

# October 15, 2004 Amendments to the Labour Relations Code

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## **Introduction**

On October 15, 2004, the following provisions of the Administrative Tribunals Act (the “ATA”) came into force that amend the Labour Relations Code (the “Code”).

109. Section 115.1 of the Labour Relations Code, R.S.B.C. 1996, c. 244, is repealed and the following substituted:

### **Application of Administrative Tribunals Act**

115.1 Sections 1 to 10, 43, 46, 47 (1) (c), 48, 49, 56, 57, 58 (1) and (2) and 61 of the Administrative Tribunals Act apply to the board.

110. Section 123 is repealed.

In this summary we will outline the most significant provisions of the ATA that now apply to the Labour Relations Board (the “Board”).

## **1. Questions of law can now be referred to Supreme Court**

Section 43 of the ATA now applies to the Board. Section 43 provides:

### **Discretion to refer questions of law to court**

- 43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.
- (2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.
- (3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.
- (4) The stated case under subsection (2) or (3) must
  - (a) be prepared by the tribunal,
  - (b) be in writing,
  - (c) be filed with the court registry, and

- (d) include a statement of the facts and relevant evidence.
- (5) Subject to the direction of the court, the tribunal must
  - (a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
  - (b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
  - (c) decide the application in accordance with the opinion.
- (6) A stated case must be brought on for hearing as soon as practicable.
- (7) Subject to subsection (8), the court must hear and determine the stated case and give its decision as soon as practicable.
- (8) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Prior to the amendments, the Board decided all questions of law raised in a case before it.

Pursuant to section 43 of the ATA, the Board now has the discretion to refer any question of law to the Supreme Court, either on application by a party or on the Board's own initiative. It is uncertain what approach the Board will take to exercising this discretion.

The Board is also now **required** to refer any constitutional question of law to the Supreme Court if the Attorney General requests that the Board do so. This means that the Attorney General has the power to bypass the Board anytime a constitutional question of law is raised in a Board case.

Once a question of law is referred to the Supreme Court, the Board is then required to hear and decide all remaining questions "to the extent practicable".

These provisions may well result in an increased number of legal issues in Board cases being decided by the Supreme Court, which will require the parties to participate in two parallel proceedings and may well delay the completion of the case.

## **2. Board can now order parties to pay the Board's costs**

Section 47(1)(c) of the ATA now applies to the Board. Section 47(1)(c) provides:

### **Power to award costs**

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows: ...

- (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

Pursuant to section 47(1)(c) of the ATA, the Board can now order a party to pay part of the Board's costs if the Board considers the party's conduct to be "improper, vexatious, frivolous or abusive". It remains to be seen how frequently the Board will do so, and in what circumstances.

Sections 47(1)(a) and (b) of the ATA do not apply to the Board. These provisions give a tribunal the power to award costs for and against parties and interveners. In the past the Board has awarded costs for and against parties in certain cases. It is arguable that the Board has no power to do so now given the fact that sections 47(1)(a) and (b) have not been applied to the Board.

### **3. Board now has new powers to maintain order at a hearing and initiate contempt proceedings**

Sections 48 and 49 of the ATA now apply to the Board. Sections 48 and 49 provide:

#### **Maintenance of order at hearings**

- 48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.
- (2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.
- (3) Without limiting subsection (1), the tribunal, by order, may
  - (a) impose restrictions on a person's continued participation in or attendance at a proceeding, and
  - (b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

#### **Contempt proceeding for uncooperative witness or other person**

- 49 (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court:
  - (a) attend a hearing;

- (b) take an oath or affirmation;
  - (c) answer questions;
  - (d) produce the records or things in their custody or possession.
- (2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court.
- (3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.

Section 48 of the ATA gives the Board the power to make orders or give directions to maintain order at a hearing, and to call on a peace officer to enforce the orders or directions.

Sections 49 of the ATA gives the Board the power to initiate contempt proceedings in Supreme Court if a person fails to comply with the Board's orders or directions under section 48, or if a witness refuses to attend a hearing, take an oath or affirmation, answer questions, or produce documents or things.

These powers replace the Inquiry Act powers that previously applied to the Board under section 123 of the Code, which has now been repealed.

#### **4. There is now a 60-day time limit for judicial review of Board decisions**

Section 57 of the ATA now applies to the Board. Section 57 provides:

##### **Time limit for judicial review**

- 57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.
- (2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, 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.

There was previously no time limit for applying to Supreme Court for judicial review or Board decisions. Judicial reviews applications must now be commenced within 60 days of the date the Board's decision is issued (although the Supreme Court has some discretion to extend the time).

#### **5. There is now a new legislated standard of review of Board decisions**

Sections 58(1) and (2) of the ATA now apply to the Board. Sections 58(1) and (2) provide:

**Standard of review if tribunal's enabling Act has privative clause**

- 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
- (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
  - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
  - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

The amendments provide that the Board is an expert tribunal in relation to all matters over which it has exclusive jurisdiction. Findings of fact, law, or an exercise of discretion over which the Board has exclusive jurisdiction are reviewable on a standard of patent unreasonableness. Natural justice or procedural fairness questions will be reviewed on the basis of whether the Board acted fairly. All other matters are reviewed on a standard of correctness.

**6. Other provisions**

The other provisions of the ATA which now apply to the Board are:

- (a) Sections 1 to 10 which deal with the appointment and termination of the Chair and Vice-Chairs of the Board.
- (b) Section 46 which deals with the requirement to give notice of constitutional questions.
- (c) Section 56 which deals with immunity from claims for damages against the Board, its decision makers, and the government.
- (d) Section 61 which deals with the application of the Freedom of Information and Protection of Privacy Act.