowed.

> ...
>
> [65] Courts must also consider the circumstances of the individual case in assessing the gravity of delay. It must consider the importance of the proceeding to each party, and to the public in general. It must also assess the prejudice caused by delay, as well as the potential prejudice in dismissing what might be a meritorious judicial review proceeding.

[47] A delay of six months in *Lowe* was unjustified considering the prejudice suffered by the respondents.

[48] In *Mawani v. Dobbs,* 2022 BCSC 1285, Justice Norell found that a 10 to 11-month delay in filing a review of a decision of the *Residential Tenancy Act,* S.B.C. 2002, c. 78 to be unreasonable.

[49] In *Li v. British Columbia (Superintendent of Motor Vehicles),* 2025 BCSC 1205, Justice Marzari dismissed a judicial review of a decision of an adjudicator with the Superintendent of Motor Vehicles regarding the validity of an immediate roadside prohibition. Justice Marzari considered a 14-month delay to set the hearing of the judicial review after the response was served to be unreasonable.

[50] In considering whether a nearly seven-year delay can be justified, I take further guidance from the *Limitation Act,* SBC 2012 c. 13, which provides a basic limitation period of two years after a claim is discovered. Although judicial review is not a claim, and does not fall within the statutory two-year limitation, it is helpful to consider other examples of the time parameters that are applied in considering what may be “reasonable”.

[51] The petitioner seeks reimbursement for medical expenses incurred out of country and his prejudice, if the petitioner is dismissed, is a financial one. The Commission argues that the *Guidelines* provide for timely decisions and that delay, such as the one in bringing forward this judicial review, make it difficult to manage the public fund that they are entrusted with. While the prejudice to both parties is a financial one, I find that the prejudice to the petitioner is greater, as the Commission is in a far better position to manage the resultant financial implications.

[52] The objective of the *Guidelines* and the three-stage process demonstrate a scheme to have decisions made quickly. This is understandable as the nature of the decision often centres around timely medical treatment. A request for an

administrative review must occur within six months of the initial determination. A formal review decision must be submitted within six months after the date of the administration review decision and the review panel will notify the parties of the decision within 90 working days.

[53] Other than pursuing a complaint through the Ombudsperson's office, there is no reasonable explanation for the type of delay that is before me. It is even harder to understand that such a delay would occur following the retaining of legal counsel. Given the importance of this matter to the petitioner, there is no good reason to have waited nearly seven years to file the petition.

[54] This is the type of delay that is so significant that it has serious negative consequences from a public administrative standpoint. Good public administration requires finality of decisions and a lapse of nearly seven years is unjustifiable in the circumstances and outweighs the financial prejudice the petitioner may face in having the petition dismissed.

[55] In considering the factors, I find that there has been unreasonable delay, and I dismiss the petition on that ground.

Should the petition be dismissed on the basis the petitioner failed to exhaust his remedies?

[56] Although I have dismissed the petition on the basis of delay, I would have also dismissed the petition on the basis that the petitioner did not exhaust all remedies prior to seeking judicial review.

[57] The petitioner submits that it is not required to participate in the administrative review process as it is still within Stage 1 and seeking judicial review of the Stage 1 denial decision. The petitioner argues that the nature of the question on judicial review is narrow and appropriately before this court.

[58] As the record demonstrates, the petitioner requested a Stage 2 Review and the file was put on hold pending receipt of additional medical information the petitioner had indicated would be forthcoming. No such information was forthcoming and the petitioner took no steps until this petition was filed. The Commission considered the file to be abandoned as no further communication was received and the deadline for submitting materials expired on July 31, 2018.

[59] The Court of Appeal in *Yellow Cab Company Ltd. v. Passenger Transportation Board,* 2014 BCCA 329 considered the availability of judicial review of a decision marker's initial decision:

> [39] There is a general principle that a party must exhaust statutory administration review procedures before bringing a judicial review application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. For that reason, where an alleged error comes within a tribunal's statutory power of reconsideration, a court may refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. Of course, where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.

[60] In the case before me, the petitioner had an opportunity to have both an administrative review and a formal review of the funding denial. The questions being put forward on this judicial review ought to have been put to decision makers at these reviews. In the absence of evidence to the contrary, I find it was within the scope of the Commission's review process to consider (a) whether there had been an inappropriate delegation of decision making at the initial decision; and (b) whether the application could be considered as submitted. The petitioner did not pursue those avenues and did not exhaust the remedies available to him.

[61] The petitioner has failed to identify why his circumstances justify departing from the established administrative process. Without explanation as to why the petitioner failed to diligently pursue the administrative remedies available to him, I decline to grant judicial review of the Commission's decision.

Conclusion

[62] As I find the petitioner's unreasonable delay and failure to exhaust all available remedies fatal to the petition, I need not consider the other issues raised in the petition.

[63] I make the following orders:

a) By consent, the petition against the respondent, Provincial Health Services Authority dba BC Cancer Agency, is dismissed without costs.

b) The petition is dismissed.

c) As noted by counsel for the Commission, there are usually no costs awarded for the Commission or against, and so there will be no order for costs on this matter.

"Justice LeBlanc"