



# BCCAT NEWS

## PRESIDENT'S MESSAGE

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This has been a challenging year for BCCAT. Just when we thought we could get back to focussing on core activities like education, we have, once again, had to respond to events affecting the integrity of the administrative justice system.

In July I wrote to you advising of the dismissal, without cause, of a residential tenancy arbitrator, Mary McKenzie, purportedly under the authority of section 14.9(3) of the Public Sector Employers Act. I reported that Mary had commenced judicial review proceedings in the Supreme Court of British Columbia to challenge the dismissal and the legality of section 14.9(3) of the PSEA, and that BCCAT had applied to intervene in the litigation to advance the public policy issues respecting tribunal and adjudicator independence. The government has filed a response to Mary's Petition conceding a breach of natural justice in the dismissal, but defending the legality of section 14.9(3) of the PSEA. The government has consented to BCCAT's intervention and the Petition is scheduled to be heard in the Supreme Court of BC November 23-25, 2005.

I encourage you to make a donation to the Tribunal Independence Litigation Fund established to assist Mary with her litigation costs. The burden of challenging the dismissal and the legislation falls on an individual but the impact of this action and the legislation itself affects all of us in the tribunal community, and has serious implications for adjudicator independence. Donations to the Tribunal Independence Litigation Fund may be made anonymously at any branch of the CIBC, by identifying the account entitled the "Tribunal Independence Litigation Fund" -- account number 9040-1922335. Alternatively, cheques payable to the "Tribunal Independence Litigation Fund", may be sent to Ron Ellis, Q.C., 405 - 955 Millwood Road, Toronto, Ontario, M4G 4E3. These

donations are also treated confidentially and will be anonymous.

Mary's case has received the attention of the national tribunal community. In June, the Board of Directors of the Council of Canadian Administrative Tribunals wrote to the new Attorney General expressing concern over the government's action and the implications for adjudicator independence. I will be meeting with the Board of Directors of the Society of Ontario Adjudicators and Regulators in September to discuss possible assistance and support from them for the litigation.

In other news, the Education Committee held a Curriculum Revision workshop on September 9th to identify and commence needed revisions to the AJ1 Course: Administrative Justice - Practice and Procedure for Decision Makers. This course has not been updated for several years so this work is much needed. We are hoping to be able to pilot revisions at the spring offering. The education courses continue to be well received. Our partnership with Vancouver Community College in the administration of our courses has been working very well.

BCCAT will be working with CCAT to host the next International CCAT Conference in May 2007 in Vancouver. CCAT has generously provided BCCAT with a \$10,000 grant to assist with our expenses associated with this conference.

I hope to see you at this year's Education Conference. BCCAT is celebrating its 10th Anniversary! Not only will this year's conference have excellent speakers and workshops on topics of interest to the administrative justice community, but it will be an opportunity to celebrate our achievements over the last decade. I hope you will join us.

Cheryl Vickers, President

# REGISTER NOW!

BCCAT's 10<sup>th</sup> Annual Conference  
October 23 & 24, 2005  
Richmond, B.C.

## A Decade of Achievement: Aspirations for the Future

### Featured speakers include:

- **Mr. Justice John Maxwell Evans of the Federal Court of Appeal: "Tribunals and Courts"**
- **The Honourable Mr. Wally Oppal, the Attorney-General of B.C.**
- **Ms. Margot Priest, Chief Review Officer under Can. Environmental Act, 1999: What's become of the "Tribunal From Hell?"**

*An in-depth program to bring you updates, analysis and opinions on the most significant issues and developments facing tribunal members, adjudicators, regulators, tribunal staff and administrative lawyers and counsel. You will hear from a learned and well rounded faculty of judges, leading academics, seasoned adjudicators and counsel, with plenty of interaction.*

### Featured topics include:

- Tribunal Records: Open or shut? (how to promote transparency and protect privacy) and Tales from the Crypt: Managing and mismanaging records for access and privacy
- Current Issues in Economic Regulation
- Sticky Wickets: Ethics Challenges
- Can ADR co-exist with a statutory duty to get it "right"? Does ADR compromise rights?
- Current issues for Senior Tribunal Staff: Where is it you work again?: Getting the support you need from your host ministry without compromising independence
- Performance Evaluation/Making the Grade: No Adjudicator Left Behind!

### Plus many more!

**REGISTER NOW AT [www.bccat.net](http://www.bccat.net) AND TAKE ADVANTAGE OF THIS GREAT OPPORTUNITY!**

## ADMINISTRATIVE JUSTICE OFFICE: AN UPDATE

The Administrative Justice Office (AJO) continues to work to support tribunals, their members, staff and users, especially with respect to the effective implementation of the new *Administrative Tribunals Act*. BCCAT members will be interested in the following AJO activities, undertaken since the Spring, 2005 BCCAT newsletter.

The AJO hosted a Workshop for Senior Tribunal Staff in May, 2005, which was attended by approximately 20 senior staff responsible for management of operations to BC's administrative tribunals, boards and commissions. The workshop provided a forum to discuss common operational issues, exchange experiences and creative solutions, and network with others who have similar responsibilities. More information about the workshop and the presentations, discussion and evaluations is available on the AJO's Web site at <http://www.gov.bc.ca/ajo>. The AJO is working with senior staff and BCCAT members on follow-up activities, which include a roundtable for senior staff at BCCAT's fall education conference and a second workshop in November.

The AJO's Web site has been significantly updated to provide easy public access to current information about administrative justice issues. Of particular interest to BCCAT members will be the "What's New" heading, which provides quick and easy access to updates on administrative justice issues, and the "Legislation" heading which includes, under "About the ATA", a summary of recent court cases. Links to BCCAT's Web site, course information and fall conference are also prominently displayed.

Dianne Flood participated on a panel at the Council of Canadian Administrative Tribunals Annual Conference, and the AJO contributed a paper on the ATA to the conference proceedings, which is also available on the AJO Web site.

A draft of the Model MOU, which is intended to provide a framework for a positive and co-operative working relationship between a tribunal chair and the minister responsible, was distributed in June and a further draft, reflecting comments received to-date and other new information, was distributed and posted to the AJO Web site in August. The AJO anticipates there may be further revisions to the Model MOU in the fall, 2005, after hearing from the Circle of Chairs. The model MOU will continue to be revised from time to time to include new provisions and update terminology and other references as necessary. If you have any comments, suggestions, or questions regarding the Model MOU, please contact Richard Rogers at [Richard.rogers@gov.bc.ca](mailto:Richard.rogers@gov.bc.ca) or at 250.387.1712.

The AJO has distributed *A Guide for Tribunals: Obtaining Compliance with Tribunal Processes*, which it hopes will be a valuable resource for tribunals. The new *Administrative Tribunals Act* is intended to give tribunals the powers they need to ensure their processes are effective, fair and timely, and an appropriate use of both the parties' and the public's resources. The purpose of this Guide is to assist tribunals in deciding when and how they may wish to use certain of those new ATA provisions if a party, intervener, or other person fails to comply with the tribunal's orders or processes.

*see AJO page 4*

# INSTITUTIONAL INDEPENDENCE OF ADMINISTRATIVE TRIBUNALS

Najeeb Hassan, Labour Relations Board

*FARMER CONSTRUCTION LTD., FARMER CONSTRUCTION (V.I.) LTD., FARMER MANAGEMENT INC. and PCL CONSTRUCTORS CANADA INC., BCLRB No. B213/2004 (June 25, 2004) ("Farmer")*

It has been more than a year since the Labour Relations Board issued the *Farmer* decision. That decision dealt with question whether, section 54 of the *Administrative Tribunals Appointment and Administration Act*, SBC 2003, c. 47 (the "ATAAA") deprived Labour Relations Board Vice-Chairs (adjudicators) of sufficient security of tenure so that they ceased to meet the legal test for institutional independence. On the anniversary of the changes brought about by the introduction of the ATAAA, we look back to see just what the *Farmer* decision established and what has occurred since that decision.

## SUMMARY OF THE FARMER DECISION

It is important to remember the context in which the question of institutional independence was addressed. A number of trade unions challenged the Labour Relations Board's independence, arguing that since becoming subject to section. 54 of the ATAAA the Board's adjudicators are no longer institutionally independent. The basis for that assertion was the assumption that the ATAAA made their appointments revocable, mid-term without notice and without cause, on payment of a maximum 12 months' compensation.

The Labour Relations Board reviewed the case authorities relating to institutional independence and concluded that institutional independence is a "fundamental" principle of natural justice, and courts will not lightly assume that legislators intended to enact procedures that run contrary to institutional independence. However, citing a Supreme Court of Canada decision (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* (2001), 204 DLR (4<sup>th</sup>) 33 ("Ocean Port"), the panel in *Farmer* also noted that express statutory language or necessary implication may oust the degree of institutional independence necessary to meet common law standards.

The *Farmer* decision reiterated the Supreme Court of Canada's view that the essence of security of tenure is that members of a tribunal must be free from arbitrary or discretionary removal from office, and that removing individual members from office without cause would almost certainly be considered arbitrary removal. However, the decision also noted that there is a distinction between arbitrary, discretionary removal from office without cause and justified removal from office to accommodate necessary reform or restructuring of a tribunal. The *Farmer* decision recognized that the former situation compromises institutional independence whereas the latter does not.

The panel in the *Farmer* decision was mindful of the Supreme Court of Canada's comments that tribunals whose "primary purpose" is to adjudicate disputes through some form of hearing and who "possess court-like powers and procedures" fall nearer to the judicial

end of the spectrum than those who merely "develop, or supervise the implementation of, particular government policies". Those at the higher end will demand a higher degree of independence.

Applying these considerations to the Labour Relations Board, the panel in the *Farmer* decision concluded that, Labour Relations Board adjudicators must not be subject to arbitrary or discretionary removal from office during the term of their appointments in order to establish a minimum level of security of tenure. Removal must be for cause to meet the requirement of institutional independence at common law.

However, the panel recognized that absent a constitutional requirement for institutional independence, the necessity for institutional independence is not absolute. Again, echoing the Supreme Court of Canada in *Ocean Port*, the panel noted that the legislature may override this fundamental common law natural justice principle. The panel in *Farmer* then considered whether section 54 of the ATAA did just that.

In doing so, the panel in *Farmer* considered (i) whether section 54 expressly and unequivocally evinces a legislative intent that the Labour Relations Board should no longer be subject to the fundamental natural justice principle of institutional independence, and (ii) if so, whether there was a constitutional requirement that the Labour Relations Board be institutionally independent?

The panel in *Farmer* concluded that absent a clear and unequivocal indication of legislative intent to the contrary, it should generally be inferred that the legislature intended the tribunal's process to meet the principles of natural justice and that it should not lightly assume that legislators intend to enact procedures that run contrary to that principle.

The panel reviewed three specific legislative provision of the *Public Sector Employers Act* that were amended by section 54 of the ATAAA. It concluded that it was at least "equivocal whether the Legislature intended to imply a power to terminate the appointments of tribunal adjudicators mid-term *without cause*, on payment of a maximum 12 months' compensation". For the legislature to have done so, it would have removed what the panel had earlier identified as the minimum level of security of tenure necessary to ensure independence. The panel then proceeded to read section 54 (and the provision of the *Public Sector Employers Act* that it amended) so as not to imply an ability to revoke tribunal appointments mid-contract without cause. By doing so, the panel held that the impugned legislation did not offend the common law principle of institutional independence.

**see *Farmer* page 4**

**Osgoode Hall Law School's  
National Forum**

**New Directions in Administrative Law & Practice**

September 20-21, 2005  
Osgoode Professional Development  
Downtown Toronto Conference Centre  
Toronto, Ontario

**Hear from over 20 expert practitioners, regulators, and  
tribunal members**

This in-depth two day program, from the developers of the part-time LLM in Administrative Law, will cover all the latest and most important developments in administrative law, including:

- The most important Supreme Court administrative law judgments in the past year
- Demystifying the standard of review
- Constitutional issues in administrative proceedings
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- Recent developments in impartiality and independence
- Tribunal policy and rule-making
- Privacy and freedom of information in administrative practice
- Winning strategies for administrative advocacy

**\*\* Keynote address: Mr. Justice Marshall Rothstein,  
Federal Court of Appeal**

For more information and on registration, please visit [www.law.yorku.ca/pdp/cle](http://www.law.yorku.ca/pdp/cle) or call 1-888-923-3394

## AJO

The AJO welcomes any comments you or your members or staff may have on the Guide and how we can improve it.

Also just completed is *A Guide for Tribunals: Stated Cases* for those tribunals to which either section 43 or 45 of the ATA applies, respecting the referral of questions of law to the BC Supreme Court in the form of a Stated Case. The Stated Case Guide will also be posted on the AJO Web site, if you are interested in reviewing it.

The AJO will also be posting on its Web site an updated version of a *Guide for Consideration of a Process for Review of Administrative Decision-Making*, which has been prepared to assist public policy makers in considering options for review of administrative decisions, but may be of interest to BCCAT members.

The AJO looks forward to participating in and providing support to the revisions and updating of the BCCAT Foundations course material and to continuing to provide advice, information and other supports to tribunals (for example, Generic Model Rules and A Guide for Parties on Enforcing Tribunal Orders in Court).

The AJO welcomes any comments and suggestions from BCCAT members, and looks forward to the upcoming Annual Conference.

## Farmer

Consequently, the security of tenure of Labour Relations Board adjudicators is subject only to removal for cause or in the event of a justified and *bona fide* systemic restructuring of the tribunal.

In view of that conclusion, the panel did consider the impact of the *Charter* on the need for the Labour Relations Board's independence.

The decision was not appealed.

## APPLICATION OF THE *FARMER* DECISION TO OTHER TRIBUNALS

To date, the question of institutional independence has not been raised in any case before a tribunal other than the Labour Relations Board. However, it would seem likely that other tribunals would adopt the analysis of the panel in *Farmer* in the event that the issue was raised before it.

The issue might also arise in the event that a tribunal member's appointment was terminated, purportedly in accordance with section 54 of the ATAAA. In such a circumstance, the issue may arise in the course of a civil action brought by the terminated tribunal member. The strength of the reasoning in *Farmer* would then be tested in the courts. This has recently occurred in the case, *Mary McKenzie, a Residential Tenancy Act Arbitrator*, who had her appointment rescinded without cause and without reasons being given on April 14, 2005.

Ms. McKenzie was appointed following a merit based process in 1994, and reappointed effective January 1, 2004 to a five year term. Just over one year into the term, her appointment was rescinded without cause and she was paid the equivalent of one year's salary purportedly under the authority of section 14.9(3) of the *Public Sector Employers Act* (which had been amended by section 54 of the ATAAA). Ms. McKenzie has commenced a judicial review Petition in the Supreme Court of British Columbia to challenge the legality of the Minister's action revoking her appointment and in the alternative, challenging the constitutionality of section 14.9(3) of the *Public Sector Employers Act*. Her counsel, Paul Pearlman, Q.C., will argue that the Minister acted unlawfully in purporting to rescind her appointment, that section 14.9(3) does not displace the strong common law principles governing tribunal security of tenure, and that there are constitutional protections for the independence of a wide range of tribunals, including *Residential Tenancy Act* adjudicators. The application for judicial review is expected to be heard in the winter of 2005 or early 2006.

If you have an announcement or an article to include in our newsletter that would be of interest to all members, please contact us at [registrar@bccat.net](mailto:registrar@bccat.net).

# IMPORTANT NOTICE: EMPLOYMENT STANDARDS TRIBUNAL'S RULES REVISION

The Employment Standards Tribunal is an independent agency of the Government of British Columbia with a mandate to conduct appeals of Determinations issued by the Director of Employment Standards.

Shortly after the tribunal was established in 1995 the Tribunal developed a set of Rules of Procedure for Appeals ("Rules"). These Rules did not include rules relating to requests for reconsideration of Tribunal decisions.

On October 15, 2004 the Administrative Tribunals Act came into effect and it gave the Tribunal the power to make rules respecting practice and procedure to facilitate the just and timely resolution of matters before the Tribunal.

The Tribunal has now revised its Rules of Practice and Procedure and it now relates to both appeals and reconsiderations.

Prior to finalizing our Rules we are requesting feedback from individuals, business associations, community organizations, associations representing workers, and the Labour and Employment Law Bar.

If you wish to provide comments, you may do so by the following options:

- (a) send your written comments to the Tribunal via mail (Suite 650, 1066 West Georgia Street), facsimile (604-775-3372), or via e-mail (registrar.est@bcest.bc.ca); or
- (b) use our discussion forum which can be found on our website at [www.bcest.bc.ca/forum/welcome.htm](http://www.bcest.bc.ca/forum/welcome.htm).

Please provide your comments by October 15, 2005 as we are planning to finalize our Rules shortly thereafter.

If you have any questions about this process, please contact the Tribunal Administrator, Marcella Gordon, at 604-775-3602.

## UPCOMING COURSES

<u>Course Name</u>	<u>Date</u>	<u>Location</u>
AJ: Practice & Procedure for Decision Makers	October 13-14, 2005	Vancouver, BC
AJ: Practice & Procedure for Decision Makers in Professional Regulatory Agencies	October 20-21, 2005	Vancouver, BC
Decision-Writing Workshop	November 24-25, 2005	Vancouver, BC
Hearing Skills Workshop	September 22-23, 2005	Vancouver, BC

If you wish to register for any of these courses, please contact the registration staff of the Provincial Instructor Diploma program at 604.871.7488 or 1-888.332.3212 or visit the Vancouver Community College website at <http://instructordiploma.com/partners.html>.

**Reminder to Members:** If there are changes to your contact information, don't forget to advise us so that we can keep you fully informed of BCCAT's events and announcements.

Contact us at [registrar@bccat.net](mailto:registrar@bccat.net)



**BCCAT NEWS**

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