

# APPOINTING ARBITRATORS

---

## INTRODUCTION

Disputes between parties to a collective agreement are frequently settled by an arbitrator. Grievances frequently go to rights arbitration. Collective bargaining disputes may go to interest arbitration depending upon the language in the collective agreement. Several pieces of legislation may require the Minister, the Director of Mediation Services or the Chair of the Board to appoint an arbitrator. This policy outlines:

- instances where the Minister is required to appoint an arbitrator;
- instances when the Director of Mediation Services is required to appoint an arbitrator;
- instances when the Chair is required to appoint an arbitrator; and
- the process of appointing an arbitrator.

Sample letters are available in Section 31(o).

## APPOINTMENTS BY THE MINISTER

### ***Voluntary Interest Arbitration Under the Labour Relations Code***

Section 93(1) provides that parties to an interest dispute may agree in writing to refer the matters in dispute to a one- or three-member arbitration panel. The parties must notify the Minister of any such agreement. If the parties do not appoint the arbitration panel, either party may notify the Minister. The Minister then directs both parties to appoint an arbitration Board in accordance with Division 20 (see below).

### ***Compulsory Interest Arbitration for Firefighters and Hospital Workers***

Section 96(1) of the [Labour Relations Code](#) requires firefighters, employees working in hospitals as defined in the *Hospitals Act*, and their employers to refrain from strikes or lockouts. In place of strikes and lockouts, the [Code](#) provides for compulsory interest arbitration. Either party or the Minister may request the appointment of a three-member arbitration panel and the parties may also jointly request a one-member arbitration panel. See: [*Section 97(1)*]. This request is forwarded to the mediator. If no mediator has been appointed, the Director of Mediation Services appoints one and then forwards the request for compulsory interest arbitration to the mediator.

The mediator works with the parties to the dispute. No longer than 14 days after the mediator receives a request for compulsory interest arbitration, the mediator forwards the request and a list of the items in dispute (as well as those that have settled) to the Minister. Section 98 provides:

98 When the Minister receives a request for the appointment of a compulsory arbitration board, the Minister

(a) if the Minister considers it appropriate, may direct the parties to continue collective bargaining and may prescribe the conditions under which collective bargaining is to take place, or

(b) if the Minister is satisfied that the dispute is appropriate to refer to a compulsory arbitration board, may direct the parties to the dispute to appoint a 3-member or one-member compulsory arbitration board in accordance with Division 20.

The parties must then act in accordance with the provisions of Division 20.

### ***Division 20***

Section 117(1) states that, if the Minister directs the parties to a dispute to appoint a voluntary arbitration Board under Section 94 or a compulsory arbitration board under Section 98, the Minister shall notify the parties to the dispute in writing and require them to, within 10 days of notification, either:

- each appoint a person to act as a member of a three-member arbitration board; or
- jointly appoint a person to act as a one-member arbitration board.

In the case of a three-person arbitration board, the two appointees shall between them choose a third person to act as chair of the arbitration board.

Section 118 gives the Minister the power to appoint a member and/or chair of the voluntary arbitration board if the parties or nominees fail to do so. Section 121 allows the Minister to revoke any appointment to a panel and appoint a replacement if the Minister believes the member is unduly or unnecessarily delaying the proceedings of the tribunal.

### ***Interest Arbitration under the Police Officers Collective Bargaining Act***

Section 4(2)(d) of the [Labour Relations Code](#) states that the [Code](#) does not apply to employees who are police officers of a municipal police service appointed pursuant to the *Police Act*, except to the extent that the [Code](#) is made applicable by the *Police Officers Collective Bargaining Act* (POCBA).

Part 3 of POCBA allows either or both parties to an interest dispute to make a request for the establishment of an interest arbitration board to a mediator or to the Director of Mediation Services (if no mediator has been appointed). Section 9(2) requires the Director of Mediation Services to appoint a mediator (if no mediator has been appointed) and forward the request for an arbitration board to the mediator. The mediator shall, no longer than 14 days after a request is received, forward the request along with a list of items in dispute and a list of items settled by the parties to the Minister. Section 10 provides:

- 10 When the Minister receives a request for the establishment of an interest arbitration board, the Minister,
  - (a) if the Minister considers it appropriate, may direct the parties to continue collective bargaining and may prescribe the procedure of conditions under which collective bargaining is to take place, or
  - (b) if the Minister is satisfied that the dispute is appropriate to refer to an interest arbitration board, may establish an interest arbitration board in accordance with this part.

If the Minister decides to establish an interest arbitration board, the Minister requires each party to appoint a nominee within 10 days. The nominees then appoint a third person to act as the chair. If the parties or nominees fail to appoint a member, or a vacancy on the board occurs, Section 12 allows the Minister to appoint a person to the board. Once the board is appointed, the Minister provides the board with terms of reference including a list of items in dispute to be resolved by the interest arbitration board.

### ***Rights Disputes Under the Police Officers Collective Bargaining Act***

Section 4(2)(d) of the [\*Labour Relations Code\*](#) states that the Code does not apply to employees who are police officers of a municipal police service appointed pursuant to the *Police Act*, except to the extent that the Code is made applicable by POCSA. POCSA contains provisions deemed to be included in any collective agreement to the degree that the agreement is silent. Section 21(f) states:

21(f) If the parties are unable to agree upon a person to act as the single arbitrator, either party may request the Minister in writing to appoint a single arbitrator.

Section 22 of POCSA provides that, if the parties are unable to agree on a person to act as the single arbitrator as provided for in their collective agreement, either party may request the Minister in writing to appoint a single arbitrator. Similarly, if a grievance arbitration board is to be established pursuant to a collective agreement and the parties or nominees fail to appoint a member, or a vacancy on the board occurs, Section 23 allows the Minister may appoint a person to the board.

### **APPOINTMENTS BY THE DIRECTOR OF MEDIATION SERVICES**

Division 22 discusses collective agreement arbitration including outlining a set of deemed provisions for the resolution of disputes should a collective agreement be silent on dispute resolution. See: [Section 136]. Section 137 provides that, if the parties to a dispute are unable to decide upon an arbitrator within 14 days of deciding to remit a matter to arbitration (or any longer period outlined in the collective agreement), either party may request the Director of Mediation Services to appoint a single arbitrator. Similarly, when a three-member arbitration board is used, if either party fails to appoint a member or if the appointed members of the board cannot select a third member to act as

chair within 7 days, Section 138 allows either party to request the Director of Mediation Services to make an appointment. These applications are handled by Mediation Services.

## **APPOINTMENTS BY THE CHAIR**

### ***PSERA Applications for Interest Arbitration***

Division 2 of the *Public Service Employee Relations Act* (PSERA) addresses interest arbitration. These provisions are necessary because Section 70 of PSERA prohibits strikes and Section 72 prohibits lockout.

If the parties are unable to conclude a collective agreement, Section 31(1) allows either or both parties to request that the Board appoint a compulsory arbitration board. As part of the application, Section 31(2) requires the applying party to list the items still in dispute and that they wish to be referred to compulsory arbitration. Rule of Procedure 42(1) requires applicants to further include with their applications:

- a description on the bargaining unit in respect of which the application is made;
- a copy of their most recent collective agreement; and
- details of the date on which notice to commence collective bargaining was given and the steps that have been taken to bargain collectively, including the dates of all meetings held.

Section 30 outlines a number of things that cannot be addressed by an arbitral award. Rule 42(3) requires that each party, at least 72 hours before any hearing, file with the Board and serve upon each other any items listed for arbitration that the party believes is non-arbitral according to Section 30.

Rule 42(4) requires the parties to jointly file at the hearing six copies of a summary of their bargaining positions on the items claimed to be in dispute. The summary shall be in the form of a three-column spread-sheet setting out the language of the existing collective agreement, the last proposal of the union and the last proposal of the employer with respect to each item claimed in dispute.

Upon receiving a request, the Board forwards a copy of it to the other party if the applicant has not already served it on the respondent. Within 10 days of receipt, the respondent must provide the Board and the applicant with a list of any additional items it would like addressed by the arbitration board.

Section 32 gives the Board discretion in appointing an arbitration board:

32(1) When a request for the establishment of a compulsory arbitration board is made by either an employer or a bargaining agent, the Board

- (a) if it is satisfied that the parties to the dispute have failed to make reasonable efforts to conclude a collective agreement, may direct the parties to continue collective bargaining,
- (b) if the party making the request agrees to withdraw it and both parties agree to the appointment of a mediator, may make that appointment, or
- (c) if it is satisfied that
  - (i) there are arbitral items to refer to a compulsory arbitration board,
  - (ii) the arbitral items can satisfactorily be considered together,
  - (iii) it is an appropriate time to refer the matter to a compulsory arbitration board, and
  - (iv) the dispute is a proper one to refer to an compulsory arbitration board,

may establish a compulsory arbitration board in accordance with this Part.

(2) When a request for the establishment of a compulsory arbitration board is made by an employer and a bargaining agent jointly, the Board may, if it is satisfied with respect to the matters referred to in subsection (1)(c), establish a compulsory arbitration board in accordance with this Part.

Should the Board establish a compulsory arbitration board, notify the parties. Section 33 requires each party to appoint a member to the arbitration board within 10 days of this notification. These two nominees then have an additional 10 days to choose a third person to chair the board. If any member of the arbitration board is not chosen within the timelines or if a vacancy occurs, Section 34 allows the Board to appoint a person to act in this capacity.

Once a compulsory arbitration board has been appointed, the Chair of the Board establishes in writing the membership of the board. See: [*Section 36(1)*]. The chair also lists the arbitral items to be resolved by the board. Section 37 allows the parties to jointly request the Board to add additional arbitral items to this list at a later time.

### ***PSERA Applications for Rights Arbitration***

Section 44 of PSERA states that Section 134 to 145 (i.e., Division 22) of the [Labour Relations Code](#) apply in respect to rights arbitration under PSERA. One important exception is that, in Sections 136(e), 137(1), 138(1)(a) and (b) and 141(2) and (4) of the [Code](#), the references to the Director of Mediation Services shall be read as references to the Labour Relations Board. Division 22 of the [Code](#) discusses collective agreement arbitration including outlining a set of deemed provisions for the resolution of disputes should a collective agreement be silent on dispute resolution. See: [*Section 136*].

Section 137 of the Code provides that, if the parties to a dispute are unable to decide upon an arbitrator within 14 days of deciding to remit a matter to arbitration (or any longer period outlined in the collective agreement), either party may request the Board to appoint a single arbitrator. Similarly, when a three-member arbitration board is used, if either party fails to appoint a member or if the appointed members of the board cannot

select a third member to act as chair within 7 days, Section 138 allows either party to request the Board to make an appointment.

Rule of Procedure 43(2) requires the applicant to include with their application:

- a copy of the collective agreement under which the difference originates;
- the name of the grievor, if applicable;
- a description of the difference; and
- the names, addresses and telephone numbers of the applicant, the respondent and the nominees, if applicable.

Rule 43(3) requires that the application **not** include a list of persons considered for appointment and rejected by the parties or their nominees.

### ***Rights Disputes in Post-Secondary Education***

The *Colleges Act*, *Universities Act* and *Technical Institutes Act* exclude academic staff and their bargaining agents and employers from the [Labour Relations Code](#) and the [Employment Standards Code](#). Schedule 1 of PSERA excludes them from the [Public Service Employee Relations Act](#). See: [[Post-secondary Institutions, Chapter 31\(j\)](#)]. Non-academic staff are covered by PSERA.

In place of these acts, the post-secondary legislation contains provisions governing labour relations between public post-secondary institutions and their academic staff. In these provisions are deemed provisions that are considered to be contained within any collective agreement to the degree that it is silent on dispute resolution. These deemed provisions give some role to the Chair of the Board when the parties wish to send a dispute to rights arbitration but cannot agree upon an arbitrator. For example, Section 39(1)(e) of the *Colleges Act* states:

39(1) (e) If the parties are unable to agree on a person to act as the single arbitrator, either party may request the chair of the Labour Relations Board under the *Labour Relations Code* in writing to appoint a single arbitrator.

This clause gives the Chair of the Board the power to appoint an arbitrator in a rights dispute. This appointment would be made by the Chair as described below in Making an Appointment.

## **MAKING AN APPOINTMENT**

When the Director of [Mediation Services](#) or the Chair makes an appointment to an arbitration board, we use the Mediation Services computer lottery system. This system randomly generates a list of five potential arbitrators. Each party is allowed to strike one name from the list. The remaining three names are fed back into the computer and an

arbitrator is randomly selected by the computer. The Director or Chair notifies the selected arbitrator and the parties of the appointment.