

BRITISH COLUMBIA'S NEW *ADMINISTRATIVE TRIBUNALS ACT*¹

I. INTRODUCTION

The *Administrative Tribunals Act* (the *ATA*)² is an innovative legislative response to the need for systemic reform of the administrative justice system in British Columbia. Its provisions impact more than 30 BC tribunals and other entities. This paper sets out:

- an overview of the reform initiative: the Administrative Justice Project, its processes and the consultations and reports that provided the framework for the *ATA*;
- a description of the *ATA*, how it works in conjunction with other legislation to apply its provisions to the various affected tribunals, and some commentary on its provisions with references to the limited case law and other commentary to-date; and
- some of the next steps in the BC administrative justice reform agenda, including support for the on-going implementation of the *ATA*.

II. THE ADMINISTRATIVE JUSTICE PROJECT

As elsewhere in Canada, various administrative tribunals were created in British Columbia over a number of decades. Combining subject matter sensitivity and expertise with impartial decision-making at arm's-length from the day-to-day operations and pressures of government, these tribunals offered an accessible, less costly alternative to the courts.

As the number and types of administrative tribunals flourished, a wide array of structures, processes, authorities and powers were developed and adopted. This diversity, while necessary in some respects, created confusion for tribunal users, government ministries, legal counsel, the courts and the tribunals themselves.

Many participants in BC's administrative justice system identified the need for systemic reform: various stakeholders, administrative law practitioners, individual tribunal members and chairs, the Bar Association, the B.C. Council of Administrative Tribunals and the Circle of Chairs. In addition, like many governments elsewhere, British Columbia faced significant challenges in delivering affordable public services and allocating scarce public dollars where most needed and most likely to be effective.

¹ This paper, prepared by the Administrative Justice Office (AJO), is based on an earlier paper for the Continuing Legal Education Society of British Columbia, which relied on work of Wendi J. MacKay. Further assistance and research for this paper was provided by the AJO's University of Victoria law co-op students: Jamie Woods and Nancy Klenavic.

² S.B.C 2004, c. 45

BC's government determined that reform was needed to ensure administrative tribunals had modern mandates and the statutory tools and processes necessary to operate effectively in a complex, changing society. A related concern was that the system recognize the need for independent decision-making responsibilities, yet remain accountable to government. In this context, in July, 2001 Attorney General Geoff Plant initiated the administrative justice reform agenda by commencing the Administrative Justice Project (AJP), the first comprehensive review of the administrative justice system in British Columbia.

This administrative justice reform was based on the fundamental premise that administrative tribunals should continue to offer informed, informal, accessible and inexpensive alternatives to the courts. In adopting its reform agenda, the government set out to meet the challenges of:

- providing timely and cost-effective services;
- ensuring that qualified appointees adjudicate disputes; and
- maintaining a more accessible, less formal alternative to the courts.

The Attorney General envisioned an administrative justice system in British Columbia that would:

- provide high quality services to people and communities;
- reflect government's core values and principles; and
- achieve the right balance between independence and accountability.

To achieve these goals, the AJP's Terms of Reference called for systemic reform of administrative institutions to ensure that:

- administrative tribunals meet the needs of the people they serve;
- administrative processes are open and transparent;
- the mandates of administrative tribunals are modern and relevant; and
- the legislative and policy framework allows administrative tribunals to carry out their independent mandates effectively.

Utilizing the skills of a number of well-recognized experts in the field, and calling on representatives of various stakeholder groups, the AJP carried out a broad consultation process and provided an unprecedented opportunity for those involved in all aspects of the administrative justice system to comment and provide feedback, in order to assist the AJP in developing and providing the best possible solutions.

As the first step, the AJP released a number of background papers for discussion and debate, including papers addressing the standard of judicial review, administrative tribunals' authority over Charter and constitutional issues, statutory powers and procedures, reviewing original decisions, and appointments. The AJP received many thoughtful and informative submissions on these issues, which informed its subsequent work.

In July, 2002, the AJP released the White Paper "*On Balance: Guiding Principles for Administrative Justice Reform in British Columbia*", reflecting the government's commitment to improving the delivery of administrative justice as a system. The White Paper included more than 50 recommendations to government and constituted a framework for further discussion, consultation and action.

A further series of reports were released in support of the White Paper, on issues such as standing, dispute resolution, independence and accountability, statutory powers and appointments.³

Public comment and feedback were welcomed and administrative tribunals, administrative law practitioners and government officials were invited to participate actively in the development of the legislative response to the reform initiatives recommended by the White Paper.

Government acted on that wealth of information and consultation and has now implemented most of the recommendations in the White Paper, principally through new legislation: the *Administrative Tribunals Appointment and Administration Act*⁴ in 2003 and the *ATA* in 2004. The provisions of the *Administrative Tribunals Appointment and Administration Act* have been substantially subsumed into the *ATA* and, in this paper, will be referred to only in the context of the related provisions of the *ATA*.

III. THE ADMINISTRATIVE TRIBUNALS ACT

This section of the paper describes the *ATA*'s innovative approach to the systemic reform of BC's tribunals and how the *ATA* applies to the affected tribunals, and the various provisions of the *ATA* and the case law and some of the commentary on the *ATA* to-date, and concludes with details on proclamation status.⁵

A. The *ATA*'s innovative approach and how it applies to affected tribunals

The *ATA*'s approach is different from most other legislation, in that the *ATA* does not “stand alone”; the *ATA* in and by itself does not have force and effect for tribunals nor does it, as some have thought, create and empower a new tribunal.⁶

What the *ATA* does provide for is a series of provisions which set out various powers and authorities for effective delivery of administrative justice, using modern, standard and consistent language. These provisions are then selectively applied to individual tribunals, in accordance with each tribunal's particular mandate and needs, by consequential amendments to the affected tribunal's enabling legislation.⁷

³ The AJP White Paper, the background papers and reports are all available at: www.gov.bc.ca/ajo

⁴ S.B.C. 2003, c. 47

⁵ As of June 23, 2005.

⁶ Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Carswell, 2005) at 38A-1 refer to the *ATA* as a “plug in” statute.

⁷ A list of the tribunals to which the *ATA* applies, the ministry responsible for each tribunal and the tribunal's enabling legislation amended by the *ATA*, is set out in Appendix 1. A table indicating those sections of the *ATA* that

Thus, in order to determine which *ATA* powers apply to a particular tribunal, it is necessary to first go to the tribunal's enabling legislation and then to the *ATA* for the specifics of the applicable provisions; the two statutes must be read to together.⁸

For example, section 89 of the *ATA* consequentially amended section 103 of the *Employment Standards Act*⁹ to provide:

Sections 1 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 40, 45, 46, 48, 49, 50 (2) to (4), 51 to 53, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the tribunal.

However, simply because a particular provision of the *ATA* is not expressly adopted by direct reference does not mean the tribunal does not have that power or authority.

In some cases, a modified power or authority may have been adopted instead, by consequential amendment, in order to reflect the unique circumstances of the particular tribunal. Again using the *Employment Standards Act* as an example, section 114(1) and (3) of that Act (as amended by section 92 of the *ATA*) is substantially the same as section 31(1) and (3) of the *ATA*, however, section 114(2) of the *Employment Standards Act* is different from section 31(2) of the *ATA*, reflecting the unique circumstances of the Employment Standards Tribunal.¹⁰

In yet other cases, a tribunal may have a power or authority (without an express reference to the *ATA*) under a pre-existing provision in its enabling legislation or regulations under that legislation.

In summary, the various ways in which a tribunal may have *ATA* or *ATA*-like powers, authorities or obligations are:

- by adoption through direct reference to the *ATA* within the tribunal's own enabling legislation;
- by adoption, with a variation, within the tribunal's own enabling legislation; or
- by a pre-existing provision in the tribunal's own enabling legislation, which is unchanged by the *ATA*.

Future changes to *ATA* provisions will be made directly to that Act. In this way, such amendments would apply to all tribunals whose enabling acts have adopted that provision by direct reference, thereby maintaining consistency.¹¹

apply to each tribunal is set out in Appendix 2. And because on proclamation consequential amendments are not shown as part of the statute as printed, to view the *ATA* consequentials as a whole, it is necessary to go to the third reading of the Act, in Bill format, which is available at: http://www.legis.gov.bc.ca/37th5th/1st_read/gov56-1.htm

⁸ While some have suggested the necessity to read the two statutes together has complicated, instead of simplified, access, the alternative, repeating all the applicable provisions in each tribunal's enabling legislation, would have posed difficulties in maintaining the desired consistency in interpretation and application over time.

⁹ R.S.B.C. 1996, c. 113

¹⁰ See Appendix 3 for specific details.

¹¹ For example, the *ATA* was amended already by the *Attorney General Statutes Amendment Act, 2004* (2004 Legislative Session: 5th Session, 37th Parliament). These amendments apply to all those tribunals whose enabling

Expansion of the application of the *ATA*, to tribunals that have not yet adopted it and to those with only limited adoption to date, is expected to be by consequential amendment to the tribunal's enabling legislation, either as a stand alone amending bill or as part of a Statutes Amendment Act.¹²

B. Overview and Details with Case Law and Commentary

B.1. Overview

The *ATA* can perhaps be most easily understood by considering it as comprised of two “parts”: the appointment provisions under sections 2 through 10 and the general reform provisions (or “menu of powers”) under sections 11 through 61.

The appointment provisions provide for merit-based, transparent processes for tribunal appointments, set fixed terms and provide some flexibility for the various operational issues that may arise in ensuring adequate numbers of tribunal members are available to meet tribunal needs.¹³

The general reform provisions provide tribunals with the tools they need to fulfill their mandates and include clear authority for various tribunal processes. For the most part, these provisions are flexible and enabling. For example, they empower tribunals to make their own rules to govern tribunal processes, so that a tribunal's rules can reflect and address the circumstances of the specific tribunal and the parties that appear before it. Many of the provisions in the *ATA* are coupled with requirements that enhance public accessibility. For example, where a tribunal exercises the power to make rules, it will be required to make those rules accessible to the public. The general reform provisions also seek to standardize certain procedures, such as the giving of notice and service of documents, the contents of appeal documents and time limits for appeals and judicial review proceedings, and bring consistency in approach.

Various authors have commented on the overall approach of the *ATA*. Macaulay and Sprague have characterized the *ATA* as “a brave attempt to rationalize and simplify administrative

legislation adopted the (now amended) provision by direct reference. These amendments can be viewed at: http://www.legis.gov.bc.ca/37th5th/3rd_read/gov62-3.htm

¹² For an example, see the Fall 2004 amendments referred to in note 11, *supra*.

¹³ Sections 2 to 10 substantially mirror those of the *Administrative Tribunals Appointment and Administration Act (ATAA Act)*. Most of the tribunals under the *ATAA Act* are now governed by the *ATA*, but there are a few minor exceptions: the Environmental Appeal Board (governed by the *Environmental Management Act*), Fire Services Advisory Board (governed by the *Fire Services Act*), the Forest Appeals Commission (governed by the *Forest Practices Code*), the Liquor Appeal Board (governed by the *Liquor Control and Licensing Act*). It is anticipated that the *ATAA Act* will be repealed once those exceptions are addressed, so that all of the reform provisions will then be consolidated under one statute: the *ATA*.

process”¹⁴, with others, for example, T. Murray Rankin, Q.C. suggesting that the *ATA* is not so much an innovative statute providing new powers, as merely a codification of existing common law powers.¹⁵ Rankin notes concerns that such statutes have not always been successful and may result in “ossification”, as he suggests occurred with Ontario’s *Statutory Powers Procedure Act*. Responding to concerns that the *ATA* may, like Ontario’s Act, become a “beached whale”, George Copley, Q.C., Constitutional and Administrative Law Group, Ministry of Attorney General, eloquently described his expectation for the future of the *ATA* as being like “a porpoise, leaping and gliding through the waters of administrative justice.”¹⁶

Most would seem to agree that clearly innovative among the *ATA*’s provisions is BC’s response to the Supreme Court of Canada’s invitations to provide a clear indication of legislative intent in two often contentious and frequently litigated areas of administrative law: the standard of review and constitutional jurisdiction. In keeping with the *ATA*’s broad application to a variety of tribunals, those matters are dealt with as alternative provisions, only one of which will apply to any one tribunal: with full, limited or no constitutional jurisdiction, and the standard of review varying depending on whether a tribunal has a privative clause.¹⁷ These aspects will be discussed in more detail below.

B.2 Details, with Case Law and Commentary

1. Definitions

Section 1

Section 1 defines the terms used in the Act. Critical among these definitions is “tribunal”, which clarifies the Act only applies to a tribunal if its enabling legislation provides. Also of interest are the definitions of:

- “appointing authority” which may be the Lieutenant Governor in Council, the minister, or such other person given the power to appoint persons to a tribunal;
- “constitutional question” which is defined by reference to section 8 of the *Constitutional Question Act*;¹⁸
- “court” which is defined as the BC Supreme Court;

¹⁴ Macaulay and Sprague, *supra* note 6 at 38A-4. See also Frank A.V. Falzon, “*Administrative Tribunals Act*, S.B.C. 2004, c. 45 – Orientation, Issues, Evaluation” (Paper presented to The Continuing Legal Education Society of British Columbia Seminar “The New *Administrative Tribunals Act*”, March 3, 2005) [unpublished] at 4

¹⁵ T. Murray Rankin, “The Administrative Tribunals Act: Evaluating Reforms to the Standard of Review and Tribunals’ Jurisdiction over Constitutional Issues” (Paper presented to The Continuing Legal Education Society of British Columbia Seminar “The New *Administrative Tribunals Act*”, March 3, 2005) at 4.1.1., however, this concern is not shared by Frank A.V. Falzon. See his paper, “*Administrative Tribunals Act*, S.B.C. 2004, c. 45 – Orientation, Issues, Evaluation” (also presented to The Continuing Legal Education Society of British Columbia Seminar “The New *Administrative Tribunals Act*”, March 3, 2005) at 4

¹⁶ Comment made during discussions at The Continuing Legal Education Society of British Columbia Seminar “The New *Administrative Tribunals Act*”, March 3, 2005.

¹⁷ A third alternative provision whether the requirement for a valid notice of appeal includes payment of an appeal fee or not (see sections 22 and 23).

¹⁸ R.S.B.C. 1996 Chapter 68

- “dispute resolution process” which makes it clear that the tribunal has flexibility to establish its own processes in this area.

2. Appointments

Section 2

Section 2 requires the appointing authority to conduct a merit-based process before appointing a tribunal chair. Initial appointments may be for a term of 3 to 5 years, with subsequent reappointments for terms of up to 5 years. The *ATA* does not limit the number of times a tribunal chair may be reappointed.¹⁹

Section 3

Section 3 requires the appointing authority to conduct a merit-based process before appointing a tribunal member. Consultation with the tribunal chair is required, which will ensure the needs of the tribunal will be addressed effectively. Initial appointments of tribunal members may be for terms of 2 to 4 years. Subsequent reappointments may be for terms of up to 5 years. As with the re-appointment of tribunal chairs, there is no limit on the number of times a tribunal vice chair or member may be reappointed.

Commenting on these sections, Macaulay and Sprague²⁰ note that no particular process is imposed on the appointing authority, nor is the process required to be by advertisement or competition. However, while the legislation does not expressly address these details, BC’s Board Resourcing and Development Office (BRDO) has established guidelines and policies that guide the recruitment and selection processes, which, together with broad public notice of vacant tribunal positions, are easily accessible at that office’s Web site at:

<http://www.fin.gov.bc.ca/ooop/brdo/adverts.htm>. In this way, all individuals who may be interested in serving on an administrative tribunal in BC have easy access to information on how to apply for an appointment and about the criteria and requirements for any vacant tribunal positions. A number of tribunal chairs, members and others have commented on the high value of the BRDO’s work in supporting transparent, merit-based tribunal appointment processes.

Section 4

Section 4 addresses what may be done when the chair is, or expects to be, absent. In the case of an expected absence, the chair may designate a person to act as chair during that absence. Where the absence is for an extended period or was not anticipated (i.e. the chair is suddenly taken ill), the appointing authority may designate the replacement. While in most cases the acting chair is anticipated to be either a vice chair or an existing tribunal member, if necessary, the replacement may be an individual who is not a member, if the individual would otherwise be qualified to be appointed as a member or as the chair.

This provides flexibility for the chair to manage short absences and gives the appointing authority a role if a longer absence is anticipated. In both cases, the merit principle is maintained

¹⁹ A previous policy, albeit somewhat informal, was to allow a maximum of two consecutive terms.

²⁰ *Supra*, note 6, at 38A-11.

by the requirement that the replacement either already be a member or possess the standard appointment qualifications. (Note: This section was amended by the *Attorney General Statutes Amendment Act, 2004*²¹ to provide greater flexibility to appoint other persons, not just vice chairs, in case the vice chair is unable or unwilling to assume the chair's duties. This recognizes that in some cases a part-time vice chair may have other pre-existing commitments that could prevent or limit their ability to accept a temporary appointment as acting chair.)

Section 5

Section 5 allows the appointing authority, in consultation with the chair, to replace a tribunal member who is absent for an extended period. Because the appointment is only for a short term, the usual merit-based process is not required, but the person appointed must still be qualified for appointment. In this way, the tribunal can bring in former members or other qualified people if necessary to assist the tribunal in meeting its obligations during the extended absence of a member.

Section 6

Section 6 gives the tribunal chair a limited power to appoint additional tribunal members on a temporary, non-renewable basis. This section allows the chair to respond quickly to temporary, unexpected increases in the tribunal's caseload or other changes in circumstances. The requirement that the person must be qualified maintains the merit-based principle, while the provision limiting any such appointments to only 6 months and only one such appointment in any two-year period, respects the usual requirement of open and transparent appointment processes. The chair must consult with the responsible minister before making an appointment under this section and the appointing authority may establish conditions and qualifications for such appointments.

Section 7

Section 7 allows the chair to extend an appointment after a member's appointment expires, so that the member can complete outstanding or ongoing proceedings. This section will avoid the need to recommence proceedings if an appointment expires before a proceeding is completed.

Section 8

Section 8 allows the appointing authority to terminate an appointment, for cause.

Section 9

Section 9 makes the tribunal chair expressly responsible for the effective management and operation of the tribunal, including the allocation of the tribunal's work among its members. This section makes it clear that the tribunal chair is responsible for assigning matters to individual tribunal members and for other matters for the effective tribunal operations.²²

²¹ *Supra*, note 11.

²² The AJO is working with ministries and tribunal chairs on a model Memoranda of Understanding that is intended to assist in defining respective roles and responsibilities within the respective legislative scheme.

Section 10

Section 10 applies Treasury Board directives to the remuneration and expenses of members, to provide consistency across the sector. In commenting on this provision, Professor Denis Lemieux²³ recognized that the directives need to be sufficiently precise, to ensure the minister sets remuneration according to objective criteria. The applicable Treasury Board Directive does in fact set specific and precise ranges for each tribunal, within which remuneration may be established.²⁴

3. Rule making power

Section 11

Section 11 provides tribunals with a general power to make their own rules of practice and procedure so that they can effectively consider and respond to the unique needs of their specific users. Section 11 also lists various types of rules that tribunals may make, with the list intended to be illustrative of the types of things that a tribunal may wish to address. Examples of these include case management, dispute resolution, disclosure, notices, hearing procedures and the effect of non-compliance. Although the Act authorizes a tribunal to waive or modify a rule, tribunals may only do so in exceptional circumstances. All rules must be accessible to the public.

Tribunals are not required to submit their rules to government for approval, but under section 60 government may make regulations addressing tribunal rules, if necessary (discussed below).

4. Practice Directives

Section 12

Tribunals to which section 12 applies are required to issue non-binding practice directives that set out:

- the usual time periods for the procedural steps to complete an application; and
- the usual time frame to make a final decision, after completion of a hearing.

These practice directives must be consistent with any other statutes, regulations or rules that govern the tribunal and must be publicly available.

²³ Denis Lemieux, “La réforme des tribunaux administratifs en Colombie-Britannique” in *Collection Municipale et de droit public*, November 2004 at 8:

It’s the Minister responsible for the Tribunal who determines the remuneration of members, in accordance with general directives of the Treasury Board. It remains to be seen whether this remuneration regime represents a risk to the financial security of the members considering the role the minister can play in appearing before the tribunal. On the other hand, if the directives are sufficiently precise, the minister will only be able to determine pay levels according to objective criteria. (translation).

²⁴ <http://www.fin.gov.bc.ca/ocg/fmb/manuals/TBDirs/TBD3-04.doc>

This section is illustrative of the balanced approach taken by the ATA. Strict and inflexible deadlines are not imposed; the tribunal is given the flexibility to consider the usual timeframes to complete its processes, but must publicly set out those timelines and may be expected to meet them in the usual case. By making the practice directives non-binding, the section balances the needs of the parties and the public to know how long it may take to complete the various processes within an appeal with the need for flexibility that can arise in unusual circumstances.

Section 13

Section 13 allows the tribunal to issue practice directives regarding other matters of a policy nature. Some examples include interpreting policy or providing general information to applicants. If such practice directives are made, they must be consistent with any other statutes, regulations or rules governing the tribunal. As with section 12 practice directives, these practice directives are not binding and tribunals must make them available to the public.

5. Authority to make orders

Section 14

Section 14 allows a tribunal to make orders in individual cases, to enforce its rules or to control its proceedings.

Section 15

Section 15 allows the tribunal to make an interim order in an application.

Section 16

Section 16 allows the tribunal to make a consent order if requested by the parties. If the tribunal declines to make a consent order when requested, it must provide the parties with its reasons.

Section 17

Section 17 provides that a tribunal must dismiss an application when it is withdrawn or if the parties advise the tribunal that they have reached a settlement. It also allows the tribunal to accept a settlement entered into by the parties and to give effect to that settlement by issuing an order, provided the tribunal is satisfied that the order is consistent with its enabling legislation. If the tribunal declines to make such an order, it must provide the parties with its reasons.

6. Enforcement of rules and orders

Section 18

This section provides the tribunal with discretion to continue with proceedings or dismiss an application if a party fails to comply with an order, rule or time limit. This will give tribunals the authority to ensure their rules and orders are respected so that their proceedings are fair, effective and timely.

While the tribunal must give the party notice before continuing with or dismissing an application under this section, there is no statutory obligation for the tribunal to hear from the party before taking the action. Whether the party is entitled to be heard and the extent of any such opportunity will likely depend on what has gone before in terms of notice and hearing (for

example, whether a party has previously disregarded orders and/or has been advised of the consequences of failure to comply).

7. Service of notice or documents

Section 19

Tribunals to which section 19 applies can serve a notice or document on a party by personal service, mail, electronically or any other method authorized in the tribunal's rules that allows proof of receipt. This flexibility allows the tribunal to meet its needs and those of its users.

Section 20

Section 20 provides proceedings are not invalidated simply because documents are not served as required, provided the person who was not served:

- knew about the information in the document within the time limits for service;
- consents; or
- was not prejudiced by the failure to be served.

This will help tribunals move proceedings forward, without prejudicing the person who was to be notified.

Section 21

Under section 21 a tribunal may use public advertising or some other means to give notice of a hearing if the parties are too numerous or if it is otherwise impracticable to serve all of the parties individually. Whether a tribunal has this authority will generally reflect the nature of the proceedings before it.

8. Procedures for filing notice of appeal

Section 22 and 23

Sections 22 and 23 are alternatives - only one of the sections will apply to an appellate tribunal. Section 22 provides for the filing of a notice of appeal where there is a filing fee; section 23 provides for the filing of a notice of appeal in circumstances where there is *no* filing fee. Under both, a notice of appeal to a tribunal must:

- be made in writing or other acceptable form;
- identify the decision being appealed;
- state why the decision should be changed;
- state the requested outcome; and
- contain contact information and be signed by the appellant or agent.

A notice under section 22 must also be accompanied by the filing fee.

Section 24

Section 24 requires that a notice of appeal must be filed within 30 days of the decision being appealed, unless the tribunal's legislation states otherwise. The tribunal may extend that time limit in special circumstances. This section reflects the expectation that administrative tribunals are to be a timely means to resolve matters.

Section 25

Section 25 establishes that an appeal does not stay the decision being appealed, unless the tribunal orders otherwise. No express criteria are set out for the tribunal to consider when considering a stay, but the overall statutory scheme for the decision under appeal and the appeal process will likely be a factor for the tribunals in exercising this power.

9. Organization of tribunal

Section 26

Section 26 provides the chair with authority to organize the tribunal in a manner that will allow it to conduct and conclude effective and timely hearings. The chair may set hearing panels and designate a chair for each panel. Panels have the same powers as the tribunal and may sit simultaneously. If a panel member is unable to continue a hearing, the tribunal chair may allow the remaining panels member(s) of the panel to continue with the proceedings. If the panel was composed of a sole member, the chair can, with the consent of the parties, organize a new panel to continue and complete the hearing. Section 26 also allows the chair or a delegate to hear and decide preliminary matters in an application.

Section 27

Section 27 provides for the appointment of tribunal employees under the *Public Service Act*. It also authorizes the chair to retain consultants, investigators, lawyers, expert witnesses or other persons, if necessary.

10. Dispute Resolution

Section 28

This provision offers the opportunity for parties to resolve matters without the cost, time and uncertainty of a hearing. The Attorney General, on second reading of the Bill, indicated: “The move to encourage alternative dispute resolution is an important part of rethinking the justice system, and administrative tribunals have an opportunity to show leadership in this regard.”²⁵

Of critical importance to this provision is section 1’s definition of “dispute resolution process” which gives tribunals the flexibility to establish their own processes, so that they can reflect the particular needs of the tribunal and its users. This definition also provides the flexibility for tribunals to adopt new dispute resolution processes as they may be developed.²⁶

Section 28 also gives the chair power to appoint a member or staff of the tribunal or another person to assist parties in resolving their dispute. If a tribunal member is appointed, the member may also make pre-hearing orders and, if all parties consent, hear the application if not otherwise resolved.

²⁵ Hansard, May 18, 2004 at page 11192.

²⁶ BC’s Dispute Resolution Office has a variety of helpful ADR materials available on its Web site at: <http://www.ag.gov.bc.ca/dro>. Of particular interest to tribunals is: *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems*.

Section 29

Section 29 provides the confidentiality essential to dispute resolution by ensuring that, unless all parties agree, no one can disclose information created specifically for the purposes of achieving a settlement in a dispute resolution process. However, section 29 does not apply to a final settlement agreement (which can be embodied in and enforced as an order of the tribunal) or in the context of a criminal proceeding.

11. Tribunal Member Obligations

Section 30

Section 30 expressly requires tribunal members to be faithful, honest and impartial while executing their duties and to treat information received as a tribunal member as confidential.

12. Dismissal of application

Section 31

Pursuant to section 31, a tribunal may dismiss all or part of an application, if the application:

- does not fall under the tribunal's jurisdiction;
- was filed late or filed for improper reasons;
- was not pursued diligently or if the applicant did not comply with an order;
- is unlikely to succeed; or
- has been addressed in another proceeding.

This enables tribunals to deal with matters expeditiously, however, Professor Lemieux has expressed concerns, stating:

Few administrative tribunals in Quebec possess discretionary powers as vast as (those in the *ATA* such as) summary dismissal for an application made in bad faith or the absence of a reasonable chance of success. Such powers are, in principle, the privilege of the superior courts. [translation]²⁷

However, before a tribunal can exercise this power, the applicant must have an opportunity to make written submissions or otherwise be heard. If all or part of an application is dismissed, the tribunal must provide its decision and give reasons in writing to all parties. If the whole of the application is dismissed, this would constitute a final decision of the tribunal, for which judicial review proceedings would be available should this power be exercised contrary to law.²⁸

13. Parties' representation and participation

Section 32

Section 32 allows a party to be represented in a tribunal proceeding and to make submissions as to fact, law and jurisdiction. Professor Lemieux suggests that this may give rise to certain issues:

²⁷ Supra, note 23, at 8 (translation).

²⁸ See *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 24

“The fact that it is not necessary for parties to a tribunal to be represented by counsel leaves intact the problem regarding the ethics of representatives who aren’t members of the bar.”²⁹

Others have also questioned this aspect, and in *Law Society of BC v. Blanchette* [2003] BCJ No.118, the BC Supreme Court found that sections 90 and 91 of the *Workers Compensation Act*, allowing workers to be represented on appeals under that Act, must, to avoid conflict with the *Legal Profession Act*³⁰, be read to mean that the person providing representation must either be a lawyer or be unpaid.

14. Interveners

Section 33

Under this section, a tribunal may permit interveners, if the interveners are able to make a valuable contribution or bring a valuable perspective to the proceeding and the potential benefit of their participation outweighs any potential prejudice to the parties. A tribunal may limit intervener participation with respect to cross-examining witnesses, leading evidence, raising issues and making written or oral submissions.

As section 33 authorizes granting intervener status to a “person”, MacAulay and Sprague³¹ point out that, under BC’s *Interpretation Act*, this may include a corporation, partnership, or party.³²

15. Conduct of hearing and admissibility of evidence

Section 34

Section 34 allows a party and/or tribunal to summon a person to attend a hearing or produce information. An application may be made to the court to compel a person to comply with the summons, if necessary. While most tribunals have been given authority to summon witnesses, the parties’ ability to do so is more limited.

Section 35

Section 35 confirms the tribunal has discretion to record its proceedings and clarifies that, if a recording is made, it must be considered to be correct and to form part of the record of the proceedings.

If a recording is made but is destroyed or otherwise damaged, the validity of the proceedings is not affected, so that a matter would not have to be re-heard, simply because the recording is faulty.

²⁹ Supra, note 23 at 8-9 (translation).

³⁰ S.B.C 1998, c. 9.

³¹ Supra, note 6, at 38A-87

³² Interpretation Act, R.S.B.C. 1996, c. 238, section 29

Section 36

Section 36 allows a tribunal to hold any combination of written, electronic and oral hearings. Video or teleconference hearings are permitted, and the language is flexible enough to permit new technology to be used as it is developed.

Section 37

Under section 37, a tribunal may combine part or all of two or more applications, hear applications simultaneously or consecutively, or stay one or more applications until another is determined. This will enhance the tribunal's ability to deal with applications in a practical and flexible way.

Section 38

Section 38 enables parties to examine or cross-examine witnesses and to present evidence and submissions. If satisfied sufficient evidence has been disclosed, the tribunal may limit examination or cross examination of witnesses.

Tribunal members may also question any witness who gives oral evidence. Macaulay and Sprague comment on how this section recognizes the greater latitude permitted to administrative decision-makers in asking questions, in comparison to the more limited ability of judges, but caution tribunal members against any appearance of bias or partiality in asking such questions.³³

Section 39

Section 39 allows a tribunal to adjourn an application on its own initiative or if the tribunal is satisfied that an adjournment is appropriate. The tribunal must consider whether the delay is reasonable and how an adjournment will affect the parties and the public interest. This section was amended by the *Attorney General Statutes Amendment Act, 2004*³⁴, to make it clear that the tribunal is to consider the impact on *all* parties of granting an adjournment.

Section 40

Section 40 allows a tribunal to accept information whether or not it would be admissible in court. Exceptions are information that is privileged or otherwise protected under other legislation and notes made in the process of alternative dispute resolution.

The tribunal may also exclude unduly repetitious evidence. This should assist in keeping hearings focussed on evidence relevant to the issues and may reduce the length of some hearings.

Section 41

Section 41 requires that hearings be open to the public except in limited circumstances: where the private interest outweighs the public interest in public hearings, or where holding a hearing in a manner that it is open to the public is not practicable.

³³ Supra, note 6 at 38A-101-102.

³⁴ Supra, note 11.

According to Macaulay and Sprague: “(I)t is unlikely that a mere desire for privacy or wish to avoid embarrassment on the part of the parties will (be) considered sufficient to outweigh the public interest in open hearings.”³⁵

Section 42

Section 42 gives a tribunal discretion to receive all or part of oral or documentary evidence in confidence if necessary for the proper administration of justice.

This provision has been considered in the limited context of a leave to appeal application in *Joint Industry Electricity Steering Committee v. British Columbia (Utilities Commission)*. In seeking leave to appeal certain Utilities Commission orders, the petitioner argued that in deciding to receive certain documents in confidence the Commission did so on an overly broad basis and did not take into account whether reasonable alternative means were available to protect confidentiality. Mr. Justice Thackray denied leave and, with respect to this ground, held that no breach of the legislation had been revealed and “more than this [the petitioner’s argument] must be established in order to form the basis for a successful appeal”.³⁶

On the appeal from the denial of leave³⁷, Rowles J.A., with separate concurring reasons delivered by Levine J.A., found the test for leave was simply whether there was a substantial question to be argued and the disclosure and confidentiality issues did constitute substantial questions to be argued. In doing so, she noted the decision to hold information confidential “is not a matter of unfettered discretion” and the right of parties to know the case they have to meet “goes to the heart of our judicial and administrative legal system”. Madame Justice Levine agreed that the fact that the Commission did not consider alternative, less restrictive means of disclosing the commercially sensitive information raised substantial questions to be argued. In dissent, Justice Hall agreed with Thackray J.A. that the point concerning disclosure of confidential information was not an issue that had a possibility of success, and as such, he found no error in the refusal to grant leave.

With BC Hydro having subsequently announced it will not be proceeding with the project that was the subject of the application, the issue currently stands with two judges of the Court of Appeal indicating there is a substantial issue to be argued, and two other judges of the same Court indicating the issue, if argued, had no possibility of success.

16. Constitutional issues

Sections 43 to 46 set out the three different alternatives for tribunal jurisdiction over constitutional questions: full, none or division of powers only. Only one of these alternatives will apply to a particular tribunal.

³⁵ Supra, note 6, at 38A-110.

³⁶ 2005 BCCA 233

³⁷ 2005 BCCA 330

Section 43

Section 43 gives a tribunal jurisdiction to decide all questions of fact, law or discretion that arise in a matter before it, including a constitutional question. Only the Labour Relations Board and the Securities Commission will have this jurisdiction. This section also grants the tribunal the power, on its own initiative or at the request of a party, to refer any question of law, including a constitutional question to the BC Supreme Court. A case must also be stated on the Attorney General's request.

Section 44

Section 44 provides that a tribunal does not have any jurisdiction over constitutional questions. This section applies to most tribunals.

Section 45

Section 45 prohibits those tribunals to which this section applies (the Employment Standards Tribunal, the Farm Industry Review Board and the Human Rights Tribunal) from considering constitutional questions relating to the *Charter of Rights and Freedoms*. This limited jurisdiction recognizes that questions relating to the division of powers may arise in proceedings before these tribunals. This section also grants the tribunal the power, on its own initiative or at the request of a party, to refer a constitutional question over which it has jurisdiction to the BC Supreme Court. Like section 43, a case must also be stated on the Attorney General's request.

A subsection was added to both sections 44 and 45, by the *Attorney General Statutes Amendment Act, 2004*,³⁸ to make it clear that these sections apply to all applications made before, on or after the date that the subsection applies to a tribunal.

Section 46

Section 46 requires a party who raises a constitutional question over which the tribunal has jurisdiction to give notice to the Attorney General in compliance with section 8 of the *Constitutional Question Act*.

On second reading of the *ATA*, Attorney General Geoff Plant identified a number of reasons for the express limitations on constitutional jurisdiction.³⁹ Those reasons included the complexity of constitutional litigation, that constitutional cases require a wide-ranging consideration of a great number of legal issues and that these decisions may have far-reaching public policy implications.

A related reason was that the expertise required to decide constitutional issues often goes beyond the specialized expertise of a tribunal. This, he pointed out, may even be the case where a tribunal's membership includes lawyers, as not all lawyers have a high degree of experience in the highly specialized area of constitutional law.

In addition, he recognized and acknowledged that most lay litigants are not well equipped to deal with complex constitutional arguments without legal representation. In a constitutional matter,

³⁸ *Supra*, note 11.

³⁹ Hansard, May 18, 2004, at page 11194.

this works to the disadvantage of both the lay litigant and the tribunal by delaying decisions, increasing the costs and complexity of the decision-making process, and undermining the fundamental goals of accessibility, efficiency and speedy dispute resolution of the administrative justice system.

An additional factor the Attorney General identified was that even if a tribunal might have the institutional capacity to deal with constitutional issues, its decisions are not binding and, as a result, most constitutional law questions end up in the courts in any event. The considerable costs of constitutional challenges for the parties and the tribunal and the commitment of extensive public resources supported these questions being left to the courts to decide.

And as Deborah K. Lovett, Q.C., in a recent article analyzing the rationale for these provisions in the context of the Supreme Court decisions, concludes: “[F]orcing constitutional issues to first be litigated [before the tribunal] simply delays the final adjudication of such matters because any constitutional issue of significance will inevitably come before the courts.”⁴⁰

However, others suggest that tribunals’ knowledge of their constituent statute and their informal procedures might have enhanced the quality of their constitutional decisions. For example, H. Murray Rankin, Q.C.⁴¹, while acknowledging that constitutional jurisdiction may slow tribunals’ decision making, suggests the efficiency of any resultant appeals would be enhanced, with the reviewing court assisted by having a full factual record before it. And both Rankin and Frank Falzon⁴² refer to Justice Gonthier’s comments in *Martin*⁴³ about the constitutionality of a provision that would “place procedural barriers in the way of claimants seeking to assert their rights in a timely and effective manner.”

Questions about how the Attorney General may utilize the stated case provisions have also been raised, with Frank Falzon noting there is no specified guidance in the legislation as to when the Attorney General’s discretion may be exercised, the criteria on which it is to be exercised, or who may speak for the Attorney General.⁴⁴ However, in other circumstances where the Attorney General may exercise similar types of discretion, typically that discretion has been exercised only with the involvement of senior Ministry officials, and it is anticipated that this discretion will also be exercised only with similar senior level involvement.

Some useful information on the practice and procedure when constitutional notice is required is set out by George Copley, Q.C in his paper for the March 3, 2005 CLE program.⁴⁵

⁴⁰ Deborah K. Lovett, Q.C., “Administrative Tribunal Jurisdiction over Constitutional Issues and the new Administrative Tribunals Act” (2005) Vol. 63 Part 2 *The Advocate* 177, published by the BC Law Society

⁴¹ *Supra*, note 15 at 4.1.13

⁴² *Supra*, note 14

⁴³ [2002]2 S.C.R. 54

⁴⁴ *Supra*, note 14

⁴⁵ Copley, George H. Q.C., *Practice and Procedure in Judicial Review and Cases Raising Constitutional Questions – Some Innovative Aspects of the Administrative Tribunals Act*, (Paper presented to The Continuing Legal Education Society of British Columbia Seminar “The New *Administrative Tribunals Act*”, March 3, 2005). See also Macaulay and Sprague, *supra* note 6 at 38A-116 and also Chapter 24.

17. Orders and decisions

Section 47

Section 47 gives a tribunal, subject to regulations, power to make orders for the payment of costs and expenses by requiring:

- a party to pay another party or intervener;
- an intervener to pay a party or another intervener; or
- a party to pay the tribunal if the party has acted improperly.

The tribunal may direct how the payments will be made. An order that is filed in the court registry has the same effect as a judgment of the court.⁴⁶

Section 48

Section 48 provides a tribunal with authority to make orders, request the assistance of peace officers and impose restrictions on persons who do not comply with tribunal orders. These provisions will assist tribunals in maintaining order during hearings.

Section 49

Section 49 allows a tribunal to apply to court for an order of contempt if a witness has breached an order to attend a hearing or has refused to take an oath, answer questions or produce information. The court may find the witness in contempt and may impose a fine or a term of imprisonment.

By enabling tribunals to ensure that individuals comply with their rules and orders, the Act can prevent parties from trying to use adjournments or other means as an unfair delaying tactic, wasting valuable tribunal resources and defeating the principle of timely resolution. Moreover, compulsion and disclosure powers help tribunals get the evidence they need to decide the issues before them.

Section 50

Section 50 directs a tribunal that orders a payment as part of its decision to include in the order the principal sum and, if applicable, the rate and method of calculating interest. The tribunal may also attach other terms and conditions.

A tribunal decision is effective on the date issued, unless the tribunal specifies otherwise, and the tribunal must make its decisions accessible to the public.

Section 51

Section 51 provides that all final decisions must be in writing and must include reasons.⁴⁷

⁴⁶ For an extensive discussion on the power to order costs, see Macaulay and Sprague, *supra*, note 6, at 38A-123-127

⁴⁷ Robert A. Kastings in “Natural Justice and the Administrative Tribunals Act,” (Paper presented to The Continuing Legal Education Society of British Columbia Seminar “The New *Administrative Tribunals Act*”, March 3, 2005), queried whether the courts have set too high a standard for the written reasons of tribunals, especially those comprised of non-lawyers.

Section 52

Section 52 requires a tribunal to send a copy of its final decision, including reasons, to each party and any interveners. The tribunal may use public advertising or other means to give notice of a final decision if the parties are too numerous to contact individually or if personal notice is impracticable for some other reason. The notice must state where copies of the decision may be obtained.

Section 53

A tribunal may make minor clerical, typographical or arithmetic corrections to a final decision, but must do so within 30 days of issuing the decision.⁴⁸

Section 54

Section 54 allows a party to file a certified copy of a decision with the court. Once filed, the decision can be enforced as if it were a judgment of the court, making procedures like garnishment available. (Note section 1 of the ATA defines “court” as the BC Supreme Court.)

18. Members’ protection from compulsion and immunity

Section 55

Section 55 clarifies that decision makers will not be required to testify or produce evidence obtained in the discharge of their duties in proceedings other than criminal cases. A “decision maker” includes a tribunal member, adjudicator, registrar or other officer who makes a decision and a person appointed as a mediator.

This section does not limit the power of a court to require a record of a proceeding in an application for judicial review.

Section 56

Section 56 provides immunity for tribunal decision makers, the tribunal and the government for errors and omissions that occur in the performance of a statutory duty or in the exercise of a statutory power. This section does not apply if there is bad faith.

19. Judicial review

These sections set a standard time period for making an application for judicial review and clearly set out the Legislature’s intent regarding the standard of review. Only one of the two alternatives for the standard of judicial review will apply to a particular tribunal. Opinion on these provisions is divided, and is discussed following the explanatory notes on section 59.

⁴⁸ Discussion on various aspects of this provision is set out in Macaulay and Sprague, *supra*, note 6, at 38A-138-142.

Section 57

Section 57 sets a 60 day time limit to commence an application for judicial review subject to any other time limit in a tribunal's enabling legislation. This new time limit ends uncertainty and brings judicial review applications into line with other appellate or review practices.

The court may, however, allow an extension of the time limit if it is satisfied that:

- there are serious grounds for relief,
- there is a reasonable explanation for the delay, and
- no substantial prejudice or hardship will result to a person affected by the delay.

This section was considered in *Andrews v. Labour Relations Board of BC*,⁴⁹ where Madame Justice Loo, in denying an application for an extension, accepted that “serious grounds for relief” means a reasonable likelihood or prospect of success of the judicial review application.

Section 58

Under this section, the courts must consider tribunals with a privative clause in their enabling legislation to be expert tribunals within their areas of jurisdiction. In a matter over which such a tribunal has exclusive jurisdiction, the court should not substitute its view for the tribunal's findings of fact, law or exercise of discretion, unless the tribunal's finding or conclusion is patently unreasonable. The test for determining whether a discretionary decision is patently unreasonable is set out. Questions of common law rules of natural justice and procedural fairness are to be considered in the context of acting fairly. Other matters are attributed a correctness standard.

Section 59

For tribunals without a privative clause, the standard of review is correctness for all questions, except those involving the exercise of discretion, findings of fact or the application of common law rules of natural justice and procedural fairness. For findings of fact, a court must not set aside a tribunal's finding, unless there is no evidence to support it or, in light of all the evidence, it is otherwise unreasonable. Discretionary decisions by these tribunals may not be set aside unless they are patently unreasonable. The test when such a decision may be patently unreasonable is also set out. Questions of common law rules of natural justice and procedural fairness are to be considered in the context of acting fairly.

The Attorney General, on second reading,⁵⁰ acknowledged the authority of the courts to oversee the work of administrative tribunals as vital and unquestioned, but noted the substantial amount of debate and uncertainty over which standard of review was to be applied. He indicated that the jurisprudence has created confusion rather than certainty over this issue. He also recognized that the Legislature had not always done as good a job as it should in making its intent clear, so that searching for that intent tends to be time-consuming, expensive and sometimes disruptive. The

⁴⁹ 2005 BCSC 746

⁵⁰ Hansard, May 18, 2004, at page 11193.

intent of the *ATA* was to simplify and codify the standards of review that the Legislature intends courts to apply in their review of tribunal decisions.

Support for this initiative can be found in Frank Falzon's paper on this topic, prepared for the Administrative Justice Project. In that paper, Falzon noted the pragmatic and functional approach presents "significant conceptual and practical difficulties" which "tend to cause confusion, expense, inconsistency and uncertainty for parties and courts."⁵¹ This paper was cited favourably by Mr. Justice Lebel of the Supreme Court of Canada in his so-called *cri de coeur* dissent in *Toronto (City) v. C.U.P.E., Local 79*.⁵²

Macaulay and Sprague also applauded the initiative, noting: "(S)ections 58 and 59 are welcomed responses by the Legislature to the complexity into which the courts have allowed judicial review and appeals of agency decisions to descend."⁵³

Rankin, on the other hand, suggests that the *ATA*'s provisions in this area "...may well reduce the overall quality of judicial review of administrative decisions, will lead to undesirable intra and inter-jurisdictional variance, and may even be construed as inconsistent with the rule of law."⁵⁴

Rankin notes that the Supreme Court of Canada rejected a "formalistic approach" to standard of review analysis in 1979 in favour of a "subtler, contextual approach", and suggests that the *ATA* "represent(s) a reversion to the formalistic approach."⁵⁵

A number of decisions on the application of section 58 or 59 have already been issued, and the AJO Website will be updated on an on-going basis with the current case law on this and other issues.

In addition, some have suggested the *ATA* does not clearly address the standard of review to be applied to questions of mixed fact and law. In *Vancouver Rape Relief Society v Nixon*,⁵⁶ the BC Human Rights Tribunal has submitted that the Court could take two alternative approaches to the s. 59 standard of review respecting question of mixed fact and law. The Tribunal suggests that using a categorical approach, the court would determine whether an impugned finding is essentially either a factual finding (in which case s. 59(2) (reasonableness) would apply), or a legal finding (in which case s. 59(1) (correctness) would apply). Under a nuanced approach, the Tribunal suggests the court could determine the standard of review according to the nature of the

⁵¹ Frank A.V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia*, June 2002, at i.

⁵² [2003] 3 S.C.R. 77, at para. 63.

⁵³ *Supra*, note 6 at 38A-143.

⁵⁴ *Supra*, note 15 at 4.1.5.

⁵⁵ *Supra*, note 15 at 4.1.5.

⁵⁶ Court of Appeal File No CA 031546

question, “in harmony with the structure of s. 59”. Again, legal findings would be captured under s. 59(1) (correctness), factual findings under s. 59(2) (reasonableness). The court would, however, draw on the pragmatic and functional analysis to discern legislative intention respecting the deference required on findings of mixed fact and law. Counsel for the Attorney General has taken a different approach, submitting that *all* questions either fall within one of the listed exceptions in s. 59(1) (discretion, findings of fact, and the application of common law rules of natural justice and procedural fairness) or within the category of “all other questions”, which are governed by s. 59(1) standard of correctness. As questions of “mixed fact and law” are not one of those listed exceptions, the standard of review applicable must be correctness. As of the date of this paper, the BC Court of Appeal had not yet issued its decision.

20. Regulations:

Section 60

Section 60 authorizes the Lieutenant Governor in Council to establish, repeal or amend a tribunal rule. This section allows government some measure of opportunity to act where a tribunal fails to do so and the rules are essential for the tribunal’s functioning.

The Lieutenant Governor in Council may also establish:

- a tariff of fees;
- criteria for making an award of costs;
- a tariff of costs to pay part of a party’s or an intervener’s costs; and
- limits to and rates for paying part of a tribunal’s costs and expenses.

21. Application of the *Freedom of Information and Protection of Privacy Act (FOIPPA)*⁵⁷

Section 61

The standard *FOIPPA* disclosure and severance provisions do not apply to:

- personal notes, communication or draft decisions of a decision maker;
- notes or records kept by a person appointed to assist in a dispute resolution process;
- information submitted during a hearing from which other persons were excluded;
- a taped record of the proceedings; and
- documents submitted during a hearing and any tribunal decisions that are made publicly available.

However, this exception does not apply to personal information that has been in existence for at least 100 years or to other information that has been in existence for at least 50 years. In addition, section 44(2), (2.1) and (3) of the *FOIPPA* do apply to allow the Information and Privacy Commissioner to require a record to be produced to the commissioner and allow the commissioner to examine any information in that record.

⁵⁷ R.S.B.C. 1996, c. 165.

21. British Columbia Review Board

Section 62

Section 62 is somewhat of an anomaly. The BC Review Board is established under the *Criminal Code* (Canada), but appointments are made by the Province. As such, certain of the *ATA* appointment provisions and section 61 of the *ATA* are made applicable directly by the *ATA*, not the enabling federal legislation, the *Criminal Code*.

C. Status of the *ATA*

Royal Assent was given on May 20, 2004, and the general reform provisions (sections 1 to 62) were brought into force on June 30, 2004 by BC Reg. 293/2004.

Consequential amendments to the various affected tribunals' enabling legislation have also been brought into force by Orders in Council, including BC Reg. 293/2004 on June 30, 2004 and subsequent Orders in Council on July 7 (BC Reg. 314/2004), October 15 (BC Reg. 425/2004, amended by 451/2004), November 19 (BC Reg. 492/2004), and December 3, 2004 (BC Reg. 516/2004), and April 4, 2005 (BC Reg. 204/2005).⁵⁸

In addition, minor amendments were made to the *ATA* by the *Attorney General Statutes Amendment Act, 2004* (2004 Legislative Session: 5th Session, 37th Parliament) which were, for the most part, brought into force on Royal Assent (October 21, 2004) or contemporaneously with the *ATA* consequentials applicable to the affected tribunal.

As of June 15, 2005, the only notable exceptions to proclamation are the consequential amendments applicable to the Securities Commission, which are anticipated to be brought into force contemporaneously with the proclamation of *The Securities Act*, S.B.C. 2004.

V. NEXT STEPS

To support effective implementation of the *ATA* and to continue the on-going reform initiative, the Administrative Justice Office (AJO) has the mandate to act as a resource to government, tribunals, the legal community, tribunal users and the public on issues related to the administrative justice system.

Some of the key activities the AJO will lead or support include:

- Developing models or precedents of various documents called for under the *ATA* that may be common to a number of tribunals, such as practice directives, rules of practice and procedure and procedural guides, so that tribunals may easily adapt the model to suit their unique needs and specific statutory provisions;

⁵⁸ <http://www.qp.gov.bc.ca/statreg/oic/>

- Working with tribunals and host ministries to implement rules and processes to take advantage of the new or enhanced powers given to them by the *ATA*, to establish effective case management and dispute resolution systems;
- Developing a model memorandum of understanding (MOU), to put into writing the respective roles and responsibilities of tribunal chairs and host ministries;
- Working with tribunals and host ministries to implement MOUs, which will serve to formally recognize and maintain the proper balance between independence and accountability in the on-going relationship between the tribunal chairs and the Ministers;
- Working with the ministries, tribunals and BRDO on the merit-based appointment processes and related issues;
- Monitoring court and tribunal decisions on the new *ATA* provisions to determine whether the intended goals of the administrative justice reform are being achieved and, if not, to consider further legislative initiatives that may be required;
- Advising on the review and evaluation of future legislative proposals to establish or alter administrative decision-making institutions and processes, in order to maintain the *ATA* as a legislative framework for consistency, predictability and transparency of administrative practices across the public sector;
- Consulting with tribunals and ministries to determine whether some tribunals should be given additional powers under the *ATA* or whether there are further opportunities to apply the *ATA* and improve consistency;
- Researching and monitoring developments in other jurisdictions, to identify further potential reforms for the British Columbia administrative justice system, in order to keep it current, modern and relevant.

Much of the AJO's work will be available on its Web site: <http://www.gov.bc.ca/ajo>

VI. CONCLUSION

The *ATA* is a creative and innovative “made in BC” response to the specific issues and challenges faced by British Columbia’s administrative justice community. Its effectiveness was tremendously enhanced by the unprecedented broad public consultation prior to its enactment and the valuable contributions of the many practitioners within the administrative justice system, who offered their ideas and creativity in that consultation and during development of the legislation. To ensure it remains effective, its implementation and application will be monitored and evaluated. In doing this, the government, through the Administrative Justice Office, will continue to look to, and rely on, the invaluable contributions from interested practitioners and committed organizations like the Law Society, the CBA, the Circle of Chairs and the British Columbia Council of Administrative Tribunals in addressing the administrative justice reform agenda.

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APPENDIX 1

**LIST OF TRIBUNALS AND ENABLING LEGISLATION
CONSEQUENTIALLY AMENDED BY THE
ADMINISTRATIVE TRIBUNALS ACT**

Tribunal	Act	Ministry
Agricultural Land Commission (ALC)	<i>Agricultural Land Commission Act</i>	Agriculture and Lands
BC Board of Parole (PB)	<i>Parole Act</i>	Public Safety and Solicitor General
BC Review Board	<i>Criminal Code of Canada (ATA section 62 applies to this provincially appointed board, but does not amend this federal legislation).</i>	Attorney General
Building Code Appeal Board (BCAB)	<i>Local Government Act</i>	Community Services
Director, Business Practices and Consumer Protection (BPCP)	<i>Business Practices and Consumer Protection Act</i>	Public Safety and Solicitor General
Community Care and Assisted Living Appeal Board (CCALAB)	<i>Community Care and Assisted Living Act</i>	Health
Employment and Assistance Appeal Tribunal (EAAT)	<i>Employment and Assistance Act</i>	Employment and Income Assistance
Employment Standards Tribunal (EST)	<i>Employment Standards Act</i>	Labour and Citizens' Services
Farm Industry Review Board (Farm IRB)	<i>Natural Products Marketing (BC) Act</i>	Agriculture and Lands
Financial Services Tribunal (FST)	<i>Financial Institutions Act</i>	Finance

APPENDIX 1

Tribunal	Act	Ministry
Forest Practices Board (Forest PB)	<i>Forest and Range Practices Act</i>	Forests and Range (and Minister Responsible for Housing)
Hospital Appeal Board (HAB)	<i>Hospital Act</i>	Health
Human Rights Tribunal (HRT)	<i>Human Rights Code</i>	Attorney General
Industry Training Appeal Board (ITAB)	<i>Industry Training Authority Act</i>	Economic Development
Labour Relations Board (LRB)	<i>Labour Relations Code</i>	Labour and Citizens' Services
Manufactured Home Park Tenancy Arbitrators (MHPTA)	<i>Manufactured Home Park Tenancy Act</i>	Forests and Range (and Minister Responsible for Housing)
Mediation and Arbitration Board (MAB)	<i>Petroleum and Natural Gas Act</i>	Energy, Mines and Petroleum Resources
Mental Health Review Panels (MHRP)	<i>Mental Health Act</i>	Health
Passenger Transportation Board (PTB)	<i>Passenger Transportation Act</i>	Transportation
Property Assessment Appeal Board (PAAB)	<i>Assessment Act</i>	Small Business and Revenue
Property Assessment Review Panels (PARP)	<i>Assessment Act</i>	Small Business and Revenue
Residential Tenancy Arbitrators (RTA)	<i>Residential Tenancy Act</i>	Forests and Range (and Minister Responsible for Housing)
Safety Standards Appeal Board (SSAB)	<i>Safety Standards Act</i>	Forests and Range (and Minister Responsible for Housing)

APPENDIX 1

Tribunal	Act	Ministry
Securities Commission (SC) ⁵⁹	<i>Securities Act</i> (New legislation)	Attorney General
Utilities Commission (UC)	<i>Utilities Commission Act</i>	Attorney General
Workers Compensation Appeal Tribunal (WCAT)	<i>Workers Compensation Act</i>	Labour and Citizen's Services

⁵⁹ The *ATA* consequential amendments to the new *Securities Act* are not in force yet, so the *ATA* does not apply to the Securities Commission at this time.

APPENDIX 2

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT (ATA)
TO INDIVIDUAL ADMINISTRATIVE TRIBUNALS⁶⁰**

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 1: Definitions</u>	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	P ₆₂	X	X	X	X	X	X	X
<u>Section 2: Chair's initial term and reappointment</u>	X	X		X	X	X	X		X	X		X	X	X		X	X	X	X			X	X	X	
<u>Section 3: Member's initial term and reappointment</u>	X	X		X	X	X	X	X	X	X		X	X	X		X	X	X	X			X	X	X	

⁶⁰ See the last page of Appendix 2 for a list of tribunals and acronyms.

⁶¹ The consequential amendments in the *ATA* that affect the Securities Commission will be made to the new *Securities Act* (Bill 38, 2004 Legislative Session: 5th Session, 37th Parliament). The new *Securities Act* and the *ATA* consequential amendments to that Act, including the provision applying the above sections of the *ATA* to the Securities Commission, are not yet in force.

⁶² Where a section is marked with a “P”, only a portion of the section applies to the tribunal. Check the enabling legislation to determine which portions are applicable.

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 4:</u> Chair's absence or incapacitation	X	X		X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X		X	X		
<u>Section 5:</u> Member's absence or incapacitation	X	X		X	X	X	X	X	X	X	X	X	X	X		X	X	X	X			X	X	X	
<u>Section 6:</u> Temporary, non-renewable appointments	X	X		X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X		X	X	X	
<u>Section 7:</u> Powers after resignation or expiry of term	X	X		X	P	X	X	X	X	X	X	X	X	X		X		X	X	X		p	X	X	
<u>Section 8:</u> Termination for cause	X	X		X	X	X	X		X	X	X	X	X	X		X	X	X	X	X		X	X	X	

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 9:</u> Responsibilities of the chair	X			X	X	X	X	X	X	X	X	X	X	X		X	X	X	X				X	X	
<u>Section 10:</u> Remuneration and benefits for members	X	X		X		X	X	X	X	X	X	X	X	X		X	X	X	X	X			X	X	
<u>Section 11:</u> General power to make rules	X		X	X		X	X	X		X		X		X		X			X				X	X	X
<u>Section 12:</u> Practice directives the tribunal must make	X			X		X	X	X		X		X											X	X	
<u>Section 13:</u> Practice directives the tribunal may make	X			X		X	X	X		X		X				X			X				X	X	X
<u>Section 14:</u> General power to make orders	X		P	X		X	X	X		X		X		X		X			X				X		X

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 15:</u> Interim orders	X		X	X		X	X	X		X		X				X				X			X	X	X
<u>Section 16:</u> Consent orders				X		X	X	X		X		X							X				X		
<u>Section 17:</u> Discontinuance or settlement of application	X			X		X	X			X	X	X		X					P				X		
<u>Section 18:</u> Failure of party to comply with tribunal orders and rules	X		X	X		X	X	X		X		X				X				X	X		X	X	
<u>Section 19:</u> Service of Documents	X			X		X	X	X		X		X		X		X				X			X	X	

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 20</u> : Failure to serve does not invalidate proceeding	X			X		X	X	X		X		X		X		X			X				X	X	
<u>Section 21</u> : Notice of hearing by publication	X					X								X									X	X	
<u>Section 22</u> : Notice of appeal (inclusive of prescribed fee)				X			X	X				X											X		
<u>Section 23</u> : Notice of appeal (exclusive of prescribed fee)	X																								
<u>Section 24</u> : time limits for appeal	X			X			X	X				X											X		
<u>Section 25</u> : Appeal does not operate as a stay	X			X			X			X		X													

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 26:</u> Organization of tribunal				X			X			X		X				p		X					X		
<u>Section 27:</u> Staff of tribunal				X			X			X		X				X							X		
<u>Section 28:</u> Appointment of person to conduct dispute resolution process			X	X		X	X			X		X							X				X	X	X
<u>Section 29:</u> Disclosure protection			X	X		X	X			X	X	X		X					X				X	X	X
<u>Section 30:</u> Tribunal duties				X	X	X	X			X	X	X		X	X	X		X			X		X	X	X
<u>Section 31:</u> Summary dismissal	P			X			X			X		X						X	P				P		X

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 32:</u> Representation of parties to an application	X			X		X	X	X		X		X		X		X				X			X	X	X
<u>Section 33:</u> Interveners	X		X	X			X			X		X							X				X		
<u>Section 34:</u> Power to compel witnesses and order disclosure				X		P	P			X	P	P		P					P				P	P	
<u>Section 35:</u> Recording tribunal proceedings	X		X	X		X	X	X		X		X				X			X				X	X	P
<u>Section 36:</u> Form of hearing application	X		X	X		X	X					X		X		X	X						X	X	
<u>Section 37:</u> Applications involving similar questions	X		X	X		X	X	X		X		X							X				X	X	X

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 38:</u> Examination of witnesses				X		X	X	X		X		X		X		X			X				X	X	X
<u>Section 39:</u> Adjournments	X		X	X		X	X	X		X		X		X		X	X		X				X	X	
<u>Section 40:</u> Information admissible in tribunal proceedings	X		P	X		X	X	X				X		X		X			X	P			X	X	
<u>Section 41:</u> Hearings open to the public				X			X	X				X		X				X					X	X	
<u>Section 42:</u> Discretion to receive evidence in confidence				X			X	X		X		X		X				X					X	X	X
<u>Section 43:</u> Discretion to refer questions of law to the court													X									X			

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 44:</u> Tribunal without jurisdiction over constitutional questions	X			X	X			X	X	X		X		X	X	X	X	X	X	X	X		X	X	X
<u>Section 45:</u> Tribunal without jurisdiction over <i>Canadian Charter of Rights and Freedoms</i>						X	X				X														
<u>Section 46:</u> Notice to Attorney General if constitutional issue raised in application						X	X				X		X									X			
<u>Section 47:</u> Costs				P			X	X		X			P	X									X		

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT	
ATA Provision																										
<u>Section 48:</u> Maintenance of order at hearings	X			X		X	X	X		X	X	X	X	X	X	X				X	X	X		X	X	X
<u>Section 49:</u> Contempt for uncooperative witness				X		X	X	X		X	X	X	X	X		X				X	X			X	X	X
<u>Section 50:</u> Decisions	X			X		P	X	X		X	X	X							P					X		
<u>Section 51:</u> Final decision	X			X		X	X	X		X		X								X				X		
<u>Section 52:</u> Notice of decision	X			X		X	X	X		X		X												X		X
<u>Section 53:</u> Amendments to final decision	X			X		X		X		X		X								X				X		

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 54:</u> Enforcement of final decision	X			X				X		X		X							X				X	X	
<u>Section 55:</u> Compulsion protection	X			X	X	X	X	X	X	X	X	X		X		X			X	X		X	X		X
<u>Section 56:</u> Immunity protection	P				X	X		X	X	X	X	X	X	X	X	X	X		X	X	X		X	X	X
<u>Section 57:</u> Time limit for judicial review	X		X	X		X	X	X		X	X	X	X	X	X	X	X	X				X		X	X
<u>Section 58:</u> Standard of review with privative clause	X			X	X	X	X			X		X	P		X		X	X				X		X	X
<u>Section 59:</u> Standard of review if no privative clause								X			X			X		X									

APPENDIX 2

Tribunal	ALC	BCAB	BPCP	CCALA	EAAT	EST	Farm IRB	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHPTA	MHRP	PB	PTB	PAAB	PARP	RTA	SC⁶¹	SSAB	UC	WCAT
ATA Provision																									
<u>Section 60:</u> Power to make regulations	P			X		P	X	X		P		P		P		P			P				X	P	P
<u>Section 61:</u> Application of <i>Freedom of Information and Protection of Privacy Act</i>	X			X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X		X	X	X

APPENDIX 2

LIST OF TRIBUNALS AND ACRONYMS

Acronym	Tribunal	Acronym	Tribunal
ALC	Agricultural Land Commission	MAB	Mediation and Arbitration Board
BCAB	Building Code Appeal Board	MHPTA	Manufactured Home Park Tenancy Arbitrators
BPCP	Director, Business Practices and Consumer Protection	MHRP	Mental Health Review Panels
CCALAB	Community Care and Assisted Living Appeal Board	PAAB	Property Assessment Appeal Board
EAAT	Employment and Assistance Appeal Tribunal	PARP	Property Assessment Review Panels
EST	Employment Standards Tribunal	PB	Parole Board
Farm IRB	Farm Industry Review Board	PTB	Passenger Transportation Board
Forest PB	Forest Practices Board	RTA	Residential Tenancy Arbitrators
FST	Financial Services Tribunal	SC	Securities Commission
HAB	Hospital Appeal Board	SSAB	Safety Standards Appeal Board
HRT	Human Rights Tribunal	UC	Utilities Commission
ITAB	Industry Training Appeal Board	WCAT	Workers Compensation Appeal Tribunal
LRB	Labour Relations Board		

APPENDIX 3
COMPARISON OF S. 31 OF ADMINISTRATIVE TRIBUNAL ACT AND S. 114 OF EMPLOYMENT STANDARDS ACT

<i>Administrative Tribunals Act</i>	<i>Employment Standards Act</i>
<p>Summary dismissal</p> <p>31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:</p> <ul style="list-style-type: none"> (a) the application is not within the jurisdiction of the tribunal; (b) the application was not filed within the applicable time limit; (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process; (d) the application was made in bad faith or filed for an improper purpose or motive; (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal; (f) there is no reasonable prospect the application will succeed; (g) the substance of the application has been appropriately dealt with in another proceeding. <p>(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.</p> <p>(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.</p>	<p>After an appeal is requested</p> <p>114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:</p> <ul style="list-style-type: none"> (a) the appeal is not within the jurisdiction of the tribunal; (b) the appeal was not filed within the applicable time limit; (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process; (d) the appeal was made in bad faith or filed for an improper purpose or motive; (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal; (f) there is no reasonable prospect that the appeal will succeed; (g) the substance of the appeal has been appropriately dealt with in another proceeding; (h) one or more of the requirements of section 112 (2) have not been met. <p>(2) Before considering an appeal, the tribunal may</p> <ul style="list-style-type: none"> (a) refer the matter back to the director for further investigation, or (b) recommend that an attempt be made to settle the matter. <p>(3) If the tribunal dismisses all or part of an appeal under subsection (1), the tribunal must inform the parties of its decision in writing and give reasons for that decision.</p>