

**THE *ADMINISTRATIVE***  
***TRIBUNALS ACT-***  
***AN UPDATE***

ADMINISTRATIVE JUSTICE OFFICE  
PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC  
JANUARY 18, 2007

# **THE *ADMINISTRATIVE TRIBUNALS ACT*<sup>1</sup>**

## **1. INTRODUCTION**

The provisions of the *Administrative Tribunals Act* (S.B.C 2004, c. 45) (the ATA) apply to 27 BC tribunals and other entities.<sup>2</sup>

The ATA has been described by James L.H. Sprague as, “likely the most useful and practical legislative addition to administrative law to come down the tracks in this country in some time.”<sup>3</sup>

Points to be addressed today include:

- A quick overview of how the *ATA* works
- The standard of review and the case law on these provisions
- Determining the applicable standard of review (the “Junger approach”<sup>4</sup>)
- Highlights of some of the administrative justice reforms and initiatives recently undertaken in other jurisdictions
- Some of the current work of the Administrative Justice Office (AJO)

## **2. THE ADMINISTRATIVE TRIBUNALS ACT**

Responding to various stakeholders, including administrative law practitioners and the Canadian Bar Association, identifying a need for systemic administrative justice reform, in July, 2001 then-Attorney General Geoff Plant initiated the Administrative Justice Project. The AJP prepared and released a number of background papers, a White Paper, and a further series of reports (all available at [http://www.gov.bc.ca/ajo/popt/publications\\_and\\_research.htm](http://www.gov.bc.ca/ajo/popt/publications_and_research.htm)).

---

<sup>1</sup> A version of this paper was first presented at the November 2006 CLE Administrative Law Conference.

<sup>2</sup> Appendix 1 lists the tribunals to which provisions of the *ATA* apply, the ministry responsible for each tribunal and the tribunal’s enabling legislation. Appendix 2 is a table indicating which sections of the *ATA* apply to each tribunal.

<sup>3</sup> *The Annotated British Columbia Administrative Tribunals Act*, Thomson Carswell, Toronto, 2005, at p. iii of the Preface

<sup>4</sup> See *Judicial Consideration of the Administrative Tribunals Act*, a paper prepared by Robin Junger, for the November, 2006 CLE Administrative Law Conference.

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

Following broad consultation, the *Administrative Tribunals Appointment and Administration Act* (S.B.C. 2003, Chapter 47) was enacted in 2003, followed by the ATA in 2004, which substantially incorporated, significantly added to and, for the most part, substantially repealed the *Administrative Tribunals Appointment and Administration Act*.<sup>5</sup>

The ATA does not create and empower a new tribunal, but instead provides a framework of modern powers and authorities, using standard and consistent language. By consequential amendments to a tribunal's own legislation, those powers and authorities are selectively applied to the tribunal, reflecting that tribunal's particular mandate and needs.

So to determine if the ATA applies to a particular tribunal, you must 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. For example, section 103 of the *Employment Standards Act* (R.S.B.C. 1996, c. 113) provides:

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.

This approach - adoption by reference - was selected to promote consistency in interpretation and application, reducing uncertainty and related costs. This approach has not been entirely without criticism, with some users suggesting that the need to read both the tribunal's own legislation and the ATA makes it complicated, however, the goal is:

- Interpretation: The expectation is that as the various provisions of the ATA are considered by the courts, a body of the judicial interpretations will develop that will apply to all tribunals who adopt that provision, avoiding or limiting costly re-litigating of issues.
- Application: Any changes to the powers and authorities that may be necessary in the future can be made simply by amendment to the relevant ATA provisions. Any such amendments will then apply to all tribunals whose enabling legislation refers to and adopts the amended provision, thereby maintaining consistency across the administrative justice system. (See section 36(1)(f) of the *Interpretation Act*.) This will reduce the likelihood of piecemeal changes and the possibility of inconsistencies developing over time, thereby retaining a system of administrative justice that is current and consistent.

While adoption by reference has been the general approach taken, there are exceptions:

---

<sup>5</sup> The *Administrative Tribunals Appointment and Administration Act* still applies to the Environmental Appeal Board/Forest Appeals Commission and the Financial Institutions Commission (FIC), but see comments below on page 5, re the FIC.

- *“Modified” ATA powers:* In some cases, a modified version of an ATA power or authority is incorporated directly into the tribunal’s enabling legislation, to reflect the unique circumstances of that particular tribunal. So although there is no direct reference in a tribunal’s enabling legislation to that section, the tribunal may still have that power or authority.
- *Pre-existing powers and authorities:* Some tribunals’ enabling legislation or regulations had provisions that pre-dated the ATA and provided the tribunal with a power or authority that is essentially the same as an ATA provision, but without an express reference to the ATA. At some time in the future, the Legislature may decide to replace these provisions with references to the equivalent sections of the ATA.

## Overview of the ATA provisions

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

The general reform provisions provide tribunals with flexible and enabling powers and authorities (for example, to make rules); with many of the provisions coupled with public accessibility requirements (for example, if a tribunal exercises the power to make rules, it must make those rules accessible to the public). The general reform provisions also seek to standardize and promote a consistent approach to 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 to various powers and authorities. Details about the various provisions are set out in Appendix 3, together with some of the case law references.

The ATA was given Royal Assent on May 20, 2004. Sections 1 to 62 were brought into force on June 30, 2004 by BC Reg. 293/2004. Minor amendments were made by the *Attorney General Statutes Amendment Act, 2004*, with most of those amendments coming into force on Royal Assent on October 21, 2004. (Others were proclaimed later, contemporaneously with the related ATA consequential amendments.)

The consequential amendments to the various tribunals’ enabling legislation were brought into force by various Orders in Council issued in 2004 and 2005, with the notable exception<sup>6</sup> being

---

<sup>6</sup> Section 173 of the ATA, which refers to the effective date of decisions of the Utilities Commission, has not been proclaimed, to avoid possible confusion with an existing provision. All other amendments to make the ATA applicable to the Utilities Commission have been proclaimed and are in force.

amendments to the *Securities Act, 2004*, which are not yet proclaimed. Instead, the *Securities Act* has been amended by section 7 of the *Securities Amendment Act, 2006* (S.B.C. 2006, C. 32) which makes sections of the *ATA* applicable to the Securities Commission. That amendment came into effect on Royal Assent on May 18, 2006.

In addition, section 51 of the *Finance Statutes Amendment Act, 2006* (S.B.C. 2006, C. 12) (not yet proclaimed) amends the *Financial Institutions Act* to replace the current references to the *Administrative Tribunals Appointment and Administration Act* regarding the Financial Institutions Commission with references to the *ATA*. Section 57 of the same Act corrects some of the *ATA* section number references that apply to the Financial Services Tribunal.

### **3. STANDARD OF REVIEW**

The intent of the *ATA* is to provide clear legislative direction on the standard of review, and Sprague<sup>7</sup> has said:

The genius of the *Act*, however, rests not in its comprehensiveness, but in the genuine effort of the British Columbia legislature to resolve the vexing issues of modern administrative law as practiced before the agencies and the courts – issues often introduced in the past decade by complex, abstract, and often intensely subjective decisions of the courts.

The approach used is to set out two options for the standard of review - only one option will apply to each tribunal, reflecting whether or not a tribunal has a privative clause.

Firstly, it's important for practitioners to note 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.

Under subsection 57(2), the court may 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.

Subsection 57(2) was considered in:

- *Andrews v. British Columbia (Labour Relations Board) et. al.*, 2005 BCSC 746 where Madam Justice Loo held (at para. 4) that “serious grounds for relief” meant “whether

---

<sup>7</sup> *Supra*, note 3.

there is a reasonable likelihood or prospect that the (application) will succeed.” Finding it was unlikely that the application for judicial review would succeed, there were no serious grounds for relief and the request for an extension of time to file the application was denied.

- *Golovkine v BC Human Rights Tribunal and Capital Region Housing Corporation*, (Unreported, BCSC, 8 December 2005) the Court found that it must determine whether the petitioner had any prospect of demonstrating that the Tribunal’s decision, which the Court found involved an exercise of discretion, was patently unreasonable. The Court concluded that no such prospect existed and it dismissed the application.

Sections 58 and 59 set out the Legislature’s intent regarding the standards it intends courts to apply in their review of tribunal decisions. Only one of the two alternatives for the standard of judicial review will apply to a particular tribunal. Which one applies will reflect whether the tribunal has a privative clause.

#### ***Section 58: Tribunals with a privative clause***

- The courts are to consider these tribunals as expert tribunals within their areas of jurisdiction.
- In matters over which these tribunals have 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.
- 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.
- The test for determining whether a discretionary decision is patently unreasonable is expressly set out.

#### ***Section 59: Tribunals without a privative clause***

- The standard of review is correctness for all questions, except those involving findings of fact, the exercise of discretion 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.
- Questions of common law rules of natural justice and procedural fairness are to be considered in the context of acting fairly.
- The test for whether a decision is patently unreasonable is also set out.

The goal of providing clear legislative intent seems to be working as in many of the cases to date the court has simply referred to the applicable section (58 or 59) as setting the standard of review and then applied the applicable standard. (See: *Harley v Employment and Assistance Appeal Tribunal (Minister of Employment and Income Assistance)* 2006 BCSC 1420, *J.P. Metal Masters 2000 v. Director of Employment Standards* 2006 BCSC 928, *Serebrova v. Employment and Assistance Appeal Tribunal et al.* 2006 BCSC 213).

And various judges have commented positively on the new provisions. In *Victoria Tours Limited v. Passenger Transportation Board*, 2005 BCSC 1693, Mr. Justice Bauman stated (at para. 6):

Happily, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, in s. 58 thereof, dictates the standard of review one is to apply to decisions of the Board.

And in *McIntyre v. British Columbia (Employment and Assistance Appeal Tribunal)* [2005] B.C.J. NO.1808, Madam Justice Russell said, at paragraph 15

Determining the applicable standard of review has historically involved a complicated and labyrinthine analysis aimed at discovering the legislative intent of the statute creating the tribunal whose decision is being reviewed. Fortunately, in British Columbia, the Administrative Tribunals Act has removed the need for this analysis....

The BC Courts have considered and applied sections 58 and 59 in a number of other cases<sup>8</sup> and the AJO regularly prepares summaries of those cases and others that refer to the ATA.

---

<sup>8</sup> One issue that initially arose with respect to sections 58 and 59 was the applicability of the provisions to proceedings commenced before they came into effect. This issue should become less relevant as those matters commenced prior to the ATA move through the administrative justice and court systems. See: *James Community Service Society v Johnston and the BC Human Rights Tribunal* 2004 BCSC 1807 (2 December 2004) held that section 59 is procedural and therefore effective from time enacted. *HMTQ v. Hutchinson et al.* 2005 BCSC 1421 (12 October 2005) applied *St. James. HMTQ v. Bolster & BC Human Rights Tribunal* 2005 BCSC 1491 (27 October 2005) found that the standard of review is a substantive right and the ATA standard of review did not apply, as it altered the standard applicable at the time the Tribunal made its decision and at the time the petition was filed. *Cariboo Chevrolet Pontiac Buick GMC v. Becker*, 2006 BCSC 43 (10 January 2006) distinguished *St. James Community Services Society, Hutchinson and Bolster* as the petitions in those cases were filed prior to the ATA coming into force, and this petition was filed after that date. *James v. British Columbia (Labour Relations whether the ATA altered the common law definition of "patently unreasonable"*:

The latest case law summary is available on the AJO website at [www.gov.bc.ca/ajo/popt/whats\\_new.htm#recent\\_decisions](http://www.gov.bc.ca/ajo/popt/whats_new.htm#recent_decisions).

There has been some criticism that sections 58 and 59 have not completely achieved the goal of providing a clear standard for judicial review, as there is still a need for some analysis of which of the standards of review provided should apply in a particular case and then to apply that standard to the tribunal's decision. In some cases, the analysis has been extensive. (See for example *University of B.C. v. University of B.C. Faculty Association et al*, 2006 BCSC 406.)

- *The need to use a pragmatic and functional analysis:*

In *Public Service Alliance of Canada, Local 05/20500 v. British Columbia (Labour Relations Board) et al.*, 2005 BCSC 577, Mr. Justice Goepel commented on the Board's submission on the applicable standard of review (in which the Board referred to Court of Appeal decisions that had applied a pragmatic and functional analysis to determine the applicable standard) and stated (at paras. 27 and 28):

With respect, this submission overlooks the legislative intent behind the ATA. The ATA codifies the standard of review with respect to those tribunals to which it applies. Moreover, it is clear that the legislative intention in codifying the standard of review was to eliminate the need to engage in a pragmatic and functional analysis and to simplify the complexity of determining the standard of review: Administrative Justice Office, *Model Statutory Powers Provisions for Administrative Tribunals*, (Victoria: Ministry of the Attorney General, August 2003) at p. 88-92.

I find that the question of whether the Board has the power to order partial revocation of bargaining rights is a matter going to jurisdiction, which the ATA mandates must be reviewed on a standard of correctness. The natural justice question is to be decided on the basis of whether the Board acted fairly.

However, in *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364, the Court indicated that, where there is an issue as to whether a question decided by an administrative tribunal is within the tribunal's jurisdiction, the courts should continue to use a pragmatic and functional analysis.

---

*Board*), 2006 BCSC 784 (17 May 2006), applied *Cariboo Chevrolet*.

ADMINISTRATIVE JUSTICE OFFICE  
PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC  
JANUARY 18, 2007

- *Whether the ATA has altered the common law definition of “patently unreasonable”:*

In a number of cases on sections 58 and 59<sup>9</sup>, the issue was not the applicable standard of review, but whether the tribunal’s decision was “patently unreasonable”. (See *United Brotherhood of Carpenters, supra, Bellman v. HMTQ et al.*, 2006 BCSC 426; *Old Dutch Foods Ltd. v. Teamsters Local Union No. 213*, 2006 BCSC 313.)

The courts have also considered whether the ATA altered the common law definition of “patently unreasonable”:

- In *Public Service Alliance of Canada, Local 05/20500 v. British Columbia (Labour Relations Board) et al.*, 2005 BCSC 577, the Court referred to cases that pre-date the ATA, to help guide the Court’s assessment as to whether the tribunal’s decision was patently unreasonable.
- In *Basura v BC (Workers Compensation Board)* 2005 BCSC 407, the Court noted that the ATA does not define “patent unreasonableness”, except for discretionary decisions in section 58(3), which “appears to leave the common law definition in place for questions of mixed fact and law” (para. 21).
- In the *University of B.C.* decision, Mr. Justice Powers suggested that the definition in section 58(3) may not be exhaustive and that the existing case law may be of assistance (at para. 50).
- In *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 (at para. 19), the Court of Appeal said:

I agree with the appellant, as does counsel for the Human Rights Tribunal, that cases decided prior to enactment of the *Administrative Tribunals Act* are no longer controlling on question of the appropriate standard of review. There was no need for the chambers judge to invoke the common-law definition of “patently unreasonable” set out in *Canada (Attorney General) v. Public Service Alliance of Canada, supra*. Rather, he should have applied the definition set out in s. 59(4) of the *Administrative Tribunals Act*.

---

<sup>9</sup> To date, the cases in which section 59 has been considered have all involved decisions of the Human Rights Tribunal with a number of those involving review of preliminary Tribunal decisions on procedural matters (*Callaghan v. University of Victoria et al*, 2006 BCSC 1503; *Cariboo Chevrolet Pontiac Buick GMC v. Becker*, 2006 BCSC 43; *Shilander v. BC Human Rights Tribunal*, 2005 BCSC 728).

#### 4. DETERMINING THE APPLICABLE STANDARD OF REVIEW - THE “JUNGER APPROACH”

Robin Junger, in his paper, *Judicial Consideration of the Administrative Tribunals Act*, prepared for the November, 2006 CLE Administrative Law Conference (highly recommended reading), set out the following as a summary of the approach that he believes should be taken to make the application of these legislative reforms both simple and in keeping with the Legislature’s intent.

*STEP 1. Determine whether the tribunal’s enabling statute applies section 58 or 59 of the ATA to that tribunal. If it does go to step 2. If it does not, apply the common law “pragmatic and functional” approach.*

*STEP 2. Classify the issue and determine the standard of review as set out in the tables below. (In any case where it is unclear whether a matter is a question of law or jurisdiction, apply the pragmatic and functional approach as discussed in Bibeault, but not as it was expanded upon in Pushpanathan and subsequent cases)*

#### **Tribunals to which ATA s. 58 applies:**

<b>Issue</b>	<b>Standard of review</b>
Fact or law <sup>10</sup>	Patent unreasonableness – common law meaning
Discretion <sup>11</sup>	Patent unreasonableness – as defined in ATA s. 59(4)
Natural justice and procedural fairness	Whether, in all the circumstances, the tribunal acted fairly
All other matters (including jurisdiction)	Correctness

---

<sup>10</sup> Robin Junger notes in his paper: “It is important to note that this category does not apply to all questions of fact or law within the tribunal’s jurisdiction, rather it applies only to those questions for which the tribunal has exclusive jurisdiction under its privative clause. While one would expect the primitive clause to extend to the full range of the tribunal’s jurisdiction in most cases, this may not be the case in all instances and it is a matter which must be reviewed carefully.”

<sup>11</sup> See above.

**Tribunals to which ATA s. 59 applies:**

<b>Issue</b>	<b>Standard of review</b>
Discretion <sup>12</sup>	Patent unreasonableness – as defined in ATA s. 59(3)
Fact	Whether there is no evidence or, in light of all evidence to support it , the finding is otherwise unreasonable
Natural justice and procedural fairness	Whether, in all the circumstances, the tribunal acted fairly
All other matters (including questions of law and jurisdiction)	Correctness

*STEP 3. Apply the applicable standard of review to determine if the decision should stand or be quashed.*

**5. ADMINISTRATIVE JUSTICE OFFICE: ON-GOING INITIATIVES**

To support effective implementation of the *ATA* and to continue the on-going reform initiative, the Administrative Justice Office (AJO) is leading or supporting some key activities outlined below.

**Tribunal Tool Kit**

Since the *ATA* came into force in 2004, the AJO has developed a number of model documents and guides that tribunals can adopt and adapt to their particular needs. These include:

- Model Practice Directives;
- Model Memorandum of Understanding;
- A Guide for Tribunals: Obtaining Compliance in Tribunal Processes;

---

<sup>12</sup> Junger also notes: Section 58 does not expressly limit this to discretionary decisions within the tribunal’s jurisdiction, but it seems clear that the Legislature did not intend, and could not have intended, for a standard of “patent unreasonableness” to apply to discretionary decisions that are outside the jurisdiction of the tribunal.

- A Guide for Tribunals: Stated Cases;
- A Guide for Consideration of a Process for Review of Administrative Decision-Making;
- A Guide for Tribunals: Developing a Case Management Strategy [in progress]; and
- Model Rules of Procedure [in progress].

The completed documents and guides are available in the Tribunal Tool Kit section of the AJO's web site ([www.gov.bc.ca/ajo/](http://www.gov.bc.ca/ajo/)). Other documents will be added as they are developed.

### **Support Services for Tribunals and Ministries**

The AJO also provides on-going support to tribunals and ministries to help implement elements of the Tool Kit, as well as other aspects of the ATA:

- The AJO works with tribunals to establish effective case management and dispute resolution systems and to implement other rules and processes that take advantage of the new or enhanced powers given to them by the *ATA*.
- The AJO is working with various tribunals and their responsible ministers on the preparation of individualized MOUs based on the model MOU developed in consultation with various stakeholders in 2005. A Memorandum of Understanding (MOU) provides a framework for maintaining an appropriate balance of independence and accountability in the on-going relationship between a tribunal chair and the minister responsible for the tribunal.
- The AJO regularly develops and presents informational and skill-development workshops for senior tribunal staff members and ministry staff that deal with tribunals.

### **Communication and Information Services**

Supplying the administrative tribunal community with up-to-date information is a regular feature of the AJO's support system. AJO activities in this regard include the following:

- 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;
- Preparing Information Bulletins on timely topics;
- Identifying and working with the relevant tribunals to publicize Tribunal Success Stories; and
- Making presentations to conferences, workshops and educational sessions.

## Research, Analysis & Planning

The AJO's mandate is to be an innovative centre of research, which includes analyzing, reporting on and, where appropriate, leading administrative justice reform initiatives to support the very best administrative justice system for British Columbians and ensure that the system presents an effective dispute resolution alternative. To this end, the AJO has been active in a number of relevant areas:

The AJO advises 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.

- The AJO has an ongoing role of 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.
- The AJO and DRO have initiated a project to determine the nature and scope of dispute resolution processes used by BC's administrative tribunals and to assess opportunities to enhance and expand dispute resolution capacity in the administrative justice system.
- 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 (see below).

## 6. CURRENT ADMINISTRATIVE JUSTICE REFORMS IN OTHER JURISDICTIONS

Information about reforms in other jurisdictions is available on the AJO's website at [www.gov.bc.ca/ajo/popt/publications\\_and\\_research.htm#reforms\\_of\\_interest](http://www.gov.bc.ca/ajo/popt/publications_and_research.htm#reforms_of_interest). Some of those initiated or announced in 2006 include:

### Alberta

The new *Administrative Procedures and Jurisdiction Act* (formerly the *Administrative Procedures Act*) came into force on April 3, 2006. Part 2 provides for tribunals' jurisdiction to determine constitutional law questions to be set by regulation. The *Designation of Constitutional Decision Makers Regulation* also came into force in April, 2006 and provides that

- the Labour Relations Board, Law Society entities, the Alberta Energy and Utilities Board and labour arbitrators may deal with all questions of constitutional law;
- the Alberta Securities Commission, human rights panels, the Workers' Compensation Board and the Workers' Compensation Appeals Commission have jurisdiction over division of constitutional powers questions.

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

- Alberta's Law Enforcement Review Board is restricted to dealing with Charter issues.

The *Administrative Procedures and Jurisdiction Act* is available at [www.qp.gov.ab.ca/documents/Acts/A03.cfm?frm\\_isbn=0779745175](http://www.qp.gov.ab.ca/documents/Acts/A03.cfm?frm_isbn=0779745175).

The *Designation of Constitutional Decision Makers Regulation* is available at [www.qp.gov.ab.ca/documents/Regs/2006\\_069.cfm?frm\\_isbn=0779744799](http://www.qp.gov.ab.ca/documents/Regs/2006_069.cfm?frm_isbn=0779744799).

## Ontario

In June 2006, the Ontario government announced that it would standardize the public appointments process for its adjudicative and regulator agencies, in order "to attract and retain qualified individuals who reflect the diversity of Ontario." The new policy standardizes the length of appointment at an initial two-year term, with discretion to reappoint for a subsequent three-year and further five-year terms, to a maximum of ten years. Effective September 1, 2006, appointees' remuneration also will be standardized at levels similar to remuneration for Ontario public service executives. A press release outlining these changes is available at [ogov.newswire.ca/ontario/GPOE/2006/06/29/c7178.html?lmatch=&lang=e.html](http://ogov.newswire.ca/ontario/GPOE/2006/06/29/c7178.html?lmatch=&lang=e.html).

The Ontario government issued a press release in September, 2006 ([www.gov.on.ca/MGS/en/News/053482.html](http://www.gov.on.ca/MGS/en/News/053482.html)), indicating that it has retained a facilitator to improve services to the public at the Assessment Review Board, Board of Negotiation, Conservation Review Board, Environmental Review Tribunal and Ontario Municipal Board. The facilitator will work with the five agencies to improve service delivery, through inter-agency cooperation and coordination of operations, administration and dispute resolution processes. The government also announced the creation of an Agency Modernization Advisory Council that will develop tools to support and enhance the governance expertise of agency appointees.

## Quebec

Quebec amended *An Act Respecting Administrative Justice* with *An Act to amend the Act respecting administrative justice and other legislative provisions* (Bill 103), and has also brought in to force a *Code of ethics applicable to the members of the Administrative Tribunal of Quebec*.

The most significant amendment to *An Act Respecting Administrative Justice* is a provision that tribunal members of the Administrative Tribunal of Quebec are appointed to hold office "during good behaviour". Other amendments include:

- Provisions on ethical behaviour for tribunal members;
- Amendments to rules of procedure; and
- A requirement to offer conciliation in cases dealing with compensation and benefits.

The full text of *An Act Respecting Administrative Justice* is available at [www2.publicationsduquebec.gouv.qc.ca/](http://www2.publicationsduquebec.gouv.qc.ca/)

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

[dynamicSearch/telecharge.php?type=2&file=/J\\_3/J3\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/J_3/J3_A.html). The full text of the Regulation *Code of ethics applicable to the members of the Administrative Tribunal of Quebec* is available at [www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/J\\_3/J3R0\\_1\\_A.HTM](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/J_3/J3R0_1_A.HTM).

## **Federal Government**

The *Federal Accountability Act* (introduced in April, 2006 as Bill C-2) was given Royal Assent on December 12, 2006. The new Act makes substantive changes to 45 statutes and amends over 100 others and is intended to “strengthen accountability and increase transparency and oversight” in government operations. Among the various reforms, those initiatives with administrative justice implications include:

- Creation of a Public Appointments Commission (within the Prime Minister’s portfolio) to
  - oversee, monitor and report on the selection process for appointments to boards, commissions, agencies and Crown corporations, and
  - set a code of practice to govern the selection process for Governor-in-Council appointments; and
- Creation of a Public Servants Disclosure Protection Tribunal, which will have the power to order remedies and discipline for complaints referred to it by the Public Sector Integrity Commissioner.

The *Federal Accountability Act* is to be available online on the Parliament of Canada's [LEGISInfo](http://www.legisinfo.ca) website.

The Immigration and Refugee Board of Canada (IRB) issued a [Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB](#). Under this Guideline, a vulnerable person is defined as an individual “whose ability to present their case before the Immigration and Refugee Board of Canada (IRB) is severely impaired.” The purpose is to ensure that individuals who are identified as vulnerable under the Guideline are provided with procedural accommodations so that they will not be disadvantaged in presenting their case before the IRB.

And in March, 2006, the IRB released its *Report on the Immigration Appeal Division Innovation Initiative*, which is intended to make the Immigration Appeal Division a “less formal, more flexible tribunal that is able to deliver administrative justice more simply and quickly, with the same high standard of fairness.” The Report identifies the principal factors contributing to backlog and longer processing times and outlines recommendations to address these concerns in the three stages of an IAD appeal (early information-gathering; early resolution; and hearing readiness, hearing and post-hearing matters). The Plan is available at [www.irb-cisr.gc.ca/en/about/tribunals/iad/innovation/plan\\_e.pdf](http://www.irb-cisr.gc.ca/en/about/tribunals/iad/innovation/plan_e.pdf)

## **United Kingdom**

The *Tribunals, Courts and Enforcement Bill*, (with Part 1 of the seven-part omnibus proposing

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

wide-ranging reforms to the administrative justice system) was introduced in the House of Lords on November 16, given Second Reading on November 29, and considered by the Grand Committee on December 13 and 14, 2006. The Bill is still to be considered by the House of Commons. The Bill was published in draft on July 25, 2006. The Bill and its current status can be viewed at the [Department of Constitutional Affairs](#) website.

The Bill proposes to implement key recommendations for administrative justice reform made in the July, 2004 White Paper "*Transforming Public Services: Complaints, Redress and Tribunals*", the government's response to the August 2001 Leggat Report *Tribunals for Users: One System, One Service*. The Bill proposes creation of a new, simplified statutory framework for tribunals, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions and new appeal rights. Essential components of the Bill include:

- Creation of a unified, two-tiered tribunal structure, comprised of the First-tier Tribunal (primarily first level decision-making or appeals from line ministry decisions) and an Upper Tribunal (primarily an appellate tribunal from First-tier Tribunal decisions);
- A new judicial office, the Senior President of Tribunals, that will be created to oversee the tribunal judiciary;
- Granting the Lord Chancellor the power to transfer the jurisdiction of most central government tribunals to the new structure from the various government departments responsible for the primary legislation that originally created the tribunals (a few specialist tribunals and tribunals operated by local government are not yet included);
- Placing a duty on the Lord Chancellor to provide administrative support to the new tribunals, as well as the major tribunals whose jurisdictions will not be transferred to the unified structure (employment tribunals, the Employment Appeal Tribunal and the Asylum and Immigration Tribunal);
- Authorizing the Senior President and the Lord Chancellor to establish "chambers" within the two tribunals, so that the many jurisdictions transferred can be grouped together according to functional and/or geographic criteria (each "chamber" will be headed by a "Chamber President");
- A unified appeal structure that will apply to all tribunals, with the following characteristics:
  - The grounds of appeal must relate to a point of law and the appeal rights may only be exercised with permission;
  - The Upper Tribunal can either remit a case back to the First-tier Tribunal, or it can substitute its own finding;
  - The Upper Tribunal will have jurisdiction to deal with certain judicial review cases that the High Court would otherwise handle, where they fall within a class specified in a direction of the Lord Chief Justice or otherwise transferred by the High Court; and,

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

- In most cases, a decision of the Upper Tribunal may be appealed to the High Court on a question of law, with permission.

Other aspects of the draft Bill include:

- Creation of a new Tribunals Procedure Committee to make tribunal rules, in place of the multiplicity of rule-making powers that currently exist;
- The Senior President will have statutory authority to supplement Tribunal Procedure Rules with practice directions, which may take the form of guidance, interpretation of the law, matters of precedent or the delegation of judicial functions to senior members;
- For decisions that are subject to appeal, the First-tier Tribunal will have a discretionary power to reconsider a decision and, where an error was made, re-decide the matter without an appeal;
- The Upper Tribunal will have the powers of the High Court/Court of Session to require the attendance and examination of witnesses and the production and inspection of documents;
- Monetary awards made by both tribunals would be enforceable through the courts; and,
- Tribunal members may be assigned to sit in more than one chamber, allowing the tribunal to deploy them to multiple jurisdictions, without having to go through the appointment process for each jurisdiction.

The Bill would also transform the current Council on Tribunals into the Administrative Justice and Tribunals Council (AJTC). The AJTC will have oversight responsibility that is broader than strictly tribunals, which is the Council on Tribunals' current focus. The AJTC will be charged with advising the Lord Chancellor, the Senior President and others on how to make the administrative justice system, as a whole, more accessible, fair and efficient. It will be non-departmental and independent of the Crown.

The new Tribunals Service began operating in April 2006 and it will provide common administrative support to the tribunals. The Tribunals Service, created through an administrative reorganization, did not require legislation.

## **Australia**

The Administrative Review Council (ARC) released its draft report on *Government Agency Coercive Information-Gathering Powers*. The ARC considers that coercive information-gathering powers should be exercised effectively, efficiently and in a manner consistent with administrative law principles and that an appropriate balance be maintained between agency objectives and the rights of individuals. The draft report focuses on the coercive information-gathering powers of six government agencies, and identifies broad principles applicable to coercive information-gathering powers generally. The ARC invites written submissions on the draft report by February 23, 2007. The draft report is available through links at the [ARC website](#).

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

The ARC also received terms of reference from the Attorney-General for a review of administrative decisions in areas of complex and specific business regulation and commenced preliminary work on the project. The ARC also reports working on a practical publication on procedural fairness for government decision makers.

In Queensland, a Parliamentary Committee on Legal, Constitutional and Administrative Review initiated an inquiry in December of 2005, *Accessibility of Administrative Justice*. The inquiry will review the effectiveness and accessibility of the statutory mechanisms that provide administrative justice under Queensland's *Freedom of Information Act* and *Judicial Review Act*. Included in the review is effective and efficient access to administrative justice and the availability of information on government decisions and actions. The Committee's discussion paper for the inquiry is available at [www.parliament.qld.gov.au/LCARC/view/committees/documents/lcArc/other Publications/IPadmjus.pdf](http://www.parliament.qld.gov.au/LCARC/view/committees/documents/lcArc/other%20Publications/IPadmjus.pdf). The Committee discussed those submissions at an April 2006 conference and has published a paper setting out the outcomes and recommendations. The Conference paper is available at [www.parliament.qld.gov.au/LCARC/view/committees/documents/lcArc/inquiries/admin Justice/Outcomes%20ABC.pdf](http://www.parliament.qld.gov.au/LCARC/view/committees/documents/lcArc/inquiries/admin%20Justice/Outcomes%20ABC.pdf). The Committee will consider the recommendations in preparing its report to Parliament.

## **New Zealand**

The [New Zealand Law Commission](http://www.lawcom.govt.nz) announced that it will, in conjunction with the Ministry of Justice, provide a final report on the issues involved in establishing a unified tribunal structure. The report is to include a draft bill to establish the new unified tribunal structure. In drafting the bill the Commission and the Ministry of Justice will have regard to the Government response to the Commission's earlier recommendations set out in *Delivering Justice: Review of Courts and Tribunals* and any matters raised in further consultation with the tribunals affected. No other information about this was readily available on the Law Commission or the Ministry of Justice websites. The Law Commission's report *Delivering Justice for All* is available at: [www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=89](http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=89). The government's response is available at [www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all/index.html](http://www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all/index.html).

## **United Nations**

In April, 2006, the United Nations replaced the Commission on Human Rights with the new Human Rights Council. The new framework for the Human Rights Council includes "universal periodic reviews" of the human rights situations in all member states, a procedure for suspending membership of Council members if they commit "gross and systematic" violations of human rights, and a more simplified process to convene special sessions to respond promptly to human rights crises. The first Council session took place from June 19 to 30, 2006. The United Nations Human Rights Council website is available at [www.ohchr.org/english/bodies/hrcouncil/](http://www.ohchr.org/english/bodies/hrcouncil/).

ADMINISTRATIVE JUSTICE OFFICE

PRESENTATION TO THE ADMINISTRATIVE LAW SUBSECTION - CBA-BC

JANUARY 18, 2007

## 7. CONCLUSION

The *ATA* is a creative and innovative “made in BC” response to address the specific issues and challenges faced by British Columbia’s administrative justice community. While some questions of interpretation have been raised in its initial application, a number of tribunals have indicated that, overall, the *ATA* has assisted them by providing clarity and standardized procedures. The *ATA* has provided tribunals with the clear ability to undertake proactive case management, establish non-adjudicative dispute resolution processes and maintain control of tribunal proceedings. Many of the “start-up” issues will likely be resolved over time, through tribunal and court decisions.

The government, through the AJO, will continue to monitor and evaluate the effectiveness of the legislation and may identify areas where it is necessary to bring forward legislative amendments, to ensure that the government’s initial goals and intentions for the *ATA* are achieved. In doing so, the AJO will continue to look to, and rely on, the invaluable contributions from interested practitioners and organizations such as the Canadian Bar Association.

For further information, contact the AJO at:

Administrative Justice Office  
300-702 Fort Street  
P.O. Box 9210, Stn Prov Govt  
Victoria, BRITISH COLUMBIA, V8W 9J1  
Tel: 250-387-0058 Fax: 250-387-0079  
Web site: [www.gov.bc.ca/ajo/](http://www.gov.bc.ca/ajo/)



## APPENDIX 1

### ADMINISTRATIVE TRIBUNALS IN BRITISH COLUMBIA TO WHICH THE *ADMINISTRATIVE TRIBUNAL ACT* APPLIES

As at January, 2007

The table below identifies those entities to which BC's *Administrative Tribunals Act* applies, including the ministry responsible for the tribunals, the tribunals' enabling legislation and their Web sites, where available.

Administrative Tribunal or Other Administrative Justice Entity	Enabling Legislation	Responsible Ministry
Agricultural Land Commission <a href="http://www.landcommission.gov.bc.ca/">www.landcommission.gov.bc.ca/</a>	<i>Agricultural Land Commission Act</i>	Agriculture and Lands
BC Board of Parole <a href="http://www.gov.bc.ca/bcparole/">www.gov.bc.ca/bcparole/</a>	<i>Parole Act</i>	Public Safety and Solicitor General
BC Review Board <a href="http://www.bcrb.bc.ca/">www.bcrb.bc.ca/</a>	<i>Criminal Code of Canada</i>	Attorney General
Building Code Appeal Board <a href="http://www.housing.gov.bc.ca/building/">www.housing.gov.bc.ca/building/</a>	<i>Local Government Act</i>	Housing (Forest and Range)
Director, Business Practices and Consumer Protection <sup>13</sup> <a href="http://www.bpcpa.ca/home.htm">www.bpcpa.ca/home.htm</a>	<i>Business Practices and Consumer Protection Act</i>	Public Safety and Solicitor General
Community Care and Assisted Living Appeal Board <a href="http://www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=5438%20">www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=5438%20</a>	<i>Community Care and Assisted Living Act</i>	Health
Employment and Assistance Appeal Tribunal <a href="http://www.gov.bc.ca/eaat/default.htm">www.gov.bc.ca/eaat/default.htm</a>	<i>Employment and Assistance Act</i>	Employment and Income Assistance
Employment Standards Tribunal <a href="http://www.bcest.bc.ca/">www.bcest.bc.ca/</a>	<i>Employment Standards Act</i>	Labour and Citizens' Services
Farm Industry Review Board <a href="http://www.firb.gov.bc.ca/">www.firb.gov.bc.ca/</a>	<i>Natural Products Marketing (BC) Act</i>	Agriculture and Lands
Financial Institutions Commission <a href="http://www.fic.gov.bc.ca/">www.fic.gov.bc.ca/</a>	<i>Financial Institutions Act</i>	Finance
Financial Services Tribunal <a href="http://www.fic.gov.bc.ca/fst/">www.fic.gov.bc.ca/fst/</a>	<i>Financial Institutions Act</i>	Finance

<sup>13</sup> The Director, Business Practices and Consumer Protection and the Director, Residential Tenancy Branch are not administrative tribunals, but certain *Administrative Tribunals Act* provisions apply to their processes.

<b>Administrative Tribunal or Other Administrative Justice Entity</b>	<b>Enabling Legislation</b>	<b>Responsible Ministry</b>
Forest Practices Board <a href="http://www.fpb.gov.bc.ca/">www.fpb.gov.bc.ca/</a>	<i>Forest and Range Practices Act</i>	Forests and Range
Hospital Appeal Board <a href="http://www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=5828">www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=5828</a>	<i>Hospital Act</i>	Health
Human Rights Tribunal <a href="http://www.bchrt.bc.ca/">www.bchrt.bc.ca/</a>	<i>Human Rights Code</i>	Attorney General
Industry Training Appeal Board <a href="http://www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=215013">www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=215013</a>	<i>Industry Training Authority Act</i>	Economic Development
Labour Relations Board <a href="http://www.lrb.bc.ca/">www.lrb.bc.ca/</a>	<i>Labour Relations Code</i>	Labour and Citizens' Services
Mediation and Arbitration Board <a href="http://www.em.gov.bc.ca/subwebs/M&amp;ABoard/">www.em.gov.bc.ca/subwebs/M&amp;ABoard/</a>	<i>Petroleum and Natural Gas Act</i>	Energy, Mines and Petroleum Resources
Mental Health Review Board <a href="http://www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=6030">www.fin.gov.bc.ca/oop/brdo/boardView.asp?boardNum=6030</a>	<i>Mental Health Act</i>	Health
Passenger Transportation Board <a href="http://www.ptboard.bc.ca/">www.ptboard.bc.ca/</a>	<i>Passenger Transportation Act</i>	Transportation
Property Assessment Appeal Board <a href="http://www.assessmentappeal.bc.ca/">www.assessmentappeal.bc.ca/</a>	<i>Assessment Act</i>	Small Business and Revenue
Property Assessment Review Panels <a href="http://www.sbr.gov.bc.ca/parp/">www.sbr.gov.bc.ca/parp/</a>	<i>Assessment Act</i>	Small Business and Revenue
Director, Residential Tenancy Branch <sup>1</sup> <a href="http://www.rto.gov.bc.ca/">www.rto.gov.bc.ca/</a>	<i>Residential Tenancy Act and Manufactured Home Park Tenancy Act</i>	Housing (Forests and Range)
Safety Standards Appeal Board <a href="http://www.mcaaws.gov.bc.ca/ssab/">www.mcaaws.gov.bc.ca/ssab/</a>	<i>Safety Standards Act</i>	Housing (Forests and Range)
Securities Commission <a href="http://www.bcsc.bc.ca/">www.bcsc.bc.ca/</a>	<i>Securities Act</i>	Attorney General
Utilities Commission <a href="http://www.bcuc.com/">www.bcuc.com/</a>	<i>Utilities Commission Act</i>	Attorney General
Workers Compensation Appeal Tribunal <a href="http://www.wcat.bc.ca/">www.wcat.bc.ca/</a>	<i>Workers Compensation Act</i>	Labour and Citizens' Services

## APPENDIX 2

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

This table is provided for convenience purposes only. All attempts have been made to maintain its accuracy and it may be updated from time to time. To ensure accuracy of the application of *ATA* provisions to an administrative tribunal, please consult the tribunal's enabling legislation.

<b>LIST OF TRIBUNALS/ENTITIES AND ACRONYMS</b>																								
Acronym	Tribunal				Acronym	Tribunal				Acronym	Tribunal													
ALC	Agricultural Land Commission				Forest PB	Forest Practices Board				PAAB	Property Assessment Appeal Board													
BCAB	Building Code Appeal Board				FST	Financial Services Tribunal				PARP	Property Assessment Review Panels													
BCRB	BC Review Board				HAB	Hospital Appeal Board				PB	Parole Board													
BPCP	Director, Business Practices and Consumer Protection				HRT	Human Rights Tribunal				PTB	Passenger Transportation Board													
CCALAB	Community Care and Assisted Living Appeal Board				ITAB	Industry Training Appeal Board				RTB	Director, Residential Tenancy Branch													
EAAT	Employment and Assistance Appeal Tribunal				LRB	Labour Relations Board				SC	Securities Commission													
EST	Employment Standards Tribunal				MAB	Mediation and Arbitration Board				SSAB	Safety Standards Appeal Board													
Farm IRB	Farm Industry Review Board				MHRP	Mental Health Review Panels				UC	Utilities Commission													
FIComm	Financial Institutions Commission									WCAT	Workers Compensation Appeal Tribunal													

  

<b>APPLICATION OF <i>ADMINISTRATIVE TRIBUNALS ACT</i></b>																										
Tribunal	ALC	BCAB	BCRB	BPCP	CCALAB	EAAT	EST	Farm IRB	FIComm <sup>14</sup>	FST	Forest PB	HAB	HRT	ITAB	LRB	MAB	MHRP	PB	PTB	PAAB	PARP	RTB	SC	SSAB	UC	WCAT
<i>ATA</i> Provision																										
<u>Section 1: Definitions</u>	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	P <sup>15</sup>	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	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	X	X	

<sup>14</sup> Application of the *ATA* to FIComm is subject to proclamation of section 51 of Bill 18 – 2006 (*Finance Statutes Amendment Act, 2006*).

<sup>15</sup> 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.

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT**

<b>Tribunal</b>	<b>ALC</b>	<b>BCAB</b>	<b>BCRB</b>	<b>BPCP</b>	<b>CCALAB</b>	<b>EAAT</b>	<b>EST</b>	<b>Farm IRB</b>	<b>FIComm</b>	<b>FST</b>	<b>Forest PB</b>	<b>HAB</b>	<b>HRT</b>	<b>ITAB</b>	<b>LRB</b>	<b>MAB</b>	<b>MHRP</b>	<b>PB</b>	<b>PTB</b>	<b>PAAB</b>	<b>PARP</b>	<b>RTB</b>	<b>SC</b>	<b>SSAB</b>	<b>UC</b>	<b>WCAT</b>
<b>ATA Provision</b>																										
<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	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		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	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	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	X	X	
<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			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			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

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT**

<b>Tribunal</b>	<b>ALC</b>	<b>BCAB</b>	<b>BCRB</b>	<b>BPCP</b>	<b>CCALAB</b>	<b>EAAT</b>	<b>EST</b>	<b>Farm IRB</b>	<b>FIComm</b>	<b>FST</b>	<b>Forest PB</b>	<b>HAB</b>	<b>HRT</b>	<b>ITAB</b>	<b>LRB</b>	<b>MAB</b>	<b>MHRP</b>	<b>PB</b>	<b>PTB</b>	<b>PAAB</b>	<b>PARP</b>	<b>RTB</b>	<b>SC</b>	<b>SSAB</b>	<b>UC</b>	<b>WCAT</b>
<b>ATA Provision</b>																										
<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	
<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												
<u>Section 26:</u> Organization of tribunal					X			X				X		X			P		X					X		

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT**

<b>Tribunal</b>	<b>ALC</b>	<b>BCAB</b>	<b>BCRB</b>	<b>BPCP</b>	<b>CCALAB</b>	<b>EAAT</b>	<b>EST</b>	<b>Farm IRB</b>	<b>FIComm</b>	<b>FST</b>	<b>Forest PB</b>	<b>HAB</b>	<b>HRT</b>	<b>ITAB</b>	<b>LRB</b>	<b>MAB</b>	<b>MHRP</b>	<b>PB</b>	<b>PTB</b>	<b>PAAB</b>	<b>PARP</b>	<b>RTB</b>	<b>SC</b>	<b>SSAB</b>	<b>UC</b>	<b>WCAT</b>	
<b>ATA Provision</b>																											
<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
<u>Section 31:</u> Summary dismissal	P				X			X		X <sup>16</sup>		X		X					X	P					P		X
<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

<sup>16</sup> Subject to proclamation of section 57 of Bill 18 – 2006 (*Finance Statutes Amendment Act, 2006*). Currently, section 242.1(7) of the *Financial Institutions Act* provides that sections 11 to 16, 18 to 20, 22, 24, 32, 35, 37 to 42, 44, 47, 48 to 57 and 59 to 61 of the ATA apply to appeals conducted by the FST.

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT**

<b>Tribunal</b>	<b>ALC</b>	<b>BCAB</b>	<b>BCRB</b>	<b>BPCP</b>	<b>CCALAB</b>	<b>EAAT</b>	<b>EST</b>	<b>Farm IRB</b>	<b>FIComm</b>	<b>FST</b>	<b>Forest PB</b>	<b>HAB</b>	<b>HRT</b>	<b>ITAB</b>	<b>LRB</b>	<b>MAB</b>	<b>MHRP</b>	<b>PB</b>	<b>PTB</b>	<b>PAAB</b>	<b>PARP</b>	<b>RTB</b>	<b>SC</b>	<b>SSAB</b>	<b>UC</b>	<b>WCAT</b>
<b>ATA Provision</b>																										
<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	P			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> Jurisdiction over constitutional questions															X								X			
<u>Section 44:</u> No jurisdiction over constitutional questions	X				X	X				X	X	X		X		X	X	X	X	X	X	X		X	X	X
<u>Section 45:</u> Jurisdiction over constitutional questions, except <i>Charter</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		
<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

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT**

<b>Tribunal</b>	<b>ALC</b>	<b>BCAB</b>	<b>BCRB</b>	<b>BPCP</b>	<b>CCALAB</b>	<b>EAAT</b>	<b>EST</b>	<b>Farm IRB</b>	<b>FIComm</b>	<b>FST</b>	<b>Forest PB</b>	<b>HAB</b>	<b>HRT</b>	<b>ITAB</b>	<b>LRB</b>	<b>MAB</b>	<b>MHRP</b>	<b>PB</b>	<b>PTB</b>	<b>PAAB</b>	<b>PARP</b>	<b>RTB</b>	<b>SC</b>	<b>SSAB</b>	<b>UC</b>	<b>WCAT</b>
<b>ATA Provision</b>																										
<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		
<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						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
<u>Section 58:</u> Standard of review with privative clause	X				X	X	X	X		X <sub>17</sub>		X		X	P			X	X			X		X		X
<u>Section 59:</u> Standard of review if no privative clause													X			X	X									

<sup>17</sup> Subject to proclamation of section 57 of Bill 18 – 2006 (*Finance Statutes Amendment Act, 2006*) coming into effect. Currently, section 242.1(7) of the *Financial Institutions Act* provides that sections 11 to 16, 18 to 20, 22, 24, 32, 35, 37 to 42, 44, 47, 48 to 57 and 59 to 61 of the ATA apply to appeals conducted by the FST.

**APPLICATION OF ADMINISTRATIVE TRIBUNALS ACT**

<b>Tribunal</b>	<b>ALC</b>	<b>BCAB</b>	<b>BCRB</b>	<b>BPCP</b>	<b>CCALAB</b>	<b>EAAT</b>	<b>EST</b>	<b>Farm IRB</b>	<b>FIComm</b>	<b>FST</b>	<b>Forest PB</b>	<b>HAB</b>	<b>HRT</b>	<b>ITAB</b>	<b>LRB</b>	<b>MAB</b>	<b>MHRP</b>	<b>PB</b>	<b>PTB</b>	<b>PAAB</b>	<b>PARP</b>	<b>RTB</b>	<b>SC</b>	<b>SSAB</b>	<b>UC</b>	<b>WCAT</b>
<b>ATA Provision</b>																										
<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 3**

### **Details of the ATA Provisions**

#### **1. Definitions<sup>18</sup>**

##### ***Section 1***

As is typical in legislation, section 1 of the *ATA* sets out the definitions that apply to the matters referred to in the Act.

Critical among these definitions is the word “tribunal”, because the definition clarifies that the *ATA* only applies to a tribunal if and to the extent its enabling legislation adopts provisions of the *ATA*. Also of interest are following:

- The definition 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;
- The term “constitutional question” is defined by reference to section 8 of the *Constitutional Question Act*;
- “(C)ourt” is defined as the BC Supreme Court; and
- The definition of “dispute resolution process” makes it clear that the tribunal has flexibility to establish its own processes in this area.

#### **2. Appointments**

The appointment provisions in sections 2 through 10 substantially mirror those of the *Administrative Tribunals Appointment and Administration Act (ATAA Act)*. These sections provide for tribunal appointments to be made using a merit-based process.

Sections 2 to 10 of the *ATA* now apply to most provincial tribunals, with a few minor exceptions. On proclamation, section 51 of Bill 18 – 2006 (*Finance Statutes Amendment Act, 2006*) will replace the references to the *ATAA Act* with reference to some of the *ATA* appointment provisions for the Financial Institutions Commission.

The Environmental Appeal Board and the Forest Appeals Commission will then be the only entities to which the *ATAA Act* will still apply. The *ATAA Act* will be repealed once those exceptions are addressed and all of the reform provisions will then be consolidated under one statute (the *ATA*).

---

<sup>18</sup> This Appendix is based on materials prepared by the Administrative Justice Office (AJO) for the Continuing Legal Education Society of British Columbia, November 2006. The AJO would like to acknowledge its reliance on the work of Wendi J. Mackay in its preparation of this material, as well as the contributions by the various students from the University of Victoria’s cooperative education program who have worked at the AJO. Any opinions, errors or omission are those of the AJO.

## APPENDIX 3

The ATA does not impose any specific process on an appointing authority for conducting the merit-based appointments, and does not require that the appointing authority advertise the opportunity for an appointment. However, BC's Board Resourcing and Development Office (BRDO) has established guidelines and policies that guide the recruitment and selection processes. Those guidelines and policies, together with a list of vacant tribunal positions, are easily accessible at BRDO's web site ([www.fin.gov.bc.ca/oop/brdo/adverts.htm](http://www.fin.gov.bc.ca/oop/brdo/adverts.htm)). In this way, individuals who may be interested in serving on an administrative tribunal in BC have easy access to information about applying for an appointment and the criteria and requirements for any vacant tribunal positions.

### *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. Subsequent reappointments may be for terms of up to 5 years. The ATA does not limit the number of times a tribunal chair may be reappointed.

### *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, to 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.

### *Section 4*

Section 4 deals with what happens when the chair is, or expects to be, absent. In the case of an expected absence, the chair may designate a replacement. Where the absence is for an extended period or unanticipated, the appointing authority may designate a replacement. Replacements are likely to be made from among the tribunal's members, but if necessary, the appointing authority may designate 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 by the requirement that the replacement either already be a member or possess the standard appointment qualifications.

### *Section 5*

Section 5 allows the appointing authority, in consultation with the chair, to replace a tribunal member who will be absent for an extended period. Because the appointment is for a shorter term, the usual merit-based process is not required, but the person appointed must 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.

## APPENDIX 3

### *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. Limiting such appointments to six months and only one such appointment in any two-year period maintains the 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 the 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 eliminates the possible need to recommence a proceeding because an appointment has expired before the proceeding is completed. Section 7 gives flexibility to meet a tribunal's operational needs when the end of a term may be approaching.

### *Section 8*

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

In *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372, the Court considered section 86.3 of the *Residential Tenancy Act* (S.B.C. 2002, Chapter 78), which is very similar to section 8 of the *ATA*. The implications of the *McKenzie* case will be the topic of a separate session and discussed in more detail during that part of this CLE program.

### *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.

Section 9 highlights the important and delicate balance between tribunal accountability for the use of public resources and independent decision-making. Memoranda of understanding (MOUs) are recognized "best practices" for addressing issues that may affect that balance and supporting a positive relationship between a tribunal chair and the minister responsible for the tribunal.

The AJO has worked with tribunals, senior tribunal staff and ministry staff to develop a model MOU, which sets out various options and considerations and is available on the AJO website. Two MOUs have been finalized recently, between the chair of the Mediation and Arbitration Board and the Minister of Energy, Mines and Petroleum Resources and between the chair of the Safety Standards Appeal Board and the Minister Responsible for Housing. A number of other tribunals and ministers are considering MOUs to govern their relationships.

## APPENDIX 3

### *Section 10*

Section 10 applies Treasury Board directives to the remuneration and expenses of members, to provide consistency. The applicable Treasury Board Directive sets specific ranges for remuneration for most tribunals. Treasury Board Directive 3/04 ([www.fin.gov.bc.ca/ocg/fmb/manuals/TBDirs/TBD3-04.doc](http://www.fin.gov.bc.ca/ocg/fmb/manuals/TBDirs/TBD3-04.doc)) is currently under review and is anticipated to be replaced with an updated version.

### **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. The government has not issued any regulations under section 60 and none are contemplated at this time.

While many tribunals had well-developed rules prior to the enactment of the *ATA*, the *ATA* has ensured that the authority for making those rules is clear and that those rules will be easily available to the public. For other tribunals, section 11 has provided the impetus for making rules: The Community Care and Assisted Living Appeal Board, the Hospital Appeal Board, the Passenger Transportation Board and the Safety Standards Appeal Board have all developed rules pursuant to section 11.

Implementation of the *ATA* has also led a number of tribunals to re-examine their rules, to ensure they are adequate for the tribunals' mandates and that the rules are not a barrier to accessing the tribunals' processes. The Employment Standards Tribunal has issued revised rules within the past year, and several other tribunals are currently in the process of drafting or revising their rules.

### **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 necessary procedural steps to complete an application; and,
- the usual time taken to render a final decision with reasons 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.

This section is illustrative of the balanced approach taken by the *ATA*: the legislation does not impose strict and inflexible deadlines; it gives the tribunal the flexibility to consider the usual timeframes to

## APPENDIX 3

complete its processes, but must publicly set out those timelines and participants may expect the tribunal 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.

All of the tribunals to which section 12 applies have now developed practice directives that indicate their expected timelines (see Appendix 2 for a list of those tribunals). The AJO has prepared precedents for practice directives. They are available on the AJO website at [www.gov.bc.ca/ajo/popt/overview\\_tribunal\\_tool\\_kit.htm](http://www.gov.bc.ca/ajo/popt/overview_tribunal_tool_kit.htm).

### *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 a tribunal issues practice directives, the directives 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.

Of the tribunals to which section 13 applies, the Financial Services Tribunal ([www.fic.gov.bc.ca/fst/pdf/FST %20Practice%20Guidelines.pdf](http://www.fic.gov.bc.ca/fst/pdf/FST%20Practice%20Guidelines.pdf)), the Property Assessment Appeal Board ([www.assessmentappeal.bc.ca/aboutAppealProcess.asp](http://www.assessmentappeal.bc.ca/aboutAppealProcess.asp)), the Safety Standards Appeal Board ([www.housing.gov.bc.ca/ssab/guidelines.htm](http://www.housing.gov.bc.ca/ssab/guidelines.htm)) and the BC Utilities Commission ([www.bcuc.com/Guidelines.aspx](http://www.bcuc.com/Guidelines.aspx)) have issued practice directives.

## **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*

Tribunals to which section 15 applies may 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.

## APPENDIX 3

### 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. Tribunals that have this authority can 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 hearing opportunity will likely depend on what has already happened 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).

The AJO has prepared a guide to assist tribunals in deciding when and how they may wish to use certain ATA provisions, such as section 18, if a party, intervener, or other person fails to comply with the tribunal's orders or processes. *A Guide for Tribunals: Obtaining Compliance with Tribunal Processes* is available on the AJO website at [http://www.gov.bc.ca/ajo/popt/obtaining\\_compliance.htm](http://www.gov.bc.ca/ajo/popt/obtaining_compliance.htm).

### 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 that proceedings are not invalidated simply because documents were 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*

Pursuant to 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.

## APPENDIX 3

### 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.

The filing fee must also accompany a notice under section 22.

#### *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 will resolve disputes in a timely manner.

#### *Section 25*

Section 25 establishes that an appeal does not stay the decision being appealed, unless the tribunal orders otherwise. Section 25 does not expressly set out criteria for the tribunal to consider when deciding whether to grant a stay, but the overall statutory scheme for the decision under appeal and the appeal process will likely be a factor for tribunals to consider when 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 panel member (or panel members) to continue with the proceedings. If the panel was composed of a sole member, the chair can organize a new panel to continue and complete the hearing, with the consent of the parties. Section 26 also allows the chair or a delegate to hear and decide preliminary matters in an application.

## APPENDIX 3

### *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, and to determine their remuneration.

## **10. Dispute Resolution**

### *Section 28*

This provision offers the opportunity for parties to resolve matters without the cost, time and uncertainty of a hearing. On second reading of the *ATA*, the Attorney General at the time indicated (Hansard, May 18, 2004 at page 11192.):

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.

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

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

### *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 requires that tribunal members be faithful, honest and impartial while executing their duties and obliges them to treat information received as a tribunal member 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;

## APPENDIX 3

- 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.

Before a tribunal can exercise this power, it must give the applicant an opportunity to make written submissions or be heard by some other means. If a tribunal dismisses all or part of an application, the tribunal must provide its decision and give reasons in writing to all parties. If a tribunal dismisses the whole of the application, this will constitute a final decision of the tribunal. As a result, the decision would be subject to judicial review proceedings, should the tribunal exercise the power provided by section 31 contrary to law.

A number of tribunals have indicated that the ability to dismiss cases summarily has been helpful in allowing them to eliminate cases over which they do not have jurisdiction, quickly and efficiently, despite the process required by subsection 31(2).

### **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. Note that section 15 of the *Legal Profession Act* (S.B.C 1998, c. 9) prohibits a person from engaging in the "practice of law" for a fee, unless the person is recognized as a lawyer or articled student by the BC Law Society. The "practice of law" is defined in section 1 of that Act.

### **14. Interveners**

#### ***Section 33***

Under this section, a tribunal may allow a person to intervene in a proceeding, if the person is 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 an intervener's participation with respect to cross-examining witnesses, leading evidence, raising issues and making written or oral submissions.

### **15. Conduct of hearing and admissibility of evidence**

#### ***Section 34***

Section 34 provides two alternatives for requiring a person to attend a hearing or produce information.

Subsection 34(1) allows a party to an application to prepare and serve a summons, "in the form established by the tribunal". Subsection 34(2) allows a party to apply to the Supreme Court for an order compelling the witness to comply with the summons.

Pursuant to subsection 34(3), the tribunal may make an order requiring a person to attend a hearing and give evidence or produce evidence in the person's possession that is admissible and relevant to the

## APPENDIX 3

application. Subsection 34(4) authorizes the tribunal to apply for a court order directing the person to comply with the tribunal's order.

For a number of tribunals, only subsections 34(3) and (4) apply, so that only the tribunal may issue summonses. However, there are some tribunals to which both alternatives apply. In either case, it is up to the tribunal to establish the process for a party to issue a summons or obtain a tribunal order.

In *Brady v. BC Human Rights Tribunal et al*, 2005 BCSC 1403, the Court considered the Human Rights Tribunal's authority, pursuant to section 34(3)(b), to order the production of documents containing sensitive personal information. The Court concluded that it would be premature to intervene in the proceedings until the Tribunal had made a final decision and observed that steps could be taken to protect the applicant's privacy. Madam Justice Russell stated (at para. 16):

As indicated above, the Tribunal's ability to make rulings respecting pre-hearing production of documents is a vital component of its role.

### ***Section 35***

Section 35 confirms the discretion of a tribunal in deciding whether 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 tribunal's records. If a recording is destroyed, the validity of the proceedings is not affected.

### ***Section 36***

Section 36 allows a tribunal to hold any combination of written, electronic and oral hearings. Tribunals may permit video or teleconference hearings, and the language is flexible enough to permit the use of new technology 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 the outcome of another is decided. This gives tribunals the 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 that a witness has disclosed sufficient evidence, the tribunal may limit examination or cross examination of the witness. Pursuant to subsection 38(3), tribunal members may also question any witness who gives oral evidence.

### ***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.

## APPENDIX 3

### *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 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, thereby reducing 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.

### *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.

The Court of Appeal considered section 42 in *Joint Industry Electricity Steering Committee and GSX Concerned Citizens Coalition et al v. B.C. Utilities Commission et al*, 2005 BCCA 233; 2005 BCCA 330. The petitioners argued (amongst other things) that the Commission, in deciding to receive certain documents in confidence, committed a breach of the rules of natural justice. While the Court of Appeal eventually granted leave to appeal (upon review by a three-member panel), Hydro has announced it will not proceed with the project that was the subject of the Commission's order. As a result, there will likely be no conclusive decision on the appropriateness of the Commission's order. Two Court of Appeal judges (Rowles and Levine J.J.A., on the review of the Chambers decision) concluded that there is a substantial issue to be argued; two judges (Thackray J.A., in Chambers, and Hall J.A., dissenting on the review of the Chambers decision) have indicated that the issue, if argued, had no possibility of success.

## **16. Constitutional issues**

Sections 43 to 46 set out three different alternatives for tribunal jurisdiction over constitutional questions. Only one of the provisions will apply to a particular tribunal.

On second reading of the *ATA*, Geoff Plant, Attorney General at the time, identified a number of reasons for the express limitations on constitutional jurisdiction (Hansard, May 18, 2004, at page 11194). 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. The Attorney General pointed out that this 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.

## APPENDIX 3

In addition, the approach to constitutional issues recognizes and acknowledges that most lay litigants are not well equipped to deal with complex constitutional arguments without legal representation. In a constitutional matter, 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 former Attorney General identified was that, even if a tribunal has the institutional capacity to deal with constitutional issues, its decisions are not binding. 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 support the approach of leaving these questions for the courts to decide.

### ***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 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 to the BC Supreme Court, including a constitutional question. A case must be stated to the court 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 federal and provincial division of powers may arise in proceedings before these tribunals. This section also grants these tribunals the power, on their own initiative or at the request of a party, to refer a constitutional question over which they have jurisdiction to the BC Supreme Court. Like section 43, tribunals must state a case on the Attorney General's request.

### ***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*.

## **17. Orders and decisions**

### ***Section 47***

Section 47 gives a tribunal, subject to regulations pursuant to section 60, power to make orders for the payment of costs and expenses by requiring:

- a party to pay another party or intervener;

## APPENDIX 3

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

An order for payment of costs that is filed in the court registry has the same effect as a judgment of the court.

The Safety Standards Appeal Board and the Financial Services Tribunal have developed policy documents, indicating the factors they will consider when exercising their authority under section 47.

The AJO is not aware of any cases where the courts have considered section 47. However, in *BC Vegetable Greenhouse v. BC Vegetable Marketing Commission*, 20 May 2005, the Farm Industry Review Board reached the following conclusions about its power to award costs under section 47:

- Even though there was another costs provision in effect for the Board at the time the appeal commenced, section 47 applies, as it was in force at the time the decision on costs was made;
- Costs can be awarded under section 47 for interlocutory proceedings in an appeal to the Board, even where the appeal is dismissed prior to hearing; and,
- Section 47 authorizes a tribunal to award special costs.

The Board's decision is available on its website at [www.firb.gov.bc.ca/appeals/vegetable/bc\\_veg\\_03-23\\_costs\\_dec\\_may20\\_05.pdf](http://www.firb.gov.bc.ca/appeals/vegetable/bc_veg_03-23_costs_dec_may20_05.pdf)).

### ***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 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 a delaying tactic, wasting valuable tribunal resources and defeating the principle of timely resolution.

A few tribunals that previously had the ability to directly punish persons for contempt have lamented the loss of that power. However, the approach in the ATA reflects government policy that a finding of contempt may result in detention and such a power should be exercised by a judge. As a practical consideration, other sections of the ATA will be easier to use in most cases and probably will be more effective (e.g. sections 18, 31, 33 and 34). Where contempt does arise, the matter would most likely end up before a court in any event. The court will have the ability to deal with Charter issues, unlike most tribunals.

## APPENDIX 3

Section 13 of Ontario's *Statutory Powers and Procedures Act* (R.S.O. 1990, c. S.22) takes a similar approach to section 49 of the *ATA*, in that tribunals are empowered to refer issues of contempt to a superior court. The Ontario legislation uses a stated case as the procedural tool for bringing contempt allegations before the court. Section 13 was considered by the Ontario Court of Appeal in *McNaught v. Toronto Transit Commission*, 2005 CanLII 1485, which hints at the potential dangers in having tribunals exercise contempt powers. On behalf of the Court of Appeal, Gillese J.A. stated (at paras. 47 and 48):

When a judge is in the position of citing a person for contempt, that judge also determines whether the contempt occurred and, if so, the appropriate punishment. Section 13 of the *SPPA* divides those functions between the Board and the Divisional Court. The Board's role is limited to determining whether a *prima facie* case has been made out that contravention occurred and, if so, whether to state a case to the Divisional Court. It is the Divisional Court that conducts the "trial" and sentences.

A separation of the *prima facie* finding of contemptuous behaviour and the trial ensures that the alleged contemnor has full access to his or her rights before any finding of or punishment for contempt.

### ***Section 50***

If a tribunal makes an order for a monetary payment as part of its decision, the tribunal must 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.

In *Harley v Employment and Assistance Appeal Tribunal*, 2006 BCSC 1420, the Court considered section 87(1) of the *Employment and Assistance Regulation* (B.C. Reg. 263/2002), a provision with obligations similar to section 51 of the *ATA*. The Court found that the Tribunal had not complied with the provision, as the hearing panel failed to adequately set out its reasoning process, how it reached the conclusions it did or why it (impliedly) rejected some of the appellant's evidence.

### ***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 the parties may obtain copies of the decision.

### ***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.

## APPENDIX 3

### *Section 54*

Section 54 allows a party to file a certified copy of a decision with the court. Once filed, a party may enforce the decision as if it were a judgment of the court, making procedures such as garnishment available.

### **18. Members' protection from compulsion and immunity**

#### *Section 55*

Section 55 clarifies that a tribunal member, persons acting on behalf of or under the direction of a tribunal member and persons appointed to conduct dispute resolution processes cannot be required to testify or produce evidence obtained in the discharge of their duties in proceedings other than criminal cases. 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*

This section 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. A "decision maker" includes a tribunal member, adjudicator, registrar or other officer who makes a decision and a person who conducts a dispute resolution process.

Section 56 does not apply if the party seeking immunity acted in bad faith.

### **19. Judicial review**

Sections 57 to 59 set a standard time period for making an application for judicial review and clearly set out the Legislature's intent regarding the standards that the Legislature intends courts to apply in their review of tribunal decisions. Only one of the two alternatives for the standard of judicial review will apply to a particular tribunal.

One issue that has arisen with respect to sections 58 and 59 is the applicability of the provisions to proceedings commenced before they came into effect. The first case to deal with this issue was *St. James Community Service Society v Johnston and the BC Human Rights Tribunal* 2004 BCSC 1807 (2 December 2004), where Mr. Justice Paris (in Chambers) held that section 59 is procedural and therefore effective from time enacted. The Court found that, as section 59 of the ATA involved a procedural amendment, its applicability was retrospective. The Court appears to have applied *St. James* in *HMTQ v. Hutchinson et al.* 2005 BCSC 1421 (12 October 2005)

In *HMTQ v. Bolster & BC Human Rights Tribunal* 2005 BCSC 1491 (27 October 2005), the ATA came into force after the Tribunal's decision was issued and after the petition was filed, but before the Court hearing. The Court found that the standard of review is a substantive right and the ATA standard of review did not apply, as it altered the standard applicable at the time the Tribunal made its decision and at the time the petition was filed. Mr. Justice Parrett referred to the Court's decisions in *St. James* and *Hutchinson* and stated (at paras. 69 and 70):

In reaching the conclusion I have I am aware that my brother Paris J. in *St. James Community Service Society v. Brent E. Johnston and The British Columbia Human Rights*

### APPENDIX 3

*Tribunal*, (unreported) December 2, 2004, Vancouver Registry No. L042142, reached a different conclusion and found that the charges were procedural. I observe that in the case before him the facts were undisputed and the issues were issues of law. I also note that despite that ruling he went on to indicate his analysis, under the common law pragmatic and functional approach, would not alter his decision.

In *H.M.T.Q. v. Hutchinson et al*, 2005 B.C.S.C. 1421 at para. 72, Cullen J., for the purposes of his decision, accepted that the ATA applied and cited the decision of Paris J. in support. With the utmost deference to those decisions I have reached a different conclusion.

In *Cariboo Chevrolet Pontiac Buick GMC v. Becker*, 2006 BCSC 43 (10 January 2006), the Court distinguished *St. James Community Services Society, Hutchinson and Bolster* on the basis the petitions in those cases were filed prior to the ATA coming into force. Mr. Justice Goepel reviewed the leading authorities and texts on the retroactive application of legislation and concluded that application of the ATA in this case did not give the statute a retrospective effect, since the petition was filed after it came into force. In *James v. British Columbia (Labour Relations Board)*, 2006 BCSC 784 (17 May 2006), Mr. Justice Sigurdson applied *Cariboo Chevrolet* and concluded that he also did not have to resolve the apparent conflict between *St. James, Hutchinson, and Bolster*. Again, the petition had been filed after the ATA came into force and the Court held that section 58 applies.

This temporal issue should become less relevant as cases commenced prior to the ATA move through the administrative justice and court systems.

The Courts have considered and applied sections 57, 58 and 59 in a number of other cases. The AJO regularly prepares summaries of those cases and others that refer to different sections of the ATA. The latest summary is available on the AJO website at [www.gov.bc.ca/ajo/popt/whats\\_new.htm#recent\\_decisions](http://www.gov.bc.ca/ajo/popt/whats_new.htm#recent_decisions).

In most of the cases to date, the court has simply referred to the applicable section (58 or 59) as setting the standard of review (*Harley v Employment and Assistance Appeal Tribunal (Minister of Employment and Income Assistance)* 2006 BCSC 1420, *J.P. Metal Masters 2000 v. Director of Employment Standards* 2006 BCSC 928, *Serebrova v. Employment and Assistance Appeal Tribunal et al.* 2006 BCSC 213). As Mr. Justice Bauman stated in *Victoria Tours Limited v. Passenger Transportation Board*, 2005 BCSC 1693 (at para. 6):

Happily, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, in s. 58 thereof, dictates the standard of review one is to apply to decisions of the Board. No issue is taken before me to suggest but that that standard is "patent unreasonableness".

This does not mean that a statutory standard of review has eliminated the need for some analysis of the issue and there has been some criticism that the ATA has not completely achieved the goal of providing a clear standard for judicial review. The court must determine which of the standards of review provided by the ATA should apply in a particular case and then apply that standard to the tribunal's decision. In some cases, the analysis has been extensive (*University of B.C. v. University of B.C. Faculty Association et al*, 2006 BCSC 406).

In *Public Service Alliance of Canada, Local 05/20500 v. British Columbia (Labour Relations Board) et al.*, 2005 BCSC 577, Mr. Justice Goepel commented on the Board's submission on the applicable

### APPENDIX 3

standard of review (in which the Board referred to Court of Appeal decisions that had applied a pragmatic and functional analysis to determine the applicable standard) and stated (at paras. 27 and 28):

With respect, this submission overlooks the legislative intent behind the *ATA*. The *ATA* codifies the standard of review with respect to those tribunals to which it applies. Moreover, it is clear that the legislative intention in codifying the standard of review was to eliminate the need to engage in a pragmatic and functional analysis and to simplify the complexity of determining the standard of review: Administrative Justice Office, *Model Statutory Powers Provisions for Administrative Tribunals*, (Victoria: Ministry of the Attorney General, August 2003) at p. 88-92.

I find that the question of whether the Board has the power to order partial revocation of bargaining rights is a matter going to jurisdiction, which the *ATA* mandates must be reviewed on a standard of correctness. The natural justice question is to be decided on the basis of whether the Board acted fairly.

However, in *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364, the Court indicated that, where there is an issue as to whether a question decided by an administrative tribunal is within the tribunal's jurisdiction, the courts should continue to use a pragmatic and functional analysis.

In a number of cases on sections 58 and 59, the applicable standard of review has not been an issue, but the question as to whether the tribunal's decision was "patently unreasonable" has been (*United Brotherhood of Carpenters, supra*, *Bellman v. HMTQ et al.*, 2006 BCSC 426; *Old Dutch Foods Ltd. v. Teamsters Local Union No. 213*, 2006 BCSC 313).

The courts have also considered whether the *ATA* altered the common law definition of "patently unreasonable". In *Public Service Alliance of Canada, Local 05/20500 v. British Columbia (Labour Relations Board) et al.*, 2005 BCSC 577), the Court referred to cases that pre-date the *ATA*, to help guide the Court's assessment as to whether the tribunal's decision was patently unreasonable. In *Basura v BC (Workers Compensation Board)* 2005 BCSC 407, the Court noted that the *ATA* does not define "patent unreasonableness", except for discretionary decisions in section 58(3), which "appears to leave the common law definition in place for questions of mixed fact and law" (para. 21). In the *University of B.C.* decision, Mr. Justice Powers suggested that the definition in section 58(3) may not be exhaustive and that the existing case law may be of assistance (at para. 50).

The Court of Appeal stated the following in *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 (at para. 19):

I agree with the appellant, as does counsel for the Human Rights Tribunal, that cases decided prior to enactment of the *Administrative Tribunals Act* are no longer controlling on question of the appropriate standard of review. There was no need for the chambers judge to invoke the common-law definition of "patently unreasonable" set out in *Canada (Attorney General) v. Public Service Alliance of Canada, supra*. Rather, he should have applied the definition set out in s. 59(4) of the *Administrative Tribunals Act*.

## APPENDIX 3

### *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.

The BC Supreme Court has considered subsection 57(2) in the cases of *Andrews v. British Columbia (Labour Relations Board) et. al.*, 2005 BCSC 746 and *Golovkine v BC Human Rights Tribunal and Capital Region Housing Corporation*, (Unreported, BCSC, 8 December 2005). In *Andrews*, Madam Justice Loo held (at para. 4) that "serious grounds for relief" in subsection 57(2) means, "whether there is a reasonable likelihood or prospect that the (application) will succeed." The Court found that, as it was unlikely that the application for judicial review would succeed, there were no serious grounds for relief and the Court denied the request for an extension of time to file the application.

In *Golovkine*, the Court was also considering an application for an extension of time to apply for judicial review. The Court found that it must determine whether the petitioner had any prospect of demonstrating that the Tribunal's decision, which the Court found involved an exercise of discretion, was patently unreasonable. The Court concluded that no such prospect existed and it dismissed the 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.

(For court decisions on section 58, refer to the general discussion, above, of decisions on the standard of review.)

### *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 for whether a decision is 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.

## APPENDIX 3

To date, all of the cases in which section 59 has been considered have involved the Human Rights Tribunal. A number of those have involved applications to review preliminary Tribunal decisions on procedural matters (*Callaghan v. University of Victoria et al*, 2006 BCSC 1503; *Cariboo Chevrolet Pontiac Buick GMC v. Becker*, 2006 BCSC 43; *Shilander v. BC Human Rights Tribunal*, 2005 BCSC 728).

The Court of Appeal, in *Berezoutskaia (supra)* dealt with a Tribunal decision to dismiss a complaint, pursuant to s. 27(1)(c) of the *Human Rights Code*, on the basis there was no reasonable prospect the complaint would be successful. Smith J.A. stated (at para. 22):

However, the appellant's submission overlooks the differences in nature between decisions made with and those made without a hearing. The latter involve findings of fact on a balance of probabilities reached after a weighing of the evidence presented, while the former involve only a preliminary assessment of the evidence submitted in order to determine whether that evidence warrants going forward to the hearing stage. Thus, in dismissing the appellant's complaint without a hearing, the Tribunal member did not weigh the evidence and make findings of fact that would be subject to review pursuant to s. 59(2). Rather, she merely concluded that the evidence did not justify the time and expense of a full hearing because, in her judgment, there was no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence. Accordingly, s. 59(2) is not engaged and the exercise of this discretion falls to be reviewed according to the standard of patent unreasonableness pursuant to s. 59(3).

Applying this standard in *Rojas v. EaglePicher Energy Products Corp. et al*, 2006 BCSC 1101, the Court held that, although there was no indication that the decision was made in bad faith, the failure to consider the complete complaint (by not allowing cross rendered the decision arbitrary and patently unreasonable. The Court directed the Tribunal to reconsider the decision after having considered the entire complaint.

### **20. Regulations:**

#### ***Section 60***

Subsections 60(a) and (b) authorize the Lieutenant Governor in Council to establish, repeal or amend a tribunal rule. These subsections allow government an opportunity to act where a tribunal fails to do so and the rules are essential for the tribunal's functioning.

Section 60 also enables the Lieutenant Governor in Council to issue rules that 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.

## APPENDIX 3

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

#### *Section 61*

The standard *FOIPPA* disclosure and protection of privacy 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.

These exceptions do 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, subsections 44(2), (2.1) and (3) of the *FOIPPA* do apply, authorizing the Information and Privacy Commissioner to require a record be produced for examination of any information in that record.

### 22. British Columbia Review Board

#### *Section 62*

Section 62 addresses the anomaly of the BC Review Board, which is established under the *Criminal Code* (Canada), but to which the Province (the Lieutenant Governor in Council) makes appointments. Section 62 makes applicable to the Review Board certain of the ATA appointment provisions and section 61 of the ATA, as the Province could not do so through the federal enabling legislation (the *Criminal Code*).