

INFORMATION BULLETIN

Orders for the Payment of Costs (Section 47 of the *Administrative Tribunals Act*)

Administrative Justice Office
January 2006

This Information Bulletin discusses tribunals' powers to make orders for payment of costs under section 47 of the *Administrative Tribunals Act*, and is intended to be general information for those tribunals and for persons who may appear before those tribunals as parties or interveners. Some of this information may also apply to those tribunals whose power to order costs is set by their own specific legislation. Topics discussed in this Bulletin include:

OVERVIEW

- ***What section 47 authorizes***
- ***Which tribunals section 47 applies to***
- ***When a cost order may be made***
- ***Conduct that might result in a cost order***

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ENFORCING A COST ORDER

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This Information Bulletin is intended for general information only and is not intended as legal advice. For specific issues related to section 47 or any other authority to order the payment of costs, legal advice should be obtained.

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OVERVIEW

What section 47 authorizes

Section 47 authorizes a tribunal to

- order a party or an intervener to pay part of the costs of another party or an intervener in connection with an application; or
- order a party to pay part of the actual costs and expenses of the tribunal, if the tribunal considers the conduct of the party has been improper, vexatious, frivolous or abusive.

Which tribunals section 47 applies to

Tribunals whose legislation adopts section 47 can make these cost orders. Those tribunals are listed in Appendix A.

Other tribunals may have powers similar to section 47 under their own legislation. Those tribunals are listed in Appendix B.

When a cost order may be made

Tribunals have a broad discretion whether to make an order requiring one party to pay another party's costs. This means they can decide when and under what circumstances they will make such an order. However, unlike the courts, most tribunals do not consider a party or intervener's "success" in the application or appeal to be a determining factor in deciding whether to make such an order. In considering whether to exercise their discretion under section 47(1)(a) and (b), many tribunals will consider whether a party or intervener's conduct has been "improper, vexatious, frivolous or abusive". Consideration whether to make an order can be exercised on the request of party or an intervener, or on the tribunal's own initiative without a request being made.

Tribunals' discretion whether to make an order for the payment of the tribunal's own costs and expenses is limited to circumstances where the tribunal finds that the party's conduct was "improper, vexatious, frivolous or abusive".

Conduct that might result in a cost order

Tribunals have broad discretion to determine if a party or intervener's conduct has been "improper, frivolous, vexatious or abusive", with the following examples, taken from court decisions, providing some guidance:

- A proceeding may be found to be "frivolous" if it has no basis in reality.

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- A proceeding may be found to be “vexatious” if it obviously cannot succeed, asks the tribunal to make an order that might have been obtained in a prior proceeding, or does not raise a serious question to be decided.
- “Abusive” behaviour (sometimes also described as an “abuse of process”) may be found where principles of fair play and decency are violated, or the proceeding is considered to be oppressive.
- “Improper” conduct may include the use of a tribunal proceeding for an “ulterior purpose”, which was not the purpose intended by the legislation.

In addition, applying the dictionary or ordinary meaning, “improper” conduct may be inappropriate conduct, and the following situations might be “improper” behaviour in the context of administrative tribunal proceedings:

- Knowingly presenting false evidence or intentionally misleading the tribunal.
- Physically or verbally abusing or threatening other parties or tribunal members and staff.
- Repeatedly refusing or neglecting to comply with tribunal orders or rules.
- Deliberately delaying the proceedings before the tribunal.

A tribunal may want to consider issuing practice directives as guidelines about the type of conduct it may consider as improper, vexatious, frivolous or abusive when considering whether to make a cost order against a party or intervener.

WHAT A TRIBUNAL CAN ORDER

Amount and type of costs - parties and interveners

Section 47(1) limits tribunals’ powers to ordering payment of only a “part” of another party’s or an intervener’s costs, so only a portion is payable, not the full costs.

Other than this limit, a tribunal can set the portion, types and amounts of the various cost items that may be ordered paid. However, the courts have suggested that tribunals, when setting amounts under a similar legislative provision, should consider the types and amounts set under Rule 57 of the Supreme Court Rules, available at:

www.qp.gov.bc.ca/statreg/reg/C/CourtRules/CourtRules221_90/221_90d.htm#rule57

Tribunals may also order payment of costs for activities specific to the tribunal and not covered by Rule 57. A tribunal may want to consider issuing practice directives as a guide to the portions, types and amounts of the various cost items that it may consider including in an order for payment of costs.

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Special costs

As noted above, in exercising its discretion to make a cost order, a tribunal may consider a party or intervener's conduct and the impact of that conduct on the proceedings and the other parties or interveners. In cases where that conduct is considered to have been "reprehensible", a greater amount, closer to the full costs (sometimes called "special costs"), might be ordered. For example, the Farm Industry Review Board, in its decision in *BC Vegetable Greenhouse I, L.P. v. BC Vegetable Marketing Commission* (May 20, 2005), ordered a party to pay special costs. However, that party has challenged the Board's authority to make the order and the issue is still to be decided by the court.

Amount and type of costs - Tribunal costs

Section 47(1)(c) permits orders for the payment of part of the tribunal's "actual costs and expenses". However, payment of a tribunal's costs can only be ordered where the tribunal has found the party's conduct to have been improper, vexatious, frivolous or abusive.

"Actual costs" and expenses may include such things as

- the tribunal's administration costs to process the application or appeal,
- amounts related to any pre-hearing matters, and
- amounts paid in relation to any hearing, including those costs associated with tribunal members (*per diems* or other remuneration, travel costs and other expenses).

A tribunal may want to consider issuing practice directives as guidelines, setting out these types of costs and the related amounts that it may consider in exercising its discretion.

The tribunal will also want to provide an appropriate opportunity for a party, who may be ordered to pay the tribunal's costs, to "test" or challenge the actual types and amounts of those costs. See the discussion below under "**Making A Cost Order**".

Pre-hearing matters

At least one tribunal (the Farm Industry Review Board, in its decision noted above) has found that section 47 gives it authority to make an order for the costs related to pre-hearing matters. However, as also noted above, the party ordered to pay those costs has asked the court to review this decision, and the matter is still before the courts.

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No special form required

There is no special form for a cost order, but the order should clearly set out the total amount of costs payable, who is required to pay them and to whom, and the effective date of the order.

Statutory limits

A tribunal's power to make an order for payment of costs under the *Administrative Tribunals Act* can be limited by regulations under that Act. To date, such regulations have not been considered necessary.

Other tribunals' powers to make cost orders under their own specific legislation may have other statutory limitations and should be carefully reviewed.

MAKING A COST ORDER

Some suggestions for processes

Tribunals are not required to set a process for considering whether to make an order for payment of costs, but a clear, known process, set in advance, can be helpful to the tribunal, parties and interveners. Tribunals may want to consider establishing a process through its rules or a practice directive. A sample process might include:

- how to initiate a request for an order: if the same or different for a party, an intervener or the tribunal itself, and any notice to be given or forms to be used,
- when a request might be made – for example:
 - prior to the completion of the application or appeal,
 - immediately at the end of the hearing of the application or appeal, or
 - on or by a later date, after the hearing is completed, but
 - before the tribunal decision has issued, or
 - after the tribunal issues its decision,
- an opportunity for the parties or interveners to make submissions, in writing or in person
 - *whether* an order should be made, and
 - the *amount* to be ordered,

with the same or different timelines and, possibly, different types of submissions. (In some cases, submissions on amount may only be necessary if the tribunal decides to make an order, and may be simply a list of the cost items and amounts claimed).

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The tribunal will also want to consider providing an appropriate opportunity for a party, who may be ordered to pay the tribunal's costs, to "test" or challenge the specific types and amounts of those costs.

Tribunal rules and practice directives

Under the *Administrative Tribunals Act*, a tribunal is not required to make rules to govern its processes for cost orders. However, a tribunal that can make rules of practice and procedure under section 11(1) of the *Administrative Tribunals Act* may want to consider including rules to govern this process.

Tribunals will want to recognize the need to be flexible when exercising their discretion under section 47, but may want to consider issuing a practice directive to indicate the circumstances in which a cost order might be made.

ENFORCING A COST ORDER

Section 47(2) of the *Administrative Tribunals Act* provides that an order for payment of costs can be filed into court, and proceedings may be taken on it as if it were an order of the court.

To do this, the party or tribunal should provide the Supreme Court Registry with a certified copy (and a photocopy) of the order. The Registry will assign a court file number, stamp both copies and return the photocopy. The photocopy can then be used in subsequent enforcement proceedings.

Once filed, the cost order becomes the same as a monetary judgment of the court. The party, intervener or tribunal seeking to collect on the order may use all of the remedies available for enforcing Court judgments, including garnishment, seizure of assets, registration against real property in Land Titles and examination in aid of execution. An Information Bulletin, *Enforcing Tribunal Orders using Court Processes*, is available at:

www.gov.bc.ca/ajo/popt/tribunal_tool_kit.htm#info

COURT REVIEW OF A COST ORDER

Cost orders may be subject to review by the BC Supreme Court under the *Judicial Review Procedure Act*. However, the test the court will apply before considering overturning or changing a cost order is a high one - sections 58 and 59 of the *Administrative Tribunals Act* set the test for discretionary orders as "reasonableness".

Appendix A

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Orders for the Payment of Costs (Section 47 of the *Administrative Tribunals Act*)

Tribunals with the Power to Order Payment of Costs Pursuant to Section 47 of the *Administrative Tribunals Act*¹

Tribunal	Comments
Community Care and Assisted Living Appeal Board	Only sub-sections 47 (1) (c) and (2) apply.
Farm Industry Review Board	
Financial Services Tribunal	
Hospital Appeal Board	
Labour Relations Board	Only sub-section 47 (1) (c) applies.
Mediation and Arbitration Board	
Safety Standards Appeal Board	The Board's rules and guidelines indicate that the Board will only order a party/intervener to pay costs to another party/intervener or the Board when the party's/intervener's behaviour has been "frivolous, vexatious, egregious or an abuse of process."

¹ This information is current as of January 6, 2006. Readers should check each tribunal's enabling legislation to verify whether section 47 is applicable.

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Orders for the Payment of Costs (Section 47 of the *Administrative Tribunals Act*)

Tribunals with the Power to Order Payment of Costs Pursuant to Their Enabling Legislation²

Tribunal	Source of Power to Order Costs	Comments
Financial Institutions Commission	<i>Financial Institutions Act</i> , section 241.1	The Commission, superintendent or council may order a party to pay the costs of a hearing and/or investigation. The costs cannot exceed the actual costs incurred, but may include the costs of remuneration for employees, officers or agents involved in the hearing and/or investigation.
Environmental Appeal Board	<i>Environmental Management Act</i> , section 95 (1)	The provision is similar to section 47 of the ATA, but also allows the Board to require an appellant to deposit the anticipated costs with the Board. According to the Board's Procedure Manual, its policy is to order costs only in special circumstances, including: <ul style="list-style-type: none">• where an appeal is brought for improper reasons or is frivolous or vexatious in nature;• where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;• where a party, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with notice;• where a party unreasonably delays the proceeding;• where a party's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; or• where a party has continued to deal with issues which the Board has advised are irrelevant.
Forest Appeals Commission	<i>Forest and Range Practices Act</i> , section 84 (3)	The Commission may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal. According to the Commission's Procedures Manual, the Commission's approach to ordering costs is identical to the Environmental Appeal Board (above).
Human Rights Tribunal	<i>Human Rights Code</i> , section 37 (4)	The Tribunal may order costs against a party that engages in "improper conduct" during the course of a complaint, or who contravenes a Tribunal rule or order.

² This information is current as of January 6, 2006. Readers should check the enabling legislation, regulations, rules and practice directives for a tribunal to confirm that tribunal's powers and policies respecting orders for payment of costs.

Appendix B

**Tribunals with the Power to Order Payment of Costs
Pursuant to Their Enabling Legislation**

Tribunal	Source of Power to Order Costs	Comments
Passenger Transportation Board	<i>Passenger Transportation Act</i> , section 7 (1.1)	If the Board considers that the conduct of a participant in a proceeding has been improper, vexatious, frivolous or abusive, the board may order the participant to pay part of the actual costs and expenses of the Board in connection with the proceeding.
Property Assessment Appeal Board	<i>Assessment Act</i> , section 60	The Board may order that a party or intervener pay to another party, intervener or the Board any or all of the actual costs in respect of an appeal. The Board's rules (Rule 21) provide that a party or intervener will be ordered to pay costs if the conduct of the party or intervener has been "frivolous, vexatious, egregious or an abuse of process", or that the party or intervener unreasonably delayed or lengthened the proceeding or failed to comply with a direction or order of the Board or the Board's Rules.
Residential/Manufactured Home Park Tenancy Arbitrators	<i>Residential Tenancy Act</i> , section 72 <i>Manufactured Home Park Tenancy Act</i> , section 65	The authority to order costs is restricted. An arbitrator may order a party to pay to another party the fee paid to commence an arbitration or to request that an arbitrator's decision be reconsidered.
Securities Commission	<i>Securities Act</i> , section 174	The person presiding at a Commission hearing may order that a person whose affairs are the subject of the hearing pay prescribed fees or charges for the costs of, or related to the hearing that are incurred by or on behalf of the Commission or its executive director. The fees and charges are set out in the Securities Regulation (B.C. Reg. 196/97).
Utilities Commission	<i>Utilities Commission Act</i> , sections 117 and 118	The Utilities Commission may order a participant to pay all or a portion of the Commission's (s. 117) or another participant's (s. 118) costs incidental to a proceeding before the Commission. Under section 118, the Commission may pay part or all of a participant's costs. The Commission, in its Order No. G-97-98, indicates that it will consider the following criteria when determining participants' eligibility for costs under s. 118: <ul style="list-style-type: none"> • whether the participant has a substantial interest in the proceeding; • whether the participant contributed to a better understanding of the issues; • whether the costs incurred are reasonable; • whether the participant would be prevented from effectively participating without the order; • whether the participant has joined with others with similar interests, to reduce costs; and • other appropriate matters.

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**Tribunals with the Power to Order Payment of Costs
Pursuant to Their Enabling Legislation**

Tribunal	Source of Power to Order Costs	Comments
Workers' Compensation Appeal Tribunal	Workers' Compensation Act Appeal Regulation, sections 6 [authorized by sub-sections 224 (2) (k.1) of the <i>Workers' Compensation Act</i>]	<p>Section 6 of the Regulation authorizes an order for costs related to an appeal if:</p> <ul style="list-style-type: none"> • another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault; • the conduct of another party has been vexatious, frivolous or abusive; or • there are exceptional circumstances that make it unjust to deprive the successful party of costs. <p>Section 7 of the Workers' Compensation Act Appeal Regulation authorizes the Tribunal to order that the Workers' Compensation Board reimburse a party for certain types of expenses (not including legal fees) incurred by the party in relation to a hearing of the appeal.</p>
Workers' Compensation Board, Review Division	<i>Workers' Compensation Act</i> , section 100	<p>Section 100 provides that the Board <u>may</u> "award a sum it considers reasonable to the successful party to a <u>contested</u> claim for compensation or to any other contested matter to meet the expenses the party has been put to by reason of or incidental to the contest...."</p> <p>Section 100.70 of the Board's <i>Rehabilitation Services and Claims Manual</i> indicates that costs will only be awarded in "unusual" cases, where workers or employers abuse their rights under the Act (e.g. where the employer contested the claim for no good reason or the review was requested without any valid grounds).</p> <p>Section 100.72 of the Manual states that costs, when awarded, will not include fees paid to lawyers or other advocates on behalf of a party.</p>