

# **On Balance: Guiding Principles for Administrative Justice Reform in British Columbia**

## **Administrative Justice Project Frequently Asked Questions**

February 2003

Since the release of the Administrative Justice Project's White Paper in August 2002, we have been asked many questions about government's plans for implementing the White Paper's proposals and recommendations. In particular, the British Columbia Council of Administrative Tribunals (BCCAT) prepared a series of questions in conjunction with its annual conference in late October. The following material is intended to provide further information on the Administrative Justice Project and to answer the questions raised by BCCAT and others.

- 1. Although the tribunal system was started a long time ago, this doesn't necessarily mean there is anything wrong with it. Why is government looking at changes to the system now?**
    - Government has a responsibility to ensure that public resources are used wisely – directed to those areas where they are likely to be most effective.
    - The province's system of administrative tribunals has developed, one tribunal at a time, over a period of more than 80 years. It is simply a matter of sound public policy and administration to undertake a comprehensive review of a system like this on a periodic basis.
    - The people we serve all benefit when each and every tribunal in the province has been shown to have a compelling public purpose and to have efficient and effective management.
  
  - 2. Why has the Administrative Justice Project limited its focus to administrative tribunals? What about statutory decision-makers, self-governing professions and the new self-regulating bodies, for example, in the financial services sector? Isn't it at this level that many administrative justice issues arise and isn't this where many citizens are most profoundly affected?**
    - Many citizens are profoundly affected by the decisions of statutory decision-makers and other self-regulating bodies. And indeed the decisions of these bodies are informed by the principles of administrative justice.
    - In setting up the Administrative Justice Project, we had to be selective in the scope of our work and in the issues we chose to address. It was our opinion that administrative tribunals would provide a good, manageable initial focus for our work, given the limited resources we have available to us and our commitment to implementing appropriate changes within a reasonable period of time.
    - The principles we develop for administrative tribunals may very well be relevant to statutory decision-makers and to decision-makers in the self-governing and self-regulating arena. As we build our collective expertise in this area, we will be able to look at issues in these other areas as well. And we will continue to work
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with line ministries whenever practicable to assist in improving first level administrative decisions.

- What has been important for us is to make a start in a way that is likely to be effective and is likely to build confidence within the broader administrative justice community.

**3. One of the objectives of the Administrative Justice Project is to ensure that administrative tribunals are able to meet the needs of the people they serve. Has an assessment of those needs been conducted or is this something that is contemplated for the future? What kind of public consultation are you proposing?**

- We are continuing to consult with adjudicators, government officials, members of the legal profession and other community groups who have indicated an interest in administrative justice reform.
- We are also developing a public consultation process that will allow us to reach out to the individuals and businesses that rely on administrative tribunals for decisions and dispute resolution. This is a challenge and we hope that members of the administrative justice community will help us by participating in this community outreach.

**4. The White Paper recommends that tribunal recruitment and selection be based on open, transparent, competitive and merit based processes. How do you reconcile the notion of appointments on the basis of merit with the traditional role of Cabinet and government ministers in making these decisions? When can we anticipate seeing government employ a consistent merit based approach?**

- The government has already taken significant steps to support a merit based recruitment and selection process through the establishment of the Board Resourcing and Development Office (BRDO).
  - Under the auspices of this office, all tribunals with upcoming vacancies are required to prepare a vacancy skills profile or job description. The BRDO posts advertised vacancies on its website and is in the process of ensuring that, for all vacancies where a candidate search is required, the vacancy and job description are posted on the BRDO website.
  - The BRDO works with each tribunal and the host ministry to determine the appropriate selection process for each type of vacancy and the BRDO ensures that all candidates brought forward for consideration by the host ministry meet the qualifications set out in the original vacancy skills profile.
  - Tribunal chairs are encouraged to play an active role in recruitment and selection. Government cannot expect to hold tribunals publicly accountable for
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the use of public resources if tribunal chairs have no formal role in the choice of tribunal members. As a consequence, we will be giving express recognition to a role for the tribunal chair role in the enabling legislation for each tribunal.

- Tribunal chairs can and should participate in the appointment process by screening prospective candidates and by making recommendations to government. As long as candidates are qualified and ministers have a list of candidates from which they can make appropriate choices, the principles of accountability and responsibility can be accommodated and balanced.
- The key to our new approach is open communication between tribunal chairs and host ministers – communication about the kinds of individuals who would be excellent tribunal members, the process for recruiting them and the timelines that must be followed to ensure that tribunals can continue to function while appointments are being considered and made.
- The changes we have made to the workers' compensation system in the fall of 2002 speak to our new approach to appointments – not only for workers' compensation but also for other administrative tribunals.
- We need to work together on this initiative over the next few years – strengthening our commitment to better practices and bolstering that commitment through legislation where and when we can.

**5. If the chair is given more power and authority, how will this be limited so that it does not interfere with or impair the independence of individual tribunal members?**

- Just as we need to craft a careful and respectful relationship between host ministers and tribunal chairs, so too must we encourage the establishment of an appropriate relationship between tribunal chairs and members.
- We must make sure that the management and reporting systems we put in place focus on issues of public accountability, leaving intact the independent decision-making autonomy of individual tribunal members.
- We invite thoughtful comments and practical suggestions from those who are working in tribunals on a day-to-day basis. Groups like BCCAT and the Circle of Chairs can help government to define the issues and provide critical commentary as we move forward.

**6. Adjudicators may be appointed by Order in Council, retained on contract or hired as employees. How do you think the issues of independence and accountability are affected by the nature of the appointment?**

- Independence and accountability are not conflicting values. All individuals who perform public functions must be accountable to the public they serve. For
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example, within the administrative justice system we have a large number of statutory decision-makers who are employees of government and who are also expected to make fair and impartial decisions.

- There is a continuum of decision-making independence – one appointment model need not be put in place for all decision-makers. What we need to do is articulate the principles upon which particular models are chosen for use in specific circumstances.
- For example, if the government does not appear before a decision-maker and the issue in question concerns a privilege rather than a right, there is less need for an arm's length relationship (or OIC appointment) and it is perfectly appropriate and acceptable for the decision-maker to be a public servant (Superintendent of Motor Vehicles).
- However, where rights are involved and government has had a say in determining or limiting those rights, then clearly a more arm's length type of appointment is desirable.
- The form of an appointment is important and should be considered carefully. However, it is also equally important to consider how the ongoing relationship between the appointee and government can best be given practical effect.

**7. In a submission to the Administrative Justice Project, BCCAT recommended the establishment of an Administrative Justice Council, consisting of members from government, the tribunal community and the public generally. As proposed, the Council would function in an independent manner, with administrative accountability to the Attorney General. Was this recommendation considered and, if so, why was it not adopted?**

- The United Kingdom has established a body similar in nature to BCCAT's proposed Administrative Justice Council. This model was considered as part of the work leading up to the White Paper. However, British Columbia is a relatively small jurisdiction, compared with a country like the United Kingdom or a large province like Ontario. In addition, because of the federal structure of our constitution, the number and size of our tribunals is, comparatively speaking, small.
  - We already have in place two excellent vehicles for working with tribunals – BCCAT and the Circle of Chairs. Resources are scarce. In considering a whole range of options, we were not satisfied that, at this time, it was in the public interest to create a new independent office as an intermediary between government and tribunals. We need to build stronger links and communication directly, rather than through another external, independent, small and relatively unsupported third party.
  - We can accomplish a great deal through the new Administrative Justice Office (AJO) that has now been established within the Ministry of Attorney General.
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The formal justice system has a long history of independent decision-making and separation of powers: for example, the police and Crown counsel; court services and the judiciary. The Ministry of Attorney General has extensive experience dealing with these kinds of issues.

**8. The White Paper suggests that the mandate of the Administrative Justice Office will be limited to 2 years. Can you assure us that a review of the AJO will be undertaken prior to the expiration of the 2 year mandate? And that external stakeholders will be able to participate in the review?**

- The new AJO has been given a 2-year time-limited mandate to implement the White Paper's recommendations. However, the office will be established on a permanent basis and we will use the experience gained in implementing the White Paper's recommendations to guide our decisions about how best to structure and position this office over the long term.
- The AJO is intended to be a resource for the administrative justice community. We invite comments from that community at any time during the implementation and review process.

**9. Was any consideration given to making the new Administrative Justice Office the agency responsible for the appointment process, rather than the Board Resourcing and Development Office (BRDO)?**

- No. The BRDO deals with Cabinet appointments across the agency sector and hence has specific expertise in these matters. It is in the right place to make sure that appointments are put forward and included on the Cabinet agenda.
- The AJO has no direct access to these processes and its involvement in the recruitment, selection and appointment of specific individuals would add unnecessary complexities to the process.
- The AJO's role is limited to advising government and the BRDO on policy issues that arise within the administrative justice system. In this capacity, the AJO has assisted, when asked, in screening and interviewing but we do not see a larger role for the office in the appointments process.

**10. If BRDO is to be the agency responsible for the appointment process, how will it avoid the perception of political interference in the appointment process?**

- The BRDO is part of the administrative or public service side of the Premier's office. Its mandate is to ensure open and transparent appointment practices and to ensure that all candidates being considered by the host minister are appropriately qualified for the positions being filled.
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- The BRDO also ensures that appropriate due diligence has taken place before appointments are recommended.

**11. One of the White Paper's recommendations is that the number of host ministries be reduced from the current 17. What criteria will be used to determine which ministry should host a tribunal or why a particular tribunal should be relocated to another ministry?**

- Specific criteria have not yet been developed. What we will be looking for are commonalities across tribunals with respect to their subject matter or their client base and expertise and resources within host ministries to address administrative justice issues.
- We must balance a ministry's subject matter expertise against the prospect of potential conflicts between host ministries and tribunals, particularly when tribunals are reviewing a host ministry's administrative decisions.
- The purpose of the re-alignment is to ensure that host ministries are able to develop an understanding of the issues that arise in the administrative justice context and have the institutional capacity to develop appropriate working relationships with the AJO and the tribunals themselves.

**12. What about training? Can you clarify what is anticipated by the reference to programs that address issues such as "the general purposes and functions of government and other public institutions"? Do you anticipate that government will continue to rely on BCCAT's expertise and existing training structures to provide the training for tribunal members? Do you anticipate that government will continue to support BCCAT's development of training programs? Have you considered the need for training initiatives to ensure that people working within government and other public institutions understand, respect and support the work of administrative tribunals?**

- Training is a major and continuing challenge for all of us, not only within the administrative justice community, but also across the public sector. Good, ongoing training is critical if we hope to develop a sound system of administrative justice.
  - BCCAT continues to provide a valued service to the tribunal community through its ongoing training programs. We want to support this activity to the extent that we can and we want to supplement BCCAT's work where we have the time and resources to do so.
  - In addition to the foundations course that is offered by BCCAT, we expect to support the development of more generic information on tribunals – material that will be appropriate for new appointees, for government officials who deal with administrative tribunals and other statutory decision makers and for members of
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the public generally. This material will supplement the materials that have already been developed by BCCAT.

- We will also encourage the development and retention of broadly based expertise across the administrative justice system by removing restrictions on the number of terms a person can serve and by creating more opportunities for cross-appointments. Over time, this will strengthen administrative justice expertise within the system as a whole.

**13. How can administrative tribunals deal with all of these changes given the limited budgets and the time constraints they have?**

- We have an opportunity and the momentum now to make fundamental changes. We understand the pressures that tribunal members face, particularly those who are part-time appointees.
- By implementing the White Paper's recommendations over a two-year period, we have tried to balance the responsibilities of government with the capacity of tribunal members and others to participate in reforms and contribute in a meaningful way.

**14. What about compensation? Per diem rates for most part-time tribunal appointees have not been adjusted since 1990.**

- Compensation rates need to be re-examined. It is essential that rates are set at a realistic level so we can continue to attract the best candidates.
- The AJO is currently working with BRDO and others on this issue and they will be making recommendations for compensation adjustments within the next few months.

**15. Why were tribunals expressly excluded from Bill 66 (*Public Sector Employers Amendment Act*) – the new legislation that deals with public sector contracts, compensation and termination?**

- Given the unique role that tribunals play in the public sector, we wanted to look at appointment issues expressly from an administrative justice perspective.
  - The AJO is taking the lead in developing recommendations for an appropriate framework for tribunal appointments in connection with government's implementation of the White Paper.
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**16. Why does the White Paper recommend a role for ministers in the development of tribunal rules? Isn't this a breach of tribunal independence?**

- Within our parliamentary system of responsible government, ministers are ultimately held to public account for a tribunal's performance. Government's stated public commitment is to improve the administrative justice system as a coherent and fair *system*.
- While government is working hard to protect the diversity and uniqueness of individual tribunals, we must also ensure that tribunals are able to operate in a manner that is consistent with government's overall guiding principles and broad policy goals.
- We need to think about practices and procedures that should or could be developed on a more consistent basis across tribunals and those that are unique. We also need to think about the different types of tribunals we have, from the highly technical and specialized tribunals with long-established practices and procedures to the smaller tribunals with less capacity to design and develop their own body of rules.
- Ministerial involvement in approving some aspects of a comprehensive set of rules and guidelines for tribunal management may ensure greater consistency, transparency and accountability.
- These are issues that we will address more fully as we proceed with implementation.

**17. What has happened to the Workplace Tribunals Review that was included in the original terms of reference for the AJP?**

- As immediate priorities, we have restructured the human rights system, streamlined the workers' compensation system and integrated the labour and employment standards tribunals.
  - Given the scope and impact of these initiatives on the everyday lives of employers and working people, we have set aside our early and more general work on workplace tribunals in order to focus our resources on issues of more immediate concern.
  - We will complete the implementation and assessment of all of these initiatives before we embark on any further review of workplace tribunals from a more general perspective.
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