

## Proposed MRPP revisions September 2021

Deletions are struck through, additions are underlined.

### 3.3.1 Issues in Decision(s) Appealed

Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision(s) which was under review, subject to the statutory limits on WCAT's jurisdiction. Similarly, when considering appeals of Board decisions which are appealable directly to WCAT, WCAT has jurisdiction to address any issue determined in the decision appealed.

WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

Panels may address an issue raised by the respondent in relation to the decision under appeal. To ensure that the panel will address a particular issue which may not be raised by the appellant, the respondent should file a cross-appeal. This may require an extension of time to appeal (8.2 to 8.2.3).

The panel will normally not address issues not expressly raised by the parties, but has the discretion to do so. The panel will give notice to the parties of the panel's intention to address any issue which was not raised in the notice of appeal or in the parties' submissions to WCAT (1.5.3.1).

An exception is where the subject of an appeal is a permanent disability award which typically includes the effective date of the award as well as the assessment of the permanent functional impairment or the loss of earnings entitlement. Panels may address any aspect of the permanent disability award decision which was addressed in the Board decision under review by the Review Division, or which was addressed in the Review Division decision, without notice to the parties.

Panels may apply any applicable policy of the board of directors of the Board without giving notice to the parties regardless of whether the policy was applied or referred to in the Review Division decision or the Board decision(s) which were under review.

### 3.4.1 Constitutional Questions

~~WCAT has jurisdiction over constitutional questions including application of Canadian Charter of Rights and Freedoms issues [s. 296 WCA,].~~

~~“Constitutional questions” are defined by the ATA as questions requiring notice to the Attorneys General of Canada and British Columbia under section 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. That Act requires notice where the constitutional validity or applicability of any law (including a regulation) is~~

~~challenged, or where an application is made under section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.~~

~~The party who raises a constitutional question may give the notice required by section 8 of the *Constitutional Question Act*. If the party who raises the question fails or refuses to give the required notice, WCAT may do so.~~

### **3.4.2 Human Rights Code**

~~WCAT has jurisdiction to apply the *Human Rights Code*, R.S.B.C. 1996, c. 210 [s. 296 WCA].~~

### **3.4.1 Constitutional Questions and Human Rights Code**

WCAT has jurisdiction at common law to decide constitutional issues including application of *Canadian Charter of Rights and Freedoms (Charter): Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, *R v. Conway*, 2010 SCC 22. WCAT also has jurisdiction to apply the *Human Rights Code*, R.S.B.C. 1996, c. 210 [s. 296 WCA].

WCAT can determine if a law or a policy of the board of directors of the Board is inapplicable on constitutional grounds in the particular matter before it, but cannot declare all or part of a law or policy to be void. WCAT may grant *Charter* remedies that are linked to a matter properly before it, but can provide only remedies that are expressly or impliedly authorized by the WCA or other applicable legislation. WCAT does not have authority to award damages for a breach of *Charter* rights.

See item 5.1.6 Procedure – Constitutional Issues and *Human Rights Code*

### **5.1.6 Procedure – Constitutional Issues and *Human Rights Code***

#### **5.1.6.1 Who May Raise Constitutional Issues**

Any party to an appeal can raise a constitutional issue. A WCAT panel may also raise a constitutional issue on its own initiative. A party or WCAT may raise a constitutional issue on appeal to WCAT, regardless of whether the issue was raised at the Review Division.

#### **5.1.6.2 When to Raise Constitutional or Human Rights Code Issues**

**Rule: An appellant who intends to raise a constitutional issue and/or to ask WCAT to apply the *Human Rights Code* must state their intention to do so and describe the constitutional issue and/or application of the *Human Rights Code* in their Notice of Appeal. Any other party who intends to raise a constitutional issue and/or ask WCAT to apply the *Human Rights Code* must state in writing their intention to do so, and describe the constitutional issue and/or application of the *Human Rights Code***

**Code. Failure to comply with this rule may result in WCAT refusing to address the constitutional issue and/or apply the *Human Rights Code*.**

### **5.1.6.3 Order of Consideration of Issues**

In general, WCAT will not address constitutional issues or apply the *Human Rights Code* unless the panel assigned to the appeal determines it is necessary to do so in order to decide the appeal. A panel may consider and decide substantive issues first. Where an appeal can be properly decided on the merits, WCAT may decline to consider a constitutional issue or apply the *Human Rights Code*.

### **5.1.6.4 Compliance with the *Constitutional Questions Act***

The *Constitutional Question Act*, R.S.B.C., 1996, c. 68 (CQA) requires notice where the constitutional validity or applicability of any law (including a regulation) is challenged, or where an application is made under section 24(1) of the *Charter*. Notice is not required where the remedy consists of the exclusion of evidence.

*Practice Directive: A party to an appeal, who seeks to challenge the constitutional validity or applicability of a provision of the Act, regulations, or policy, or obtain a constitutional remedy as defined by the CQA, must comply with the section 8 of the CQA. In particular, the party raising the constitutional issue or seeking the constitutional remedy must prepare and serve notice on the Attorney General of Canada and the Attorney General of British Columbia in accordance with section 8 of the CQA. Additionally, the party raising the constitutional question must promptly provide to WCAT a copy of the notice together with proof of service on the Attorney General of Canada and the Attorney General of British Columbia.*

WCAT determines whether the notice complies with section 8 of the CQA. If the party fails to comply with section 8 of the CQA, the WCAT panel may:

- (a) Decline to consider the constitutional issue or provide a constitutional remedy;
- (b) Adjourn a hearing to give the party time to comply with section 8 of the CQA; or
- (c) Comply with section 8 of the CQA on its own initiative.

In considering whether to exercise its discretion to give the required notice, WCAT will consider whether the party seeking to raise the constitutional question has, when filing their Notice of Appeal or Notice of Participation:

- (a) Identified the specific provision of the WCA, regulations or policy they intend to challenge, or the Charter remedy they seek;
- (b) Identified the specific constitutional provision(s) they intend to rely on;
- (c) Identified any specific Charter right or freedom alleged to have been infringed or denied;
- (d) Given particulars necessary to show the point to argued on appeal; and
- (e) Explained why they are unable to provide the notice required by section 8 of the CQA.

WCAT will not normally exercise its discretion to provide notice in the absence of the above information.

If the party seeking to raise a constitutional question does not provide the notice required by the CQA, and WCAT does not exercise its discretion to do so, the constitutional question that the party identified will not be considered.

Where a panel indicates that it will consider the merits of the appeal before considering a constitutional issue, the party raising the constitutional question or seeking the constitutional remedy may postpone compliance with section 8 of the CQA until the panel has determined whether consideration of the constitutional issue is required.

### **5.1.6.3 Disclosure to Attorneys General and Submission Process**

Where the panel determines that it is necessary to consider a constitutional question, and if, following notice, the Attorney General of Canada or the Attorney General of British Columbia becomes a party to the appeal:

- (a) WCAT will order disclosure of the Board's records relevant to the matter under appeal to be made to the Attorney General or Attorneys General, as the case may be. WCAT will also provide to the Attorney General or the Attorney's General, relevant information from the appeal, including but not limited to submissions made by the party or parties concerning the constitutional question;
- (b) The Attorney General or Attorneys General will have 28 days from the date of disclosure to provide submissions with respect to the constitutional question;
- (c) WCAT will disclose any submission received from either Attorney General to the other parties, who will have 21 days to provide a submission on the constitutional question in response;
- (d) WCAT will disclose any submission received in response to an Attorney General's submission to the other parties, for information purposes only, except that the Attorney(s) will have 14 days to provide a rebuttal submission with respect to the application of section 1 of the Charter;
- (e) WCAT will disclose any rebuttal submission received from the Attorney(s) General to the other parties, for information only. N

## **12.8 Other Medical Advice or Clarification**

The statutory authority for seeking independent medical assistance or advice under section 302 does not prevent a panel from asking other health professionals for medical evidence or to clarify or interpret medical evidence the health professional previously provided. That evidence or clarification may be requested, for example, from a treating physician or a physician who is not on the list established by the chair under section 301(1) [s. 302(9) and 302(10)]. Normally, a panel will only ask a physician employed by the Board to clarify or interpret medical evidence they have previously provided.

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