

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Skerry v. British Columbia (Human Rights Tribunal)*,  
2024 BCCA 345

Date: 20241009  
Docket: CA49471

Between:

**Deborah Skerry**

Appellant  
(Petitioner)

And

**British Columbia Human Rights Tribunal**

Respondent  
(Respondent)

Before: The Honourable Justice Winteringham  
The Honourable Justice Iyer  
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated  
October 17, 2023 (*Skerry v. British Columbia (Human Rights Tribunal)*),  
2023 BCSC 1819, Vancouver Docket S215217).

The Appellant appearing in person: D. Skerry

Counsel for the Respondent: J. Thackeray  
S. Monchalin

Place and Date of Hearing: Vancouver, British Columbia  
September 19, 2024

Place and Date of Judgment: Vancouver, British Columbia  
October 9, 2024

**Written Reasons by:**  
The Honourable Justice Iyer

**Concurred in by:**  
The Honourable Justice Winteringham  
The Honourable Justice Riley

**Summary:**

*Deborah Skerry appeals from the judicial review of the BC Human Rights Tribunal's decision refusing to accept her complaint for filing under s. 27(1)(b) of the Human Rights Code. The chambers judge found that the Tribunal's decision was not patently unreasonable or procedurally unfair. The appellant submits that the chambers judge erred. She seeks to adduce new evidence and make arguments that she says should have been made on judicial review.*

*Held: Appeal dismissed. The evidence is confined to the record. Having considered the appellant's new arguments, the Tribunal's decision was not patently unreasonable or procedurally unfair.*

**Reasons for Judgment of the Honourable Justice Iyer:**

**Overview**

[1] In 2019, the appellant, Deborah Skerry, filed a human rights complaint with the BC Human Rights Tribunal ("Tribunal") alleging that the Pacific National Exhibition ("PNE"), ten of its employees, and two representatives of the Canadian Union of Public Employees, Local 1004 ("CUPE") discriminated against her in relation to her employment up to and including its termination. She alleged discrimination on the grounds of political belief, religion, marital status, family status, physical or mental disability, sex, gender identity or expression, and age.

[2] The Tribunal refused to accept Ms. Skerry's complaint for filing, relying on s. 27(1)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [Code]. That section permits the Tribunal to dismiss a complaint without a hearing if the acts or omissions alleged in the complaint, if proved, could not contravene the Code.

[3] Ms. Skerry applied to the Supreme Court for judicial review of the Tribunal's decision. At the time, she was represented by a lawyer. The chambers judge dismissed Ms. Skerry's application, finding that the Tribunal's decision was not patently unreasonable and its process was not unfair.

[4] Ms. Skerry now appeals to this Court. She says that the chambers judge's conclusion was wrong. She advances arguments that were not made in the court

below, which she says was the fault of her former lawyer. She also submits evidence that was not before the chambers judge and asks this Court to consider it.

[5] At its core, this appeal requires the Court to assess the merits of the Tribunal's decision and the fairness of the process it followed based on the applicable standard of review. This Court must also decide whether it should hear arguments and receive evidence that were not before the chambers judge.

**Background**

[6] Ms. Skerry worked at the PNE for many years as a security guard and was represented by CUPE. Her employment was terminated on April 12, 2019. (Although Ms. Skerry submits on appeal that her employment was actually terminated on March 6, 2019, the additional information she provided to the Tribunal in July 2020 states that the termination meeting occurred on April 12, 2019.)

**Proceeding Before the Tribunal**

[7] In August 2019, Ms. Skerry filed a complaint with the Tribunal alleging numerous instances of discrimination relating to her employment on multiple grounds. She submitted 35 pages of information about her allegations against each of the respondents. However, Ms. Skerry provided very little in the way of concrete facts that, if proved, could establish discrimination. For example, in response to the question, "what did the respondent do?", Ms. Skerry wrote in respect of one of the twelve individual respondents:

1. What did Respondent 1 do?

[Respondent 1] and I have had very little interaction in the last 5 or so years. [Respondent 1] is always in the background. He is omnipresent he likes to be sure that everyone knows how powerful he is but he usually has his underlings do all of the personal interactions. This includes Mr. Cavrijl, Ms. Shields, and all H.R. employees, the watchman (and the watchwoman). [Respondent 1] is both manager and director and his influence is paramount. He is heavy handed and appears to believe only brute force is effective in security. [Respondent 1] has been reducing the female staff at regular intervals (in security). I have asked members of the union to provide rosters to assess this situation but they have not been forthcoming. [Respondent 1] has prevented me from attending the Occupational Health and Safety Committee Meetings because he wants to silence my voice. I asked for washroom breaks-something a male can do in public-I cannot. I asked for

shelter from the elements when outside. I asked that the collective agreement be respected. This was not welcome or acknowledged. [Respondent 1] started the Hate campaign after my very brief stint as a first aider. It ended abruptly after a sexual incident in which a coworker publically [*sic*] requested assistance with his alleged Groin injur[y]. It was terrifying and humiliating but I was afraid to ask for help. I was punished and the co-worker was never spoken to and no training or corrections were made. I got on [Respondent 1's] bad side and he is unforgiving. It happened long ago but the co-worker is still there. [Respondent 1] took actions but not to support me. He has also advanced another worker who sexually harassed me every shift-something about perseverance-I did not complain to management. See documentation.

[8] On June 1, 2020, the Tribunal wrote to Ms. Skerry, explaining that it needed more information in order to decide whether to accept her complaint for filing. The letter outlined what the Tribunal understood Ms. Skerry's allegations to be and what information it required. It stated, "For a complaint to proceed past screening, it must set out facts that, if proven, could be against the Human Rights Code." The letter then gave examples of what information it wanted Ms. Skerry to provide:

You describe a negative experience working with PNE, but it's unclear how your protected characteristics were factors. Can you provide more details?

Your allegations about sexual harassment sound like they could suggest discrimination, but you provide no details and the incidents appear to have happened several years ago well outside of the *Code's* one-year time limit for filing complaints.

With respect to disability, if you were denied an accommodation or treated unfairly, that could suggest discrimination. But again, you provide no details.

Keep in mind that you must describe what was said or done that shows how your protected characteristic was a factor. It's not enough to say you think a protected characteristic such as marital status was a factor. You need to show how it was a factor – otherwise, it's speculation which is not enough to ground a human rights complaint.

Also, keep in mind that for each individual you name as a respondent, you need to make specific allegations about your interactions with them.

[9] The Tribunal's letter gave Ms. Skerry an opportunity to provide further information by June 22, 2020. It emphasized that it was asking for information, not evidence, because the Tribunal does not review evidence in its screening process.

[10] Ms. Skerry responded to the Tribunal's request on July 13, 2020. Her 24-page letter sets out the long history of her employment with the PNE, and the evolution of her relationship with various respondents. It refers to the PNE's

concerns about the way she communicates with PNE clients and to a possible instance of sexual harassment that occurred “many years” ago, which Ms. Skerry states is not worth pursuing. Ms. Skerry describes a meeting with Mr. Bussanich concerning the whereabouts of a set of keys and a possible issue with Ms. Skerry’s foot. Ms. Skerry states that she did not ask for accommodation.

[11] In large part, the information provided by Ms. Skerry in relation to the alleged grounds of discrimination other than physical and/or mental disability is a description of her protected characteristic. She does not provide concrete examples of how the particular characteristic is connected to instances of adverse treatment in her employment or when these things occurred.

[12] Ms. Skerry’s letter sets out her notes or recollections of the April 12, 2019 termination meeting, attended by Ms. Skerry, her union representative and Stacy Shields, a PNE representative. Ms. Shields explains that management had asked Ms. Skerry previously about going to a doctor, not because of a foot problem but because of possible mental health issues:

- 7) We ask you to go to the doctor because we think there is something wrong that’s causing you to make really disastrous decisions-with respect to your life. And we believe that there might be some mental health issues occurring and we were worried about that. And that’s why we wanted you to go to your doctor-not about your feet. About whether or not something was making you make such disastrous decisions. So, we tried to give you as much ability to turn the situation around. To go to the doctor. To let your doctor know what [was] happening. And if the doctor had come back and said “Ya Deb’s going through a bit of a tough time. She isn’t capable of dealing with the employer in an effective way. She needs to be off and to get treatment. We would have worked with that.
- 8) And so, I don’t even know to this day-what Deb has done in terms of, not her feet-but in actually going to the doctor and talking about what’s happened and why is she making decisions that are so irresponsible that they are affecting her livelihood. For her to say her job is so important and that she is a precarious worker and the financial implications of her decision-it’s even another future flag that you would let die situation to escalate in the way that it did. And so I am wondering what’s changed since these last three months. Have you gone to the doctor and discussed this aspect of what’s going on in your life because what’s the point in giving you your job back if you haven’t dealt with this-because there is something seriously wrong.

9) You are not functioning as a successful adult here. Like most people in jobs understand they have to stay in contact with their employer and have some conversations. You are unable to do that. And I don't understand why you would even consider having a discussion about taking you back when we do not see that you even have that basic fundamental ability to do the core part of your job. **I don't think you would be successful in any job. I just don't think you fully grasp how dysfunctional and chaotic the way you communicate.** And so, I know this is very blunt feedback-but you have a bit of a reality check here. It's not normal for the employer to have to deal with your behavior. It's not normal.

[Emphasis in original.]

[13] In her July 2020 letter, Ms. Skerry denies having any mental health issues. She explains various physical conditions, such as tendonitis in her hands and problems with her feet and legs.

[14] The letter includes a list of documents that it appears Ms. Skerry intended to introduce at a hearing.

[15] By letter, dated March 15, 2021 ("Tribunal Decision", reported at 2023 BCSC 1819), the Tribunal informed Ms. Skerry that her complaint was not accepted for filing for the following reasons:

Regarding sexual harassment and the groin incident, which appears to have occurred several years ago, you again provide no details of what happened. Regarding more general allegations of sex discrimination, you provide no details beyond speculation.

Regarding disability, you identify issues with your feet but no accommodation that you required or requested. The respondents showed due diligence by asking about possible mental health issues, but you say you had no such issues and needed no accommodation. You describe no adverse treatment due to a disability.

Regarding age, family and marital status, religion, gender identify/expression and political belief, you again provide no details beyond speculation which is not enough to ground a human rights complaints.

[16] I will refer to Ms. Skerry's complaint form together with the additional information she provided in July 2020 as the "Complaint".

### **Judicial Review Proceeding**

[17] Ms. Skerry retained legal counsel and filed a petition for judicial review. The central issue raised in the petition related to the ground of disability. Specifically, it

characterized the Tribunal Decision as having found as a fact that the employer showed due diligence by asking about mental health issues, and submitted that such a finding was unreasonable and unfair. The petition did not refer to the other grounds of discrimination or allegations in the Complaint.

[18] The petition was heard on September 18, 2023. The chambers judge issued his reasons on October 17, 2023 (“Decision”, reported at 2023 BCSC 1819).

[19] At the outset of his reasons, the chambers judge addressed standard of review. Relying on s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [ATA] and the decision of this Court in *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 94 [*Gichuru BCCA*], the chambers judge determined that the standard of review of the merits of the Tribunal Decision is patent unreasonableness, and that the standard of review of the Tribunal’s process is fairness.

[20] The chambers judge outlined Ms. Skerry’s four arguments that the Tribunal wrongly rejected her claim (at para. 23):

- a) The Tribunal failed to recognize that the *Code* protects against discrimination based on perceived disability;
- b) The only reasonable interpretation of the statements allegedly made by the PNE at the April 12, 2019 termination meeting is that it was ending Ms. Skerry’s employment because it perceived her as having a mental disability;
- c) The Tribunal considered possible defenses available to the PNE, which are irrelevant at the screening stage, and only reached its decision after making a finding of fact that the PNE had a defence; and
- d) The Tribunal’s process was unfair.

[21] The chambers judge found that the Tribunal had not failed to recognize that the *Code* protects against discrimination on the basis of perceived disability. He

noted that this proposition is well-established in human rights law and that the Tribunal is presumed to know human rights law (at para. 29). He held that the Tribunal's June 2020 letter requesting more information from Ms. Skerry about her allegation that the respondents had accused her of having a mental disability and the reference in the Tribunal Decision to the respondents having questioned Ms. Skerry about mental health issues showed it was alive to possible discrimination based on perceived disability. The chambers judge concluded that the statement in the Tribunal Decision that, "you describe no adverse treatment due to a disability", read in context, could not reasonably be taken to exclude perceived disability.

[22] With respect to the statements made at the termination hearing, the chambers judge explained that, in order to ground a discrimination claim, they must be capable of showing a connection between the ground (here, perceived disability) and the conduct (here, termination) (at para. 35). He found that it was not patently unreasonable for the Tribunal to interpret Ms. Shields' statements as inquiring about mental health issues in order to try and accommodate them, rather than as discriminating against Ms. Skerry based on a perceived mental disability (at para. 37). In other words, the chambers judge found that it was not patently unreasonable for the Tribunal to construe Ms. Shields' statements as a legitimate inquiry about whether Ms. Skerry had a disability, and not a statement that her employment would be terminated if she had a disability.

[23] With respect to Ms. Skerry's arguments that the Tribunal Decision improperly considered accommodation, which is a defence to discrimination, at the screening stage, the chambers judge found that this was not what the Tribunal did. He found that the Tribunal Decision considered those statements only in relation to whether there was a connection between the alleged ground and the alleged conduct, not in relation to any possible defence (Decision paras. 40–41).

[24] Finally, the chambers judge rejected Ms. Skerry's allegation that the Tribunal's process was unfair. He noted that the issues raised before him concerned the substance of her complaint, not the Tribunal's process, which he characterized as "exemplary" (Decision paras. 45–46).

**Issues on Appeal**

[25] The issues on appeal are:

- a) what is the standard of appellate review?
- b) should the Court consider arguments not raised in the court below?
- c) should the Court admit fresh evidence?
- d) should the appeal be allowed because the Tribunal Decision was patently unreasonable or the Tribunal’s process was unfair?

**Standard of Appellate Review**

[26] In an appeal such as this, the standard of review is correctness. That means the court must “step into the shoes” of the chambers judge and decide first, whether he correctly identified the standards of review to apply to the Tribunal Decision and second, whether he correctly applied those standards: *Conklin v. UBC*, 2022 BCCA 333 at para. 15.

[27] In my view, the chambers judge correctly identified the applicable standards of review. Section 32 of the *Code* provides that s. 59 of the *ATA* applies to the Tribunal. Section 59 provides:

- 59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
- (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
  - (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
  - (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
    - (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.

(5) 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.

[28] The chambers judge relied on *Gichuru BCCA* to identify that decisions made under s. 27(1)(b) of the *Code* are discretionary so that the standard of review is patent unreasonableness. Based on s. 59(5), he held that Ms. Skerry’s challenge to the Tribunal’s process must be assessed on a fairness standard.

**New Arguments not Raised Below**

[29] Ms. Skerry seeks to make arguments to this Court that were not made before the chambers judge, in part because her lawyer failed to make the arguments she wished to advance, an argument that is known as “ineffective assistance of counsel”.<sup>1</sup>

[30] This Court has been reluctant to hear arguments that were not made in the court below. In considering whether to hear new arguments, it asks (as stated in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 45):

- a) is the issue truly “new”?
- b) is the evidentiary record sufficient?
- c) do the interests of justice support making an exception to the general rule?

See also *Pereira v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2024 BCCA 158 at para. 58.

[31] An appellant arguing that a civil appeal should be allowed because of ineffective assistance of counsel will succeed only in extraordinary circumstances. In part, this is because the person has a civil claim against their lawyer: *Nguyen v.*

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<sup>1</sup> I address Ms. Skerry’s arguments about the Tribunal’s process below.

110891 B.C. Ltd., 2024 BCCA 48 at paras. 34–36. In *Nguyen*, the Court quoted a passage from *D.W. v. White*, [2004] 189 O.A.C. 256 describing those circumstances:

37 A common description of what might constitute such extraordinary circumstances is found in *White*. There, the court said:

[55] ... I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But... I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.

[32] Ms. Skerry wants to argue that the PNE denied her requests for accommodation of a physical disability. She says that, contrary to her instructions, her lawyer on the judicial review confined the submission to the ground of perceived mental disability and conceded that the rest of her complaint lacked substance. Ms. Skerry also makes new arguments about why the Tribunal’s process is unfair.

[33] In my view, Ms. Skerry has not presented circumstances that justify departing from the general policy against hearing ineffective assistance of counsel arguments in civil appeals. The substance of her complaint about inadequate representation lies against her lawyer, not against the Tribunal.

[34] Ms. Skerry’s arguments about why the Tribunal’s process is unfair are not confined to its handling of the Complaint. She makes wide-ranging allegations about the Tribunal’s operations, including that Tribunal members have “failed in their mandate” from 2018 to 2022, their annual reports contain “fraudulent statistics” and that members “provide free legal services to respondents.” These allegations are not based in the record, but on fresh evidence that Ms. Skerry seeks to put before this Court.

[35] I would not hear any of these process arguments on appeal. They are new issues that do not reasonably arise from the complaint or the Tribunal Decision. Even if the fresh evidence Ms. Skerry wants to introduce were accepted, it does not

provide a sufficient evidentiary basis for the findings Ms. Skerry wants this Court to make. The interests of justice do not support hearing these arguments.

[36] That said, I consider that the Court should exercise its discretion to hear Ms. Skerry’s argument that her complaint should have been accepted for filing based on her allegation that the PNE failed to accommodate her physical disability, and also hear the argument raised in her reply factum that her complaint should have been accepted for filing on all of the other grounds she advanced. These issues are not truly “new” because they were raised in the Complaint. The full record before the Tribunal was before the chambers judge and is before the Court on appeal, so the evidentiary record is certainly sufficient. The very limited scope of the new argument means that judicial resources are conserved by determining the merits of that issue.

[37] Before leaving the topic of new arguments, I note that Ms. Skerry’s reply factum clarifies that the reference to s. 7 of the *Charter* in her factum is not intended to raise a constitutional issue. Therefore, there is no need to consider notice to the Attorneys General.

**Fresh Evidence**

[38] Ms. Skerry has not applied for leave to adduce fresh evidence under Rule 59 and has not provided written argument explaining why she ought to be able to present it to the Court. However, from my review of the body of her affidavit, it appears that she wants to present evidence to: establish the allegations in the Complaint, demonstrate the poor representation she received from counsel, and support her allegations about the institutional failings of the Tribunal.

[39] It is inappropriate to admit fresh evidence for the purpose of substantiating Ms. Skerry’s complaint because the issue before the Tribunal was whether the allegations in the Complaint could, if proved, contravene the *Code*. The Tribunal does not receive evidence or make factual findings when it makes a screening decision: *BCHRT Rules*, Rule 12(2); *Gichuru BCCA* at paras. 52–57 and the cases cited in those paragraphs.

[40] As I have already discussed, it is not appropriate for this Court to decide this appeal based on Ms. Skerry's allegations about her lawyer or the Tribunal as an institution. That means evidence on those topics is not relevant to this appeal. I would not permit Ms. Skerry to adduce fresh evidence.

**Merits of the Appeal**

[41] As the chambers judge selected the correct standards of review, the outcome of the appeal turns on an assessment of whether he applied them correctly. That assessment requires this Court to put itself into the position of the chambers judge: *Conklin* at para. 15. It must then ask two questions: first, whether the Tribunal Decision was patently unreasonable, and second, whether the Tribunal's screening process was fair.

[42] The "patently unreasonable" standard of review is very deferential. The court is not to ask itself how it would have decided the issue. Instead, the court looks at the decision as a whole and asks whether it is "openly, evidently and clearly irrational": *Gichuru v. Palmar Properties*, 2011 BCSC 827 at para. 34.

[43] As this is an appeal of the Tribunal Decision, the Court should only consider information or arguments made to the Tribunal: *Gorenshtein* at para. 47. I would disregard factual statements in Ms. Skerry's factum that were not before the Tribunal. These include the statements that Ms. Skerry told the PNE that she was physically injured, that she provided doctor's notes, and that she requested but was denied accommodation.

[44] When the Tribunal screens a complaint under s. 27(1)(b) of the *Code*, it must decide whether the complainant has alleged some facts that, if proved could establish each of the three elements:

- a) they have a protected characteristic or were perceived by the respondent to have a protected characteristic;
  - b) they experienced adverse treatment in an area protected by the *Code*;
- and

- c) the protected characteristic was a factor in the adverse treatment.

See *Moore v. British Columbia*, 2012 SCC 61 at para. 33.

[45] The Complaint alleged multiple grounds of discrimination. It is not disputed that the adverse treatment was in relation to Ms. Skerry's employment or that her employment was terminated. The central question before this Court and below concerns the third element: whether the protected characteristics or grounds advanced by Ms. Skerry were a factor in her adverse treatment.

[46] Based on the submissions made by Ms. Skerry's former counsel, the chambers judge understood Ms. Skerry as arguing that the Tribunal should have accepted the Complaint on the basis that the facts alleged could constitute discrimination in employment based on perceived disability.

[47] In her factum, Ms. Skerry submits that her complaint is not about mental disability. She submits that the Tribunal should have accepted her complaint for filing on the ground that she has a physical disability or disabilities and that her requests for accommodation were denied. However, in her reply factum, Ms. Skerry takes issue with this characterization. She writes:

I disagree that accommodation was the issue. This is not about accommodation – it is about the 10 discriminations named in the original complaint whose actions created a great deal of harm to the appellant.

[48] I understand that Ms. Skerry is arguing that the Tribunal should have accepted her complaint for filing on all of the grounds identified in the Complaint.

[49] The Tribunal Decision gave reasons for refusing to accept the Complaint on all of the grounds in the Complaint. It characterized Ms. Skerry's allegations of discrimination on the grounds of sex, age, family and marital status, religion, gender identity, expression and political belief as speculative, stating that Ms. Skerry had not provided sufficient detail to demonstrate an arguable case. With respect to sexual harassment, it explained that the incident identified by Ms. Skerry as the "groin incident" occurred several years before and that Ms. Skerry had not provided enough detail about it. With respect to disability, it interpreted the Complaint as

alleging physical disability (problems with Ms. Skerry's feet) and possible mental disability but the Complaint did not link the relationship between any disability Ms. Skerry had or was perceived to have to the termination of her employment.

[50] Were these conclusions patently unreasonable in the sense that they were clearly irrational?

[51] In my view, they were not. In the Complaint, Ms. Skerry provides a great deal of information explaining her protected characteristics in relation to each of the grounds of discrimination she alleges. She also provides a lot of information about her employment, including her perceptions of the named respondents and how their actions adversely affected her. However, in relation to the third element necessary to prove discrimination, the Complaint only sets out Ms. Skerry's beliefs that her protected characteristics were factors in the way that she was treated. The Complaint does not set out facts that support inferences that Ms. Skerry's protected characteristics were factors in the adverse treatment she received.

[52] Applying the very deferential standard of review, I would conclude that the Tribunal Decision was not patently unreasonable in refusing to accept the Complaint because it failed to set out sufficient facts — as opposed to beliefs — that, if proved, could establish a contravention of the *Code*.

[53] Ms. Skerry's submissions that the Tribunal's process was unfair in relation to the Complaint are about the absence of proof of service for some documents; that there is an unspecified discrepancy in the initial complaint form; that different people signed different Tribunal letters; and that the process took too long.

[54] To be unfair in a way that raises concern on appeal or review, a tribunal's process must be fundamentally flawed in the sense that it denies a party the right to participate in the process: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.

[55] None of the first three points advanced by Ms. Skerry raise procedural fairness concerns. With respect to delay, Ms. Skerry filed the initial complaint form in

August 2019. The Tribunal took nine months before it wrote to ask her for more information. Ms. Skerry took about six weeks to respond, and the Tribunal Decision was issued eight months later.

[56] I appreciate that Ms. Skerry felt the process was too slow. However, a finding that an administrative delay caused procedural unfairness requires consideration more than the length of the delay. The court must also look to factors such as the nature of the case and its complexity, and the manner in which it progressed: *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221 at paras. 36–37, citing *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44. Since delay was not raised in Ms. Skerry’s initial petition for judicial review, this issue was not fully litigated in the court below. I have already explained why it is not appropriate in this case to consider new arguments raised for the first time in this court.

[57] In any event, without some prejudice, delay on its own does not amount to procedural unfairness: *Blencoe* at paras. 104, 108–109, 115. Ms. Skerry has not explained how the delay in issue impacted on the procedural fairness of her case.

**Conclusion**

[58] I would dismiss the appeal without any order as to costs.

“The Honourable Justice Iyer”

I AGREE:

“The Honourable Madam Justice Winteringham”

I AGREE:

“The Honourable Justice Riley”