



BCCAT NEWS

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December 2003

2003-2004 Board of Directors

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President's Message



(L-R) Attorney General Geoff Plant, Walter Pylypchuk, Barb Junker, Gwen Taylor, Sharon Kearney at 8th Annual Education Conference, October 2003.

It seems amazing that it is December and the Board of Directors is once again looking forward to its annual Planning session in January.

We meet for a day with a facilitator to review the issues facing BCCAT and its members, and then strategize to meet those challenges. In the past couple of years most of our issues have been associated with the Administrative Justice Project. Our Policy and Research Committee, as

well as Board members, have spent huge amounts of time on responding to the various aspects of the Project, including draft papers and legislation.

Regretfully, I have reached the conclusion that although our input was appreciated, it really was not worth the effort. Hopefully in the year 2004 we can move on to a project that will create positive results for our Members. If any member has an

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Seasons
Greetings

and

Best Wishes
for the
New Year!



BCCAT responds to Bill 68

A letter was sent to the Ministry of the Attorney General on September 18, 2003 to reflect BCCAT's concerns about Bill 68. We have set out some excerpts below:

We have considered the proposed changes to the legislation and write to express our members' concerns about its impact on their independence in decision making, and the consequential potential for weakening the delivery of administrative justice.

We understand that the intent of this proposed legislation is to limit payouts to tribunal members in the event of policy change or restructuring. We believe that the current proposed wording of the legislation goes much further than the stated policy objective and impacts the independence of adjudicators throughout the Administrative Justice system.

The proposed legislation provides the same limited security of tenure for all tribunal appointees. However, as the Supreme Court of Canada noted *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, tribunals perform a variety of functions spanning the constitutional divide between the executive and judicial branches of government. The court went on to state that those tribunals that are closer to the judicial end of the spectrum "may bring with them stringent requirements of procedural fairness, including a higher requirement of independence". We believe that Section 53 of Bill 68 undermines the notion of "independence" for tribunal members at the judicial end of the spectrum.

The standards for independence in decision making and institutional impartiality of a tribunal were set out in *R. V. Valente*, [1985] 2 S.C.R. and referred to and adopted in *Re: Independence of the Provincial Court of B. C. Justices of the Peace*, [2000] B.C.J. No. 2003 (QL). In that case, the B. C. Supreme Court found that the Justices of the Peace lacked security of tenure even though their proclamations said they were at pleasure because their appointments had to be renewed annually at the discretion of the Chief Judge and there was no evidence as to the basis on which the renewal took place.

We then cited paras. 41, 51, 57 and 88 from that decision.

At the meeting between representatives of BCCAT and Wendi MacKay, Ms. McKay informed us that one of the reasons for giving longer term appointments was to attract more qualified persons. However, we believe the practical effect of Section 53 is to undermine this, because a 5 year term carries little practical security beyond one year if the appointee can be terminated at any time without cause with a maximum of a one year payout. As a result, the consequential amendment to the PSEA undermines the impact of the very positive content of Bill 68 itself.

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BRITISH COLUMBIA COUNCIL OF ADMINISTRATIVE TRIBUNALS

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Nova Scotia (Workers' Compensation Board) v. Martin

By Lisa Wong

In a landmark case, *Nova Scotia (Workers' Compensation Board) v. Martin*, (2003) SCC 54, rendered October 3, 2003, the Supreme Court of Canada held that both the Nova Scotia Appeals Tribunal and the Workers' Compensation Board have jurisdiction to consider *Charter* issues. The case concerned two workers who suffered chronic pain attributed to work-related injuries. One of the key issues was whether the Appeals Tribunal has jurisdiction to hear the *Charter* issue. The Nova Scotia Court of Appeal held that the Appeals Tribunal did not have jurisdiction to consider *Charter* issues because its authority was simply to interpret and apply its own enabling statute, not to interpret or apply "any law necessary to reaching its findings", or to address "general questions of law". On appeal, the Supreme Court of Canada the appeal was allowed.

Administrative tribunals which have jurisdiction, explicit or implicit, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. In applying this approach, there is no need to draw any distinction between "general" and "limited" questions of law. Explicit jurisdiction must be found from the statute.

Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other

"Administrative tribunals which have jurisdiction, explicit or implicit, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction.."

elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. A presumption that a tribunal has authority to consider *Charter* issues may be rebutted by pointing to an explicit withdrawal of authority to consider the *Charter*, or by convincing the court that an examination of the statutory scheme clearly leads to

the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal.

The Act provides that the Appeals Tribunal "may confirm, vary or reverse the decision of a hearing officer" exercising authority of the Board in s. 185(1) of the *Workers Compensation Act* and determine all questions of fact and law arising pursuant to this Part". It follows, then, that s. 185(1) also confers upon the Appeals Tribunal jurisdiction to "determine all questions of fact and law arising pursuant to this Part". The Appeals Tribunal thus has explicit jurisdiction to decide questions of law, a jurisdiction presumed to include the authority to consider their constitutional validity and to disregard provisions if it finds them to be unconstitutional. Moreover, even if s. 185(1) had not provided the Appeals Tribunal with explicit authority to decide questions of law, an examination of the statutory scheme set out in the Act would lead to the conclusion that it has implied authority to do so.

Section 185(1) of the Act defines the jurisdiction of both the Board and the Appeals Tribunal. Therefore, the court's "holding

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The second concern we have with the proposed legislation is that it is unclear to whom it applies. We were given to understand that the proposed capped payout of one year applies only to “full time” tribunal members. The wording itself does not specify to whom it applies. Many of our members are considered “part-time”, and their tribunal appears on the Schedule e.g. Community Care and Assisted Living, Employment Standards Tribunal and Workers’ Compensation Appeal Tribunal. As a result, the amendment to the PSEA may cause confusion.

On the basis of the current wording of Section 14.9(1) of the Public Sector Employers Act, there is no distinction set out in subsection (e) that would exclude part-time members: a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal. Therefore, we do not see how, based on the current wording of this provision and the proposed amendment adding Section 14.9(3), that part-time members of tribunals are excluded from the proposed provision.

We understand another of the reasons behind the proposed Section 53 is to limit litigation, but because the legislation is not clear to whom it applies, we believe the legislation will not have the desired effect.

BCCAT believes that the interests of administrative justice would be adversely affected by legislation that could result in tribunal members being terminated without notice and without cause because of an unpopular decision or a decision that negatively impacts government or its agencies. The

perception of a lack of independent decision making leads to challenges that increase the cost to the system as a whole.

We then set out the following recommendations.

Whereas, the first priorities of any legislation that affects the security of tenure of appointed quasi-judicial decision-makers must be to safeguard the administrative justice system against interference in independent decision making, and to ensure that high quality candidates will be attracted to new positions, BCCAT proposes the following:

- In view of the need to protect decision making independence, actual and perceived, and the need to foster a strong administrative justice system, there should be no ability to remove members mid term except for cause (that is already covered in s. 8, Bill 68), unless a program (tribunal) is being phased out, restructured or amalgamated;
- if a program is being phased out, restructured or amalgamated, the first consideration should be placing members affected in other positions of equal stature; in the event there is no position available, if the member’s services must be terminated, compensation should be based on the remaining term of the appointment and the common law; and,
- that the legislation clearly defines to whom it applies – part time, full time, and per diem; nature of the judicial decision making (as per the SCC).

that this section confers explicit jurisdiction upon the Appeals Tribunal to decide questions of law, including *Charter* issues, appears to lead to the conclusion that such jurisdiction is also vested in the Board, despite the considerable different characteristics of its claims adjudication process”. The Board argued that it did not possess the resources or expertise to deal with numerous *Charter* cases, and that doing so would compromise its efficiency and timeliness in handling vast numbers of compensation cases.

However, practical considerations cannot override the clear expression of legislative intent in s. 185(1). Moreover, the Act explicitly provides a procedural mechanism that allows such complex issues to be redirected from the Board to the Appeals Tribunal and the Chair of the Board of Directors deems it appropriate. In particular, s. 199 provides that a hearing officer may refer the appeal to the Chair of the Board of Directors when faced with an important or novel question of general significance, such as a *Charter* issue; the Chair may then refer the appeal to the Appeals Tribunal or return it to the hearing officer. Under these provisions, it is entirely within the Board’s discretion to refer complex *Charter* cases to the Appeals Tribunal, either on a case-to-case basis or as a matter of policy. The Board would not be infringing its duty to consider the constitutionality

BCCAT 8th Annual Education Conference



Attorney General Geoff Plant addresses conference.



Conference Co-chairs Walter Pylypchuk and Sharon Kearney



Madame Justice Lynn Smith chats with delegates.



Plenary Panel: Phil Brydon, Elizabeth Watson, Wendi Mackay, Bernd Walter, Jill Callan.

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issue that they think BCCAT should address, please let us know.


We continue to need members to join our committees. Many of the Board members and committee members have been supporting BCCAT for several years. We would love some fresh blood to bolster our anaemic souls. Please do not hesitate to contact me, or any of the Board members, if you are interested. I think our Fall Conference was

a huge success and I would once again like to thank the organizing committee, Co-Chairs and presenters. I think you will see some pictures in this Newsletter from the Conference, but you can also access more on our web-site.

Best of the Season and New Year!

Barbara J. Junker
President 

Nova Scotia.. from page 2

of the Act by referring such cases to the Appeals Tribunal. Notably, the Court said it was expressly refraining from expressing any opinion as to the constitutionality of a provision that placed procedural barriers in the way of claimants seeking to assert their rights in a timely manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims. 

BCCAT Membership Form

*To become a member please complete and return this form with your payment

Last Name: _____

First Name: _____

Address _____

Postal Code: _____

Tel: () _____

Fax: () _____

Email: _____

Are you a member of a board or tribunal? Y N

P/T F/T

Name of Tribunal/Board: _____

Are you staff of a board or tribunal?

Y N

Would you be interested in participating on a BCCAT Committee?

Y N

May we publish your name in the Membership Directory?

Y N

Attention: Membership Committee
P.O. Box 2016, 349 W. Georgia St.,
Vancouver, BC, V6P 3P8



BCCAT Course Schedule 2004

Course	Date/Venue	Contact
Hearing Skills Workshop	September 16-17, 2004 Vancouver	Tom Patch tompatch@shaw.ca 604-806-6166
Decision Writing Workshop	May 13-14, 2004 Vancouver November 25-26, 2004 Vancouver	Sharon Kearney Sharon.Kearney@gems5.gov.bc.ca
Administrative Justice: Practice and Procedure for Decision Makers	April 22-23, 2004 June 3-4, 2004 Victoria October 21-22, 2004 Vancouver	Tom Patch tompatch@shaw.ca 604-806-6166
Administrative Justice: Practice and Procedure for Professional Regulatory Agencies	May 6-7, 2004 Vancouver October 7-8, 2004 Vancouver	John Mayr registrar@cd.bc.ca 604-515-0533
Administrative Justice: Practice and Procedure for Staff Members	October 28, 2004 Vancouver June 2004 Victoria	Jim Collins Jim.Collins@gems8.gov.bc.ca

All of the dates are tentative and depend on instructor and facility availability