On Balance

Guiding Principles for Administrative Justice Reform in British Columbia

White Paper

prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

July 2002

BRITISH COLUMBIA

Ministry of
Attorney General

Administrative Justice Project

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July 31, 2002

Honourable Geoff Plant
Attorney General
Parliament Buildings
Victoria, British Columbia

Dear Sir:

I am pleased to present to you our White Paper on administrative justice reform in British Columbia. This report addresses the most significant challenges facing the administrative justice system today and makes recommendations to government for reforms that will ensure that:

- administrative tribunals are able to meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government is able to fulfill its obligations by providing the legislative and policy framework administrative tribunals require to carry out their independent mandates effectively.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. In the course of preparing our recommendations, we have consulted with members of the administrative justice community and considered experiences in other Canadian and common law jurisdictions.

Our work has been guided by an Advisory Committee chaired by the Deputy Attorney General, Gillian Wallace. The committee was structured to include senior government representatives, tribunal representatives and a member of the academic community. I am indebted to the committee members for their commitment to the Project and for their timely and thoughtful commentary on our work.

The White Paper sets out an implementation plan for moving forward with the recommendations contained within it. Consultation with practitioners and members of the public is an essential component of this plan. In this respect, we have invited public comment on the White Paper until November 15, 2002.

I trust our work will assist government in strengthening the province's administrative justice system and ensuring that its processes are accessible, efficient, fair and affordable.

Respectfully submitted,

Wendi J. Mackay
Project Director
Administrative Justice Project

BRITISH COLUMBIA'S AGENDA FOR MODERNIZATION

The ad hoc development of what has become British Columbia's administrative justice system has served the public well despite significant challenges in a number of key areas. From the outset, administrative tribunals were established, often as an alternative to the courts, for the purpose of providing informal, accessible and efficient mechanisms for decision making and dispute resolution. In recent years, competition for scarce public resources, the so-called judicialization of tribunals and the limited institutional capacity of some tribunals to respond to increased workloads and pressures for greater accountability have all contributed to uncertainties, costs and delays - challenges that are similar to those now facing the very institutions and processes tribunals were intended to replace. These challenges and pressures have very real implications for people and communities, making it more difficult for them to access, understand and use administrative tribunals in a timely way in the course of their everyday lives.

Administrative tribunals have taken preliminary steps to address some of these challenges. Organizations like the Circle of Chairs and the British Columbia Council of Administrative Tribunals play an important and active role by providing tribunal members with a common forum for information sharing and discussion. In contrast and in many respects, government policy and practice has not kept pace with emerging issues and challenges. This White Paper provides an opportunity for government and its partners in the administrative justice system to build on existing strengths within the current system and take the lead in implementing a reform agenda that is both innovative and commensurate with present institutional capacities and constraints within government and within the broader administrative justice community.

The recommendations in this White Paper are, in many ways, unique to British Columbia. By articulating a clear set of principles on the issues of independence and accountability and by clarifying the roles and responsibilities of government and tribunals, government will encourage greater public confidence in the administrative justice system. By adopting more consistent powers, rules and procedures, government will improve and strengthen the public's understanding of the goals and purposes of the administrative justice system. By encouraging innovation in dispute resolution processes and management practices, government will provide the leadership necessary to ensure that the administrative justice system is modern, relevant, open and responsive to the needs of the people it serves.

With this White Paper, the Administrative Justice Project is setting the stage for government to move forward with a two-year program of systemic reform, addressing existing challenges and charting a new course, one that we believe will strengthen the independence and accountability of administrative tribunals and continue to foster the core values of informality, accessibility and efficiency. Through the concerted efforts and goodwill of all of the partners in the administrative justice system, these reform initiatives will further strengthen the province's administrative justice system and ensure courteous service, timely decisions and fair treatment for all British Columbians.

A VISION FOR THE ADMINISTRATIVE JUSTICE SYSTEM

Provides high quality services to the people of British Columbia

Accessible – to everyone, including those who are unrepresented and those for whom access may be limited by geography, language, culture or personal circumstances

Informal and Simple – easy to use and understand

Efficient – offers early dispute resolution, with clear, certain and final decisions

Proportionate – follows procedures that are proportionate to the issues at stake

Affordable – operates so that reasonable costs are not a barrier to access

Reflects government's core values and principles

Fair Treatment

- treats individuals in similar circumstances in similar ways
- treats participants in proceedings equally, courteously, impartially and with respect

Openness and Transparency

- operates under policies and practices that are published and readily available
- provides written reasons for decisions, where appropriate and in the public interest
- is responsive to the views and concerns of partners and stakeholders

Flexibility

- offers choices to individuals in selecting the forum and process that most clearly addresses their needs
- is responsive, adaptable and able to accommodate unusual or unexpected circumstances

Sustainability

- operates effectively within government's economic and fiscal framework

Achieves the right balance between independence and accountability

- respects the independent decision making authority of tribunals in individual cases
- fosters professionalism and the development of specialized expertise
- adopts best practices for performance measurement and evaluation
- holds tribunals accountable in an appropriate and public way

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OVERVIEW

Administrative tribunals affect everyday life in profound ways. Individuals may come face to face with tribunals when they seek access to public resources and programs or when they seek assistance in resolving disagreements with neighbours, tenants, landlords, co-workers or business associates. While everyone has no doubt had some experience with at least one tribunal, this part of the public sector, taken as a whole, is largely invisible and often not well-understood because it operates through a host of separate organizations with different mandates that, on the surface at least, appear to have little in common.

British Columbia's first administrative tribunal, the Workmans' Compensation Board, was set up in 1916 to administer a scheme for assessing and collecting premiums from employers and to adjudicate and pay claims to injured workers. The Utilities Commission followed in 1938. However, it was not until after World War II that the number of tribunals began to proliferate. Amongst the new tribunals, the Labour Relations Board was first established in 1947. By July 2001, 67 administrative tribunals, excluding the governing bodies of the professions and occupations, were operating within the province. The mandates of these tribunals encompassed a full range of social, economic and financial matters including employment standards, human rights, environmental issues, forest practices and taxation. A list of tribunals, host ministries and enabling statutes as they existed in June 2002 is included in this White Paper as Appendix 1.

Administrative tribunals are distinct from government departments and normally function independently of the day-to-day operations of line ministries. They are also distinct from other arm's length public bodies such as Crown corporations, policy advisory bodies, community boards and grant funding agencies.

While public bodies are normally created by statute, subject to broad policy direction from government and often publicly funded, it is in the exercise of their adjudicative functions that administrative tribunals take on a distinctive role and become part of the larger justice system. Like the courts, administrative tribunals are expected to be impartial and fair. As an alternative to the courts, they are also expected to be more accessible, less costly and more able to reach decisions in a timely and efficient manner. In this respect, governments create administrative tribunals to:

- review the decisions of other public officials;
- issue licenses or permits and enforce regulations;
- provide a place for policy to inform or influence adjudicative decisions;
- allow for the application of specialized professional or technical expertise where it is relevant and helpful in resolving disputes;
- provide an alternative to the courts that is less formal and costly so that disputes between private parties can be resolved quickly and efficiently without necessarily engaging legal counsel.

As part of the larger justice system, administrative tribunals share a common purpose in that they have a mandate to make decisions about rights. Tribunal decisions have legal consequences for

the parties who appear before them. In receiving and weighing evidence, tribunals apply legal principles to the facts before them. Administrative tribunals are also subject to the supervision of the courts and, as such, they must provide at least some degree of procedural fairness in their decision making processes.

The courts and academic writers have addressed the unique nature and function of administrative tribunals in a variety of ways over the years. It has been said that tribunals were created by the executive branch of government for the purpose of implementing government policy. While tribunals often make quasi-judicial decisions in implementing that policy, they have also been described as spanning the constitutional divide between the executive and judicial branches of government. In such circumstances, it is not uncommon for a healthy tension to exist between administrative tribunals and government. In particular, there is an ongoing tension between the tribunal's need to decide cases in an impartial and quasi-judicial manner and the tribunal's accountability to the executive, to government and ultimately to the wider community. Achieving the right balance between independence and accountability informs each of the recommendations in this White Paper.

In addition to their common purpose, administrative tribunals also exhibit extraordinary diversity. Writing in 1957, the Franks Committee made the following observation about the tribunal system in the United Kingdom:

> *"Perhaps the most striking feature of tribunals is their variety, not only of function but also of procedure and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfill their particular functions and should therefore vary widely in character. But the wide variations in procedure and constitution which now exist are much more the result of ad hoc decisions, political circumstance and historical accident than of application of general and consistent principles."*

This observation remains true for administrative tribunals in British Columbia to this day. Aspects of diversity within the administrative justice system are evidenced by:

- the relative importance of decisions for individuals and the larger community ranging from issues of individual liberty or livelihood through broad public policy disputes about environmental issues and public safety to questions about the regulation of complex economic activities;
- the role of tribunals in adjudicating disputes between private parties or between individuals and government;

- the full scope and breadth of the tribunal's mandate, whether investigative, adjudicative, policy making or regulatory;
- the relative size of the tribunal;
- the ways in which tribunal members are appointed, whether by Cabinet, the responsible minister or through some other nomination and selection process.

Administrative Justice Project

Over the course of many years, the provincial government, on behalf of the people of British Columbia, has made an enormous public investment in its system of administrative justice. In embarking on a mandate to return the province to its full social and economic potential, government initiated a thoughtful and comprehensive review of this part of the justice system from a broad legal and policy perspective. On July 27, 2001, the Attorney General established the Administrative Justice Project for this purpose. Terms of Reference for the Project and its background papers and reports to date are available online at www.gov.bc.ca/ajp.

The Project has examined fundamental questions about the nature, quality and timeliness of the services that administrative tribunals offer to people and their communities. Its recommendations have been guided by principles intended to ensure that, in the years to come:

- administrative tribunals will continue to be able to meet the needs of the people they serve;
- their administrative processes will be open and transparent;
- their mandates will be modern and relevant; and
- government will be able to fulfill its obligations by providing the legislative and policy framework administrative tribunals require to carry out their independent mandates effectively.

In carrying out its work, the Administrative Justice Project has:

- reviewed the mandates of the province's administrative tribunals to ensure they are relevant to a modern and efficient economy;
- made recommendations to eliminate overlapping jurisdictions and multiple proceedings;

- made recommendations to streamline administrative procedures;
- made recommendations for government to support the work of administrative tribunals in an appropriate and effective way.

In proceeding with a comprehensive review of administrative justice at this time, government has initiated a process to ensure that tribunals can fulfill their core responsibilities in the best possible way. This is a bold initiative – the first of its kind in this province – and an essential component of government's overall commitment to excellence in public service.

Core Services Review

In August 2001, government initiated a core services review of all public programs, government ministries, Crown corporations, other public agencies and the administrative tribunals that are the subject of this White Paper. The review was part of government's general commitment to the reform of British Columbia's public institutions. It was and is intended to ensure that ongoing public programs and services are modern, relevant and affordable.

The following guiding principles informed the conduct of the core services review, namely that, in all of its endeavours, the provincial government is committed to fostering:

- public accountability and transparency;
- fair and impartial administrative practices and procedures;
- timely, efficient and cost effective decisions and resolutions;
- courteous and efficient service;
- accessible programs that are easy to use and understand;
- public service excellence and professionalism.

The review provided an opportunity for administrative tribunals and host ministries to "rethink" fundamental assumptions about mandates, responsibilities, programs and services. In this respect, the objectives of the review were to ensure that:

- non-essential programs and services were eliminated;
- taxpayers' dollars were being directed to the highest priorities and to those areas where government, in the broadest sense, is best placed to deliver services;

- the most appropriate service delivery and organizational models were being used to best meet the needs of British Columbians; and
- public programs and services continued to address market imperfections, equity and social justice concerns, environmental considerations and public security and safety imperatives.

The Administrative Justice Project developed specific guidelines for administrative tribunals and host ministries. These guidelines set out five questions that each administrative tribunal and host ministry was expected to address in presentations to the Core Services Review and Deregulation Task Force.

Phase 1: Mandate Review

The purpose of the first phase of the core services review was to answer fundamental questions about each administrative tribunal under three distinct tests:

1. Public Interest Test

Does the administrative tribunal, in its mandate, programs and activities, continue to serve a compelling public purpose?

2. Affordability Test

Are the costs of the administrative tribunal, including the costs of its programs and activities, affordable in the current fiscal environment?

3. Effectiveness and Role of the Public Sector Test

Are we doing the right thing? Is there a legitimate and essential role for the public sector in the field in which the administrative tribunal operates?

Phase 2: Service Delivery Review

The purpose of the second phase of the core services review was to examine the efficiency and accountability of administrative tribunals under the following tests:

4. Efficiency Test

Is the current organizational and service delivery model the most efficient way to provide, manage or deliver the administrative tribunal's services?

5. Accountability Test

Are current measures and reporting mechanisms the most effective way to account for the services of the administrative tribunal and to measure its ongoing relevance, performance and effectiveness?

Most administrative tribunals and host ministries had completed their core services reviews by the end of January 2002. Detailed information on the individual results of these reviews to date are available at www.gov.bc.ca/ajp. From the perspective of the administrative justice system, as a whole, the following general conclusions emerged from the review and have informed the subsequent work of the Administrative Justice Project and the recommendations in this White Paper:

- Government can enhance administrative decision-making and dispute resolution by directing resources to improvements in the quality and timeliness of initial decisions and by providing more opportunities for informal reviews and reconsiderations earlier in the adjudicative process.
- Government can amend enabling legislation so that administrative tribunals are able to access a full range of early dispute resolution techniques and adopt those that are appropriate, proportionate and likely to be effective within the unique context and operating environment of each administrative tribunal.
- Government can foster greater certainty and finality in administrative decision making by eliminating unnecessary review and appeal processes, thereby reducing the number of times the parties can request a review or file an appeal and reducing the length of time required to reach a final determination in individual cases.
- Government can be guided in its decision making about whether to establish or restructure administrative tribunals by considering existing or anticipated workloads and determining whether workloads are in fact large enough to allow tribunals to develop a sufficient body of specialized knowledge and expertise.
- Government can structure the mandates of administrative tribunals so that their primary purposes are to apply specialized professional or technical expertise rather than legal principles which are more properly within the jurisdiction of the courts.

White Paper

This White Paper is the culmination of the Administrative Justice Project's work. It includes a brief analysis of many of the important issues and challenges facing the administrative justice system today. It also sets out recommendations for government to consider as it moves forward with its reform agenda. Finally, the White Paper lays out a recommended implementation plan for managing the reforms and the reform process over the next two years.

Many of the issues referenced in the White Paper are considered in more detail in background papers released earlier by the Administrative Justice Project. These background papers are available on the Project's website at www.gov.bc.ca/ajp. Other issues are raised in the White Paper for the first time. Separate reports on some of these issues have been prepared and are also posted on the Project's website. For the reader's convenience, a list of background papers and reports is included in the White Paper as Appendix 2. Electronic links are also provided throughout the White Paper to the relevant supporting material.

The White Paper is intended to serve as the foundation for further public consultation, discussion and debate. Interested members of the public are invited to contact the Project Office or to make comments on the White Paper before November 15, 2002 in one of the following ways:

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ISSUES AND RECOMMENDATIONS

This part of the White Paper highlights the significant issues and challenges that have been identified over the past year through the Administrative Justice Project's work, reviews and consultations. It also sets out recommendations to government for addressing these issues either through legislative enactment or through the development of new policy instruments and agreements.

At the core of the recommendations in this White Paper are a set of principles to guide government and administrative tribunals in addressing the interrelated issues of independence and accountability. Building from these guiding principles are recommendations to clarify the roles and responsibilities of the partners in the administrative justice system, to give administrative tribunals the full range of statutory powers and tools they need to discharge their independent mandates effectively and to establish new ways to improve public accountability for the administrative justice system, as a whole, whether through government or through administrative tribunals themselves.

The reforms contemplated in this White Paper are intended to strengthen the province's system of administrative justice by making its processes more consistent, transparent and predictable – thereby making the system itself more accessible and understandable to the people it serves. The key to the success of these initiatives will be measured by whether the system is able to provide courteous service, timely decisions and fair treatment for every British Columbian who comes to an administrative tribunal for a decision or the resolution of a dispute.

Independence and Accountability

Perhaps no issue provokes more discussion and debate within the administrative justice community than the interrelationship between the concepts of tribunal "independence" and "accountability". Parties in proceedings before administrative tribunals have challenged government's authority to structure tribunals in certain ways. While the courts have confirmed that governments are fully competent to create administrative tribunals under provincial legislation, details about the appropriate institutional relationship between administrative tribunals and government have not been finally settled from a policy perspective.

At issue are questions about what constitutes inappropriate government interference in the independent decision making responsibilities of administrative tribunals and about what limitations, if any, government might face in implementing appropriate mechanisms for the full public accountability of administrative tribunals. On the one hand, there must be an appropriate balance between independence and accountability. On the other hand, initiatives that foster independent decision making may also enhance the public accountability of administrative tribunals.

This part of the White Paper summarizes a more in depth analysis contained in a report, Independence and Accountability, available on the Project's website at www.gov.bc.ca/ajp.

Analysis

Administrative tribunals exercise court-like functions when they make adjudicative decisions. Yet most tribunals also perform non-adjudicative tasks and all tribunals are in one sense part of the executive arm of government. They are not courts. In structuring its institutional relationship with tribunals, government needs to foster both an appropriate level of tribunal independence in deciding individual cases and an appropriate level of tribunal accountability in the performance of their statutory mandates.

Although tribunals are most often intended to operate at arm's length from government, they are nevertheless part of a legislative scheme for implementing public policy. Government, in turn, is ultimately accountable to the legislature and the people of British Columbia for the implementation of that policy and for the appropriate expenditure of public funds.

The importance of independence and accountability for administrative tribunals is not uniformly understood across government, within the administrative justice community or by the public at large. Approval and articulation of an appropriate government perspective on this matter would create an improved and more uniform relationship between administrative tribunals and government.

Recommendations

In order to provide a foundation for the development of a shared understanding about the role and purposes of the administrative justice system, it is recommended that government adopt the following guiding principles, namely that:

1. Government base its ongoing relationships with administrative tribunals on a commitment to the principles of:
    - independence for administrative tribunals in adjudicative decision making;
    - public accountability for administrative tribunals through the adoption of modern and innovative management practices.
2. Government reinforce the decision making independence of tribunals by:
    - continuing to respect decisions of tribunal members in individual cases;

- formalizing relationships with tribunals through clear legislation, policies, practices and agreements;
- establishing standard terms and conditions of appointment;
- acknowledging the role of organizations like the British Columbia Council of Administrative Tribunals and the Circle of Chairs;
- providing public information and education on the role and purpose of administrative tribunals.

3. Government strengthen public accountability for administrative tribunals by:
   - implementing an appointment process that is open, transparent and merit based;
   - establishing a management framework for tribunal governance that is proportionate to the scope of the tribunal's activities and sets out clearly the respective roles and obligations of both government and the tribunal.
4. In establishing the level of independence and accountability that is appropriate to the diverse mandates and operating circumstances of individual tribunals, government should be guided by the following additional principles:
   - tribunals should be accountable for producing fair and competent decisions in a timely fashion;
   - public confidence in the fairness, quality and impartiality of tribunal decisions should not be undermined through unnecessary or inappropriate government interference in tribunal operations;
   - government and tribunals should have shared obligations for using in a prudent manner public funds allocated to tribunal operations.

Appointments

Issues related to the appointment of administrative tribunal chairs and members have emerged as central themes in the literature, in discussions with public officials and in the principled assessment of reform initiatives in other jurisdictions. There is strong consensus that unless appointment issues are addressed in a complete and comprehensive way, success in realizing other reforms within the administrative justice system is likely to be elusive, difficult or short-lived.

This part of the White Paper summarizes a more in depth analysis contained in a background paper, Appointments: A Policy Framework for Administrative Tribunals, and a report, Making Sound Appointments. Both are available on the Project's website at www.gov.bc.ca/ajp.

Analysis

There is a compelling need for government to provide greater certainty and consistency in appointment policies and in the processes and standards that are followed and applied. While some tribunals recruit through open competition, others use informal or closed networking as the primary basis for recruitment and selection.

There is broad consensus within the administrative justice community that government rethink and clarify its expectations of tribunal chairs with respect to both their specific obligations in the appointment process and their other duties as the heads of administrative tribunals.

There is an opportunity for government to enhance the public accountability of administrative tribunals by providing a formal role for tribunal chairs in the appointment process and by holding the chairs to account for the tribunal's performance.

It is also timely for government to review compensation levels for tribunal appointees. No adjustments to approved per diem rates have been made since 1990. There is wide variation in compensation for full time members that does not necessarily reflect market forces, expertise or the operational complexities of the tribunals themselves. Current compensation rates for tribunal chairs are not always commensurate with government's developing expectations about the role of the chair and the chair's responsibilities for the efficient and effective operations of the tribunal.

Recommendations

By making sound appointments to administrative tribunals, government can foster public confidence in the administrative justice system, enhance the transparency of the appointment process, ensure fair and open recruitment practices and provide for appointments that are based on merit. Implementation of the following recommendations will allow government to achieve these objectives.

Recruitment and Selection

5. In order to support the development of an orderly recruitment and selection process, it is recommended that an annual appointment plan be prepared for each administrative tribunal setting out in advance:

    - the respective roles and responsibilities of government and tribunals;

- the number of vacancies anticipated in a given year including the number to be filled by recruitment efforts and renewals;
- the types of positions to be filled, whether chairs or members and whether full time or part time;
- the kinds of recruitment and outreach activities that will be required, including their potential costs;
- the critical timelines from initiation to completion for key deliverables and appointment decisions.

6. Within the framework of an annual appointment plan, it is recommended that a needs assessment be prepared or updated each time tribunal appointments are required.

7. It is recommended that tribunal chairs have the capacity to recommend a variety of appointments tailored to meet the needs and circumstances of individual tribunals. Where appropriate, it should be possible to make appointments on a full time, part time or contractual basis. Further, cross-appointments should be encouraged where the required adjudicative expertise is transferable and it would not be contrary to the public interest to do so.

8. It is recommended that job descriptions be developed for administrative tribunal appointees.

9. It is recommended that recruitment and selection be based on open, transparent and competitive processes that are proportionate to the nature of the position being filled and subject to monitoring and auditing by the Board Resourcing and Development Office.

Appointment Terms and Conditions

10. In order to implement polices and procedures that will further government's strategic goals, it is recommended that the following guidelines for appointments to administrative tribunals be adopted. While there should be a general commitment to the principle of consistency, there should also be sufficient flexibility in practice to allow individual tribunals to adjust or adapt to particular or unusual circumstances. Accordingly, government should:

    - discontinue the practice of making tribunal appointments at pleasure or for the term of an appointee's working life and instead establish fixed term appointments within a range of 3 to 5 years with appropriate provisions for tenure, reappointment, termination and severance;
    - in appropriate circumstances, permit initial appointments for terms of less than 2 years for the purpose of early performance reviews and assessments;
    - remove current policy restrictions on the number of subsequent appointments an appointee may expect or accept;
    - provide capacity to appoint tribunal members on a short-term acting or interim basis for the purpose of maintaining tribunal operations through transitional periods or for accommodating leaves of absence;

- establish consistent practices for providing notice to appointees of decisions not to reappoint or to terminate;
- clarify in legislation that tribunal members have the capacity to complete deliberations in proceedings that continue after they have resigned or their appointments have lapsed;
- initiate a review of current legislation and practices with respect to the appointment of staff to administrative tribunals and develop recommendations for further clarification and reform.

11. In order to enhance the overall effectiveness of tribunal operations, it is recommended that government provide tribunal chairs with the capacity to delegate responsibilities and duties to other tribunal members.

Compensation and Benefits

12. It is recommended that government review and implement changes to compensation and benefits for tribunal appointees in two stages:
    - first, to reflect changes in overall compensation levels since 1990;
    - second, to define appropriate benchmarks and provide more consistency in and accountability for compensation levels across tribunals.

Appointment Model

13. It is recommended that the Board Resourcing and Development Office continue to take the lead in the recruitment and selection of tribunal chairs and that tribunal chairs, in consultation with the Board Resourcing and Development Office, take the lead in the recruitment and selection of tribunal members, subject to formal approval and appointment by Cabinet.
14. Subject to specific considerations within individual tribunals, it is recommended that government:
    - amend legislation, where necessary, to provide for the appointment of:
        - tribunal chairs by Order in Council;
        - tribunal members by Order in Council on the recommendation of tribunal chairs and after completion of a merit based recruitment process;
    - reduce, from 17, the number of host ministries with responsibilities for administrative tribunals;
    - provide centralized coordination and support to tribunal chairs in the development of appointment plans, recruitment strategies and processes.
15. It is recommended that the Board Resourcing and Development Office have an ongoing supervisory role in standard setting and in monitoring and auditing the recruitment and selection practices of host ministries and tribunals.

Policy Instruments

16. It is recommended that government clarify the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals through an operating agreement, amending the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

17. It is recommended that government:

    - develop and implement a standard form of appointment agreement for administrative tribunals setting out government's expectations with respect to term and tenure, reappointment, notice, termination and severance, compensation and benefits;

    - if necessary, amend the *Public Sector Employers Act* to clarify how and to what extent that Act applies to administrative tribunals.

Statutory Powers for Administrative Tribunals

The ability of administrative tribunals to deliver their statutory mandates in a fair, efficient and effective manner is inextricably linked to their powers and procedural obligations. At present, the powers, procedures and functions of the various tribunals are as diverse as the public policy concerns underlying the statutes that create them. While there is general consensus that greater uniformity in the types of powers and procedures of these tribunals is a desirable administrative justice reform objective, the concept of a single, comprehensive powers and procedures code has not been widely considered in British Columbia. Ultimately, however, the public will be better served where some commonality of approach is realized and administrative powers and procedures are more open, understandable and transparent.

This part of the White Paper summarizes a more in depth analysis contained in a background paper, The Statutory Powers and Procedures of Administrative Tribunals in British Columbia, and a report, Providing Administrative Tribunals with Essential Powers and Procedures. Both are available on the Project's website at www.gov.bc.ca/ajp.

Analysis

There is general concern that the current diversity in powers and procedures among administrative tribunals is more a reflection of ad hoc decision making and political circumstance than the result of comprehensive and careful policy consideration of the specific needs of a given tribunal at the time it was created. Additionally, while some variations in tribunal powers and procedures will be inevitable, there are many points of commonality between these tribunals and a

more principled and consistent approach is needed to determine which types of powers and procedures are necessary for a tribunal's efficient and effective functioning. To the extent possible, similar powers should be couched in similar, if not identical, statutory language. As a general rule, variation in statutory language should only occur where necessary to accommodate the unique needs of the administrative tribunal. The same holds true for tribunal rules of practice and procedure.

The development of appropriate powers and procedures is a collaborative undertaking. Government can take the lead in providing an appropriate framework and guidelines. Guidelines should be developed in consultation with the Circle of Chairs, the British Columbia Council of Administrative Tribunals, members of the legal profession and the wider community. Individual administrative tribunals and host ministries are best positioned to identify and assess the tools that suit their unique needs and they should be involved in the development of detailed recommendations.

Recommendations

It is the responsibility of government to provide administrative tribunals with the statutory tools they need to make their processes more accessible and transparent. In striking an appropriate balance between flexibility at the individual tribunal level and consistency across administrative tribunals, it is recommended that government adopt a principled approach to legislative decisions about what powers are appropriately granted to a tribunal and how such powers are described. To achieve these objectives and ensure both procedural fairness and effective tribunal administration, it is recommended that government:

18. Develop a policy document, Model Statutory Powers Provisions for Administrative Tribunals, setting out a comprehensive "menu" of statutory powers that can be selectively applied (with any necessary adjustments) to individual administrative tribunals. It will include alternative provisions in respect of some powers and guidelines governing the application of all tribunal powers. The statutory powers appropriate to each administrative tribunal will be determined by a tribunal-by-tribunal review. As a general rule, administrative tribunals will be given the power to establish rules of practice and procedure (subject to ministerial approval) and to issue practice directives.

19. Establish a special advisory body within the Ministry of Attorney General that includes representatives of the Office of Legislative Counsel, an administrative justice office, host ministries and the Dispute Resolution Office, with access to administrative law and policy experts in the Ministry of Attorney General. The advisory body will be responsible for developing the Model Statutory Powers Provisions for Administrative Tribunals policy document and guidelines, developing uniform rules of practice and procedure, assisting individual tribunals in the development of administrative justice

plans and rules and making recommendations to the Attorney General about legislative reform.

20. Require administrative tribunals to develop administrative justice plans identifying and justifying the statutory powers each tribunal sees as being essential to its efficient functioning, having regard to the policy document and guidelines established by the advisory body. These plans will include existing or proposed rules of practice and procedure.

21. Establish a central review mechanism to ensure consistency in tribunal powers and procedures. This review mechanism will consist of a "sign off" of tribunal administrative justice plans and proposed rules of practice and procedure by the Attorney General. The advisory body will be responsible for making recommendations to the Attorney General as to whether this "sign off" is appropriate.

Dispute Resolution

The phrase "dispute resolution" can be broadly construed as applying to all forms of dispute resolution, including arbitration, litigation, negotiation, mediation or administrative review. Within the context of this White Paper, "dispute resolution" refers more narrowly to consensual dispute resolution.

Although most administrative tribunals were intended to offer an alternative to formal, complicated and costly court processes, many are experiencing problems that parallel those in the court system. In both forums, cost, delay and procedural complexity can impede public access. The adoption of processes for the early, consensual resolution of disputes has come to be seen as a significant component in enhancing public access to justice and improving the efficiency of administrative tribunals. There are clear opportunities for administrative tribunals to consider adopting consensual dispute resolution processes and, where necessary and appropriate, statutory provisions should be enacted to ensure that tribunals can take advantage of these opportunities.

This part of the White Paper summarizes a more in depth analysis contained in a report, Dispute Resolution, available on the Project's website at www.gov.bc.ca/ajp.

Analysis

The use of non-binding consensual dispute resolution processes is an important tool for maximizing the efficiency of tribunal processes and improving the quality of outcomes. Dispute resolution processes are particularly well suited to contributing to the achievement of an administrative justice system that is informal, proportionate, efficient, accessible and affordable.

Statutory Provisions

The power to engage in consensual dispute resolution processes is often absent from legislation governing tribunals. Legislating such powers would provide tribunals with the certainty they need to engage in designing such processes with confidence and creativity.

Applicability of Dispute Resolution Processes

Some forms of consensual dispute resolution are appropriate for most tribunals. However, certain types of disputes do not lend themselves to consensual processes. These types of disputes will vary depending on a range of factors and circumstances but may include disputes in which:

- the dispute is over a decision where a statutory decision maker had no discretion;
- a legal precedent is needed to govern similar cases in the future or the constitutional validity of an act or law is challenged;
- people who are not parties to the dispute might be prejudiced by the outcome;
- the case is genuinely frivolous or opportunistic or a party is acting in bad faith;
- there is fear of violence between the parties.

Appointment of Neutrals

The term “neutral” is used to describe the person appointed to assist the parties in resolving their dispute. There are at least four sources of neutrals for tribunals using consensual dispute resolution processes: tribunal members, staff, contractors or neutrals whose services are shared with other tribunals. From whatever source neutrals are drawn, it is important that they be properly trained and that the parties understand the differences between the consensual dispute resolution process and the adjudicative work of the tribunal.

Confidentiality

Confidentiality is the cornerstone of certain consensual dispute resolution processes such as mediation. Parties are more likely to engage in a frank discussion of their interests - and be open to considering a range of solutions - if they can be sure that the information shared will not become evidence in an adjudicative proceeding. Many jurisdictions address this matter through confidentiality provisions that prevent the disclosure of information that was prepared for or produced in the course of the non-binding dispute resolution process. There are a number of common exemptions to such provisions including evidence that is otherwise discoverable and evidence in proceedings to enforce agreements.

Enforcement of Agreements

Consensual dispute resolution processes are non-binding in the sense that a resolution will not be imposed on the parties. However, parties engaged in such processes often come to agreement about how to resolve their dispute and such agreements then become binding on the parties. Tribunals should consider whether they need the power to enforce settlement agreements. Settlement terms may be simply filed for reporting purposes. They may be reflected in tribunal orders and subject to the enforcement powers of the tribunal or, in cases where a tribunal has a strong public interest mandate or decisions must conform to statutory requirements, tribunals may require approval of settlements.

Recommendations

Dispute resolution practices, other than formal adjudication, have been shown to be effective in the courts and in the few administrative tribunals where they have been tested. Better use of these practices will enhance public access to justice and improve the efficiency of administrative tribunals. Accordingly, it is recommended that government encourage broader use of consensual dispute resolution processes within the administrative justice system and that, where appropriate:

22. Administrative tribunals, as part of their service planning, identify opportunities for adopting early and alternative dispute resolution techniques.
23. Government contribute to the development of information, expertise and advice on:
    - how and when it would be appropriate to provide consensual dispute resolution processes in individual tribunals;
    - how to design comprehensive dispute resolution systems that do not rely solely on adjudication to resolve disputes.
24. Government amend the enabling statutes of administrative tribunals to include:
    - a power for tribunals to engage in consensual dispute resolution processes;
    - provisions dealing with the appointment of neutrals, confidentiality and enforcement of agreements.

Standing before Administrative Tribunals and on Judicial Review

The term “standing” is used to define who may participate in a proceeding before a court or a tribunal, either as a party or as an intervenor. The doctrine of standing performs an important gate-keeper function in defining the degree of interest required to entitle a party to participate in a legal proceeding. The question of standing to appear before administrative tribunals is largely

dependent on statutory language. It is therefore important that statutory standing provisions are framed with sufficient clarity to identify those entitled to appear before tribunals and to avoid unnecessary disputes over the scope of participatory entitlements.

This part of the White Paper summarizes a more in depth analysis contained in a report, Standing to Appear before Administrative Tribunals, available on the Project's website at www.gov.bc.ca/ajp.

Analysis

The current legislation is not consistent in its approach to questions of standing to appear before administrative tribunals.

The use of open-ended standing provisions to define rights of appeal or complaint injects unnecessary uncertainty into the administrative process, leaving courts and tribunals to guess at legislative intent. Clearer legislative guidance would eliminate some of this uncertainty and reduce litigation over issues of party status.

The provision of explicit powers to tribunals to add parties or intervenors to an ongoing proceeding would provide parties with clear direction on the scope of participatory rights.

Recommendations

Ambiguous rules about who can participate in administrative proceedings cause unnecessary confusion, uncertainty, delay and expense for individuals who come to tribunals for decisions or for the resolution of disputes. In order to identify those entitled to appear before administrative tribunals and avoid unnecessary proceedings over the scope of participatory entitlements, it is recommended that government:

25. Provide, as far as possible, in the context of tribunals engaged in party/party dispute resolution, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.
26. Provide, where open-ended standing provisions are necessary because tribunal decisions will affect a broad constituency:
    - consistency in the language of such open-ended standing provisions;
    - legislative guidance as to the types of interests that are intended to be captured by the standing provision.

27. Enact legislation, where appropriate, authorizing tribunals to add parties or intervenors to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.
28. Provide greater legislative guidance on the scope of tribunal standing on appeal or judicial review.
29. Ensure that while the general principle of restrictive standing should continue to apply, there is greater scope for participation by a tribunal on review or appeal where there is an interest, particularly the public interest, that would otherwise not be fully represented.

Charter Jurisdiction

In some circumstances, it may be open to one of the parties in a proceeding before an administrative tribunal to raise a question about whether a provision in the tribunal's enabling statute is contrary to the *Charter of Rights and Freedoms*. *Charter* litigation is highly specialized and complex. Administrative tribunals seldom have the legal expertise, institutional capacity or procedural rules to address these challenges effectively. Furthermore, unlike the courts where decisions set precedents to be applied in subsequent proceedings, the decisions of administrative tribunals are not binding. A tribunal's decision on the application of the *Charter* in one context need not necessarily be considered in another. As a consequence, resources dedicated to addressing complex *Charter* challenges may not have lasting or precedential value for the tribunal, the parties who appear before the tribunal or the community at large.

Legislative clarification is required to establish which tribunals have jurisdiction to entertain a *Charter* challenge and, for those that do, when the tribunal can refer a *Charter* question to court. There must also be a process in place to ensure that notice is given to the Attorney General in those cases where a tribunal hears a *Charter* challenge.

This part of the White Paper summarizes a more in depth analysis contained in a background paper, Administrative Agencies and the Charter, and a report, Charter Jurisdiction. Both are available on the Project's website at www.gov.bc.ca/ajp.

Analysis

A tribunal's jurisdiction to hear a *Charter* challenge currently depends on the application of a legal test - the outcome of which is frequently difficult to predict. The result is that parties and tribunals expend time and resources determining whether the tribunal has the power to exercise this type of *Charter* jurisdiction. Providing legislative clarity about a tribunal's jurisdiction to decide whether a

provision in its enabling statute is inconsistent with the *Charter* would result in a more efficient and appropriate resolution of this issue when it arises.

Few tribunals have the institutional capacity and expertise to address *Charter* issues in an appropriate way. Therefore, the list of tribunals with this type of jurisdiction must necessarily be limited. If a tribunal is to be granted this type of *Charter* jurisdiction, it must demonstrate clearly that it has the institutional capacity and expertise to fulfill this role effectively.

Recommendations

As informal and less costly alternatives to the courts, administrative tribunals are not necessarily well-suited to deciding complex constitutional questions, including those that arise under the *Charter*. In order to contain the costs of administrative proceedings, eliminate uncertainties and delays and ensure that administrative processes remain open and accessible to people who may not be represented by legal counsel, legislative amendments are required to clarify which administrative tribunals have jurisdiction to hear a *Charter* challenge. Accordingly, it is recommended that:

30. Government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in the tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question Act*.
31. No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the *Charter* unless this jurisdiction is expressly enumerated.
32. The list of enumerated tribunals with this type of *Charter* jurisdiction be strictly limited.
33. A tribunal with jurisdiction to decide this type of *Charter* issue have a discretionary power to refer the *Charter* question to the British Columbia Supreme Court.
34. The *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.

Standard of Review on Judicial Review or Statutory Appeal to the Court

When a tribunal's decision is challenged in the courts, either by appeal or on judicial review, the first issue considered by the reviewing court is the appropriate standard of review. The standard of review jurisprudence developed by the courts is complex and primarily involves consideration of the nature of the issues (jurisdictional or intra-jurisdictional) and a search for the legislature's intent: did the legislature intend the question to be within the tribunal's jurisdiction, and if so,

should the policy of judicial or curial deference be applied to it for reasons of relative expertise? However, legislative intent is not always clear, leaving room for considerable debate about whether the tribunal's decision should be reviewed on a standard of correctness or reasonableness.

As they apply to individual tribunals, the legislature's intentions respecting the application of the policy of judicial deference should be made manifest in the tribunals' enabling statutes. In addition, a limitation period for judicial review applications under the *Judicial Review Procedure Act* should be enacted in order to provide a greater finality to decisions of administrative tribunals.

This part of the White Paper summarizes a more in depth analysis contained in a background paper, Standard of Review on Judicial Review or Appeal, available on the Project's website at www.gov.bc.ca/ajp.

Analysis

Many of the enabling statutes of administrative tribunals provide that their decisions are subject to an appeal to the courts. Some of these statutes provide for an appeal to Supreme Court, some provide for an appeal directly to the Court of Appeal and still others require leave to appeal to either the Supreme Court or the Court of Appeal. Sometimes the grounds for appeal (or leave) are expressly set out in the statute, but usually they are not. Even where a statutory appeal provision expressly provides that the appeal court can effectively substitute its own decision for that of the tribunal, the court may nevertheless determine, based on standard of review jurisprudence, that the policy of judicial deference should be extended to the tribunal's decision.

In other cases, the tribunals' enabling statutes do not contain any statutory appeal provision. The decisions of these tribunals are subject to judicial review under the *Judicial Review Procedure Act*. Sometimes a tribunal's statute contains a strong privative or quasi-privative clause signaling the legislature's intention to insulate the tribunal's decisions on intra-jurisdictional questions from review for other than patently unreasonable error. In other cases, the statute contains a less specific or less rigorous privative clause (a quasi-privative or finality clause). At present, the types and wording of privative and quasi-judicial clauses vary greatly. In still other cases, the tribunal's statute does not contain any privative or quasi-privative clause. In such cases, it is unclear whether the legislature intended the tribunal's intra-jurisdictional decisions to be subject to the policy of curial deference, leaving considerable room for legal debate about whether the appropriate reviewing standard is that of correctness or reasonableness.

It is not always clear why a tribunal's decision is subject to a statutory appeal provision instead of judicial review. Nor is it always clear why the decisions of some tribunals are protected by a privative or quasi-privative clause and others are not. Also, there does not appear to be a clear policy justification for the broad variance in the statutory expression of privative clauses. As the standard of review jurisprudence involves fundamentally a search for legislative intent, greater statutory consistency and clarity as to whether the tribunal's decision is to be reviewed only for jurisdictional error – or is to be reviewed on either a correctness or another "middle" standard – would do much to simplify the analysis in each case.

Where the enabling statute of an administrative tribunal contains an appeal provision, it will specify the period within which the appeal must be brought. The *Judicial Review Procedure Act,* however, currently contains no limitation period. In cases of undue and unjustifiable delay, the reviewing court may exercise its inherent discretion in favour of declining to proceed to decide the merits of the judicial review application. However, the inclusion of a statutory limitation period for judicial review proceedings would assist in ensuring greater certainty about the finality of tribunal decisions. The court would be given a statutory discretion to relieve against the limitation period in appropriate cases.

Recommendations

Questions about the appropriate standard of review can give rise to costly and time consuming litigation, although these questions are often not central to the substantive issues between the parties. In the absence of clear legislation, the courts have struggled to ascertain legislative intent, often, from a systemic perspective, with mixed and confusing results. Government has the capacity to address these questions on a comprehensive basis through legislation. By addressing these questions directly, government can modernize and streamline administrative processes, thereby allowing the individuals who appear before administrative tribunals to focus on the substantive issues and questions that concern them. Accordingly, it is recommended that:

35. The mechanism of statutory appeal be used where the tribunal's decisions on intra-jurisdictional questions are to be reviewed on a correctness standard. This should be reflected clearly in legislation.

36. Clear and consistent privative clauses be used where the tribunal's decisions on intra-jurisdictional questions are to be judicially reviewed only for jurisdictional error. This should also be made clear in legislation.

37. Government develop policy guidelines governing the criteria for determining (1) when a tribunal's decision should be subject to statutory appeal provisions rather than subject to judicial review only and (2) when a tribunal's decision should be insulated from review for other than jurisdictional error.

38. Government conduct a tribunal-by-tribunal review to address the question of whether an administrative tribunal's statute should include a statutory appeal provision or a privative clause and consider appropriate legislative amendments.

39. Government develop a *Statutory Appeals Procedure Act*, providing a uniform procedure for statutory appeals to the court.

40. The *Judicial Review Procedure Act* be amended to include a limitation period of not more than 6 months, subject to a discretion in the court to relieve against it.

Institutional Design: Tribunals and Review Processes

Like most other jurisdictions, British Columbia has a diverse array of administrative tribunals that were established to achieve a broad range of policy objectives but which can appear confusing and complex to those not familiar with them. Most were established in response to circumstances existing at the time, often without precedent or without consideration of more general questions about institutional design. Whether intended to make decisions in the first instance or to review decisions made by other public officials, all administrative tribunals share a common purpose – to make decisions at arm's length from the day-to-day operations of government and to resolve disputes in a forum other than the courts.

The Core Services Review provided an opportunity for government to examine inconsistencies in tribunal mandates and processes across the administrative justice system. As a consequence of this review, the Administrative Justice Project sees value for government in articulating a clear set of principles and policies as a guide to decision makers who become involved in designing administrative tribunals and review processes.

This part of the White Paper addresses issues raised in a more in depth analysis contained in a background paper, Reviewing Original Decisions: Guiding Principles and Options, available on the Project's website at www.gov.bc.ca/ajp.

Analysis

Public policy makers face significant challenges in addressing questions about institutional design. There is little information or guidance available to assist in resolving threshold questions about whether and when to establish administrative tribunals and how to structure review processes that

are appropriate, proportionate, suited to the circumstances and likely to be effective. Furthermore, in the absence of a clear policy framework, it is difficult to choose amongst alternatives such as internal review, reconsideration or the various forms and types of appeal to or review by the courts. As a consequence, the current process for creating or restructuring review processes is ad hoc and policy choices are often made in an inconsistent manner.

The Administrative Justice Project has begun the process of developing an appropriate policy framework in its background paper, Reviewing Original Decisions: Guiding Principles and Options. While the paper concentrates on questions about the design of institutions and processes for the review of decisions of other public officials, the paper's guiding principles and methodology provide the framework for the development of more systemic policy of general application.

Recommendations

There are consistent and principled approaches to the design of administrative tribunals and review processes that will enhance the overall transparency and efficiency of the administrative justice system. To encourage the use of these approaches and foster the development of a system of administrative justice that is open and accessible, it is recommended that government:

41. Establish and publicize a policy framework setting out principles and alternatives for decision makers involved in designing administrative justice institutions and processes. This framework should be based on the Administrative Justice Project's background paper, Reviewing Original Decisions: Guiding Principles and Options.

42. Require that, as part of the approval process for legislative changes restructuring or creating new administrative tribunals or review processes, the Attorney General be afforded an opportunity to consider whether the proposed scheme has been analyzed according to the established framework and is justified within that framework.

Operating Agreements for Administrative Tribunals

Administrative tribunals are established at arm's length from government to provide impartial forums for decision making and dispute resolution. Tribunals operate independently of the executive and allow specialized expertise to inform decisions that might otherwise be made through the executive process. The independent nature of this decision making role raises unique questions about public accountability. These questions do not arise as readily in other areas of the public sector where accountability flows more clearly and directly from operating programs through ministry executives to responsible ministers.

A commitment to the principles of ministerial responsibility has led governments to implement a host of mechanisms designed to foster public accountability. However, within the administrative justice community, the potential for conflict between the competing values of independence and accountability has been the subject of a lively and continuing debate. As a consequence, the precise application of accountability mechanisms to administrative tribunals has been called into question from time to time and many public agencies have developed specific policies or operating agreements to structure and manage government's relationships with administrative tribunals in an appropriate and effective way.

Analysis

A modern framework for effective tribunal management should address a range of issues including strategic goals, service plans, budgets, finance, administrative support, shared services and training. In the absence of a formal agreement that sets out mutual obligations and responsibilities, there can be misunderstandings and uncertainties about the appropriate roles, responsibilities and expectations of central agencies, host ministries and administrative tribunals.

Although wide variation in existing government management practices can result in inefficiencies and inconsistencies, there are also circumstances where a particular relationship between individual host ministries and tribunals should be preserved and fostered. It is fundamental to an effective management approach and framework that important differences are acknowledged and respected.

Within a management framework that encourages greater consistency but also fosters individual relationships, an appropriate working arrangement requires that host ministers, ministry staff, central agencies and administrative tribunals share a common understanding about:

- the policy objectives the tribunal was established to achieve and the reasons for its positioning at arm's length from government;
- the respective roles, responsibilities and expectations of the various parties involved in achieving those objectives;
- the range and source of resources required to allow the tribunal to fulfil its mandate;
- the timelines and timeframes that are critical to government and to the tribunal's continued operations.

The model Memorandum of Understanding that was developed through discussions amongst partners in the administrative justice community provides a good foundation on which to build a comprehensive operating agreement between host ministries and administrative tribunals. Such an agreement can be used to establish a common baseline and accommodate considerations that are relevant and unique to specific relationships.

Recommendations

Modern systems of public administration and concerns about independence and accountability within the administrative justice system itself call for innovative approaches to the effective development and management of the relationship between administrative tribunals and government. In order to establish a modern and relevant framework as the basis for ongoing operational relationships between administrative tribunals and government, it is recommended that:

43. Government, in consultation with administrative tribunals, review, reassess and update the model Memorandum of Understanding (MOU) incorporating, where appropriate, measures to give effect to government's strategic plan, its operational policies and the recommendations contained in this White Paper.

44. Where both parties are willing and the circumstances are appropriate, host ministries and tribunals be encouraged to negotiate, implement and evaluate the effectiveness of the revised MOU as an instrument for achieving a modern management framework.

45. Where a revised MOU would be inappropriate or too cumbersome and complex, host ministries and tribunals be encouraged to review existing operational arrangements, identify areas where improvements can be made and, wherever practical and appropriate, enter into written agreements addressing and clarifying areas of mutual concern.

46. The specific elements of the management framework that should be addressed on a tribunal by tribunal basis either within the MOU or within another type of operating agreement include the following:

    - assigning express responsibility for ensuring the tribunal achieves its purposes, either by designating the chair as the head of the tribunal (for large tribunals with full time members) or by adopting an approach based upon shared management responsibilities between the host ministry and the tribunal (for smaller tribunals or tribunals with part time chairs);

    - defining the role of the tribunal as it relates to government's general functions including policy development, legislative drafting, stakeholder consultations and communications;

    - specifying how the tribunal is to report on its activities and outcomes, whether through annual reports or service plans, either independently or through the host ministry;

- specifying what role the tribunal is expected to play in the annual budgeting process and in the handling of financial transactions;
- defining the role of the host ministry in providing administrative supports to the tribunal for matters such as human resource management or information technology;
- establishing arrangements for the provision of legal services to tribunals;
- identifying opportunities for providing shared services, either between the host ministry and the tribunal or between tribunals;
- setting out the role and contributions of the host ministry for training and for the development of the core competencies required by the tribunal.

47. Government develop a strategy for supporting training programs that build on current initiatives of the British Columbia Council of Administrative Tribunals and foster a better understanding of administrative justice issues within government and within the wider community. These programs should address issues such as the general purposes and functions of government and other public institutions, the operational implications of the concepts of independence and accountability within the administrative justice system, current issues in administrative justice reform and public sector management practices.

An Organizational Model for Tribunal Governance

The relationship between administrative tribunals and government is, in some ways, like government's relationship with the judiciary. As adjudicators, tribunals and courts are entitled to expect that they will be able to carry out decision making functions without executive interference or influence. However, tribunals are not courts and, while the executive and the judiciary have a long standing relationship, the relationship between the executive and tribunals is more recent in origin and accordingly not so well-defined or developed. This creates not only uncertainties but also opportunities to design an organizational model for tribunal governance that is proportionate, innovative and founded on a shared understanding of existing administrative justice values and concerns.

Following the recent release in the United Kingdom of Sir Andrew Leggatt's report on administrative tribunals, the Lord Chancellor's office took early steps to gain support for the establishment of a centralized tribunal service, similar in principles and structure to the court services branch in the same office. The new service would consolidate government's responsibilities for administrative tribunals and provide a central focus for government and tribunals as they work together to address issues like recruitment, training, compensation, rule making, ethics and complaint investigations.

Similar initiatives have been contemplated or implemented in other jurisdictions. Quebec has an integrated administrative tribunal. Australia considered an integrated tribunal and a centralized administrative justice council. There are widely differing views about the likely effectiveness of most governance models, whether centralized or not. What emerges clearly from the literature is that no one approach is preferred and that governments have a wide range of choices in designing a governance model that is appropriate to a particular jurisdiction's circumstances and conditions.

The following factors and circumstances are relevant to an assessment of a model for tribunal governance in British Columbia that is designed to:

- address government's current priorities and concerns;
- provide a clearly-defined focus and responsibilities for addressing and resolving issues;
- build on current strengths, relationships, resources and capabilities;
- be proportionate to the scope and scale of the administrative justice community and the fiscal conditions within government;
- be flexible enough to allow for audit, reassessment and evaluation as circumstances and conditions change.

Analysis

Governments share responsibility for effective tribunal governance with administrative tribunals. Like their counterparts elsewhere in Canada, tribunals in British Columbia are created by provincial legislation and are subject to the broad policies and priorities of the government of the day. In turn, government relies on administrative tribunals to apply specialized expertise in resolving technical disputes and to make decisions and manage caseloads in effective ways. A successful partnership between administrative tribunals and government will enhance public perceptions about the overall quality and integrity of the administrative justice system as a whole.

The implications of distinctions between tribunal independence and accountability are not well-understood within the public sector and may be unknown or even foreign to those outside the administrative justice community. There are currently 17 ministries that play host to the province's administrative tribunals. In some instances, strong policy linkages have been established between tribunals and host ministries, either through a long association with each other or

because both are mandated to deal with the same or a similar subject matter. In other instances, the policy linkages between tribunals and host ministries may be weak. In consequence, some host ministries have had little inclination or opportunity to develop expertise in administrative justice issues or to provide the administrative supports tribunals require to carry out their mandates effectively. Given the complex nature of the relationship between administrative tribunals and host ministries – and government's interest in achieving more consistency in practices and approach across the public sector – some consolidation of responsibilities on the government's side would enhance the province's capacity to develop the expertise it requires to be an effective partner in tribunal governance and accountability.

The role of the chair is pivotal to the success of a modern framework for tribunal governance and accountability. It is essential that this role be defined clearly. Tribunals chairs must have the full statutory authority they require to carry out their duties effectively and to establish clear and transparent relationships with host ministries and the central agencies of government. The legislative provisions that create the role of the tribunal chair and establish the chair's current powers and authority have been enacted on an ad hoc basis without the benefit of a consistent, coherent and well-reasoned policy framework. By articulating this framework and addressing identified deficiencies, government can provide a proper legislative basis for tribunal chairs to discharge their responsibilities. This will ensure that, when tribunal chairs enter into operating agreements with host ministries, they have the statutory powers and authority they require to meet government's expectations and to fulfill their obligations under these agreements in an appropriate and effective way.

The Attorney General is committed to strengthening partnerships with those working within the justice system and is expected to take the lead in implementing the recommendations in this White Paper. The recent work of the Administrative Justice Project has demonstrated that administrative tribunals are part of the justice system and that efficiencies can be achieved by looking at issues from a systemic perspective rather than on an ad hoc or individual basis.

The recommendations in this White Paper place strong emphasis on legal policy considerations and administrative justice reforms. There is a need for a dedicated institutional resource within government to provide corporate leadership, expertise and advice to Cabinet, host ministers and tribunals on administrative justice issues and the reform agenda. However, the moderate size of the province's administrative justice system and government's current economic and fiscal circumstances suggest that this resource should be small and closely linked to the ongoing role of

the Attorney General in providing legal and legislative advice to government. Furthermore, because of the need for operational flexibility and the time-limited nature of the reform agenda articulated in this White Paper, it would be premature to formalize this resource in legislation at this time.

Recommendations

It is incumbent upon the partners in the administrative justice system to develop an operational model for tribunal governance that is appropriate to the context and circumstances of the particular jurisdiction within which the tribunals operate. This model must be designed to ensure that scarce public resources are used effectively and that services to people and communities remain the central focus and purpose of the administrative justice system. To enhance the governance model as it exists in British Columbia today, it is recommended that government:

48. Retain the essential characteristics of the host ministry model for providing administrative supports to administrative tribunals.
49. Consider reducing the number of host ministries with operational responsibilities for administrative tribunals, thereby improving the capacity of government to provide effective support and expert advice to the tribunals.
50. Adopt a consistent, coherent and well-reasoned policy framework as the basis for amending the enabling statutes of individual tribunals to provide tribunal chairs with the statutory powers and authority they require to meet government's expectations and to fulfill their obligations under operating agreements with government in an appropriate and effective way.
51. Establish an administrative justice office within the Ministry of Attorney General to develop capacity and expertise within government to address administrative justice issues, policies, trends and legislation, law reform, organizational change, operating agreements, administrative powers, rules of procedure and other issues of common concern to governments and tribunals.

IMPLEMENTATION PLAN

The ad hoc development of what has become British Columbia's administrative justice system has served the province well despite significant shortcomings in a number of key areas. The implementation plan that flows out of the Administrative Justice Project's work and this White Paper is designed to build on existing strengths within the current system and provide leadership in implementing a reform agenda that is both innovative and commensurate with present institutional capacities and constraints within government and within the broader administrative justice community.

The tribunal community in British Columbia is relatively small compared with systems in unitary states like the United Kingdom, with systems at the national level in Canada or with systems in large jurisdictions like Ontario and Quebec. Many tribunals in British Columbia operate with part time chairs, members and staff. There are few resources, either within the tribunals themselves or within the line ministries of government, to take on the challenges of systemic or sustained, ongoing reform. In developing this implementation plan, careful consideration has been given to the priorities and concerns of those who have contributed to the work of the Project and to the scope and extent of reforms that can be managed realistically within the current institutional framework and fiscal climate. As such, the implementation plan is structured to build on the Project's work to date and to lay out an agenda for reform that can be achieved successfully over the next two years.

There is broad consensus within the administrative justice community that appointment issues and processes are the most critical aspects of any administrative justice reform agenda and should therefore be addressed first. A transparent appointment process with appointments based on merit fosters public confidence in the institutions of administrative justice and ensures that qualified professionals are available to apply their considerable expertise in resolving what have become, in many instances, increasingly complex disputes. The administrative justice system has matured over the past 30 years and is now firmly established as a critical part of the province's justice system. It is no longer either desirable or acceptable for appointment decisions to be made without the full involvement of tribunal chairs. Modern management practices and good governance dictate a significant role for the tribunal chair in ensuring a tribunal's ongoing professionalism and public accountability. To be effective, this must necessarily include a greater role for the chair not only in the appointment process but also in the overall management of the tribunal.

The modernization of existing statutory powers ranks second on the list of issues identified for administrative justice reform. As tribunals have matured, their workload has not only increased but also become increasingly complex. The limited range of powers and procedures that are set out in many tribunals' enabling statutes were not designed to accommodate – and are often not well-suited to – present purposes. In the absence of readily available alternatives for handling demanding caseloads, many tribunals have responded to the pressures and tensions of modern life by adopting court-like practices and procedures. The so-called judicialization of administrative tribunals has tended to undermine the core values of the administrative justice system itself, established, as it was, for the purpose of providing accessible, informal and efficient mechanisms for decision making and dispute resolution. These values continue to be relevant and indeed are

perhaps more important today, given the overall complexities of the myriad relationships, at all levels, between citizens and government. In order to allow administrative tribunals to flourish in contemporary society, government must provide a full range of modern and effective tools for managing caseloads through processes that are informal, efficient, responsive and innovative.

The third aspect of the administrative justice reform agenda addresses issues of performance management, codes of conduct, operating agreements between the line ministries of government and administrative tribunals, core competencies, training and evaluation. These systems and practices are internal to the public sector. Their precise extent and scope will be determined, in part, by government's success in moving ahead with the other reforms recommended as part of this implementation plan.

Central to the success of administrative justice reform is the establishment of a focus for this activity within the public sector. In the United Kingdom, the lead role in tribunal reform rests with the Lord Chancellor who serves as a member of Cabinet and as head of the judiciary. In Quebec, the province's consolidated administrative tribunal provides the leadership and focus for reform. In Ontario, the organizational focus of responsibility for administrative justice reform rests with a small central agency within the Management Board Secretariat.

At the end of the day, British Columbia should have an administrative justice system that provides high quality services to the people of British Columbia, reflects government's core values and principles and achieves the right balance between independence and accountability. For the British Columbians who turn to administrative tribunals for decisions or for assistance in resolving disputes, this means a greater assurance of courteous service, timely decisions and fair treatment for all.

Administrative Justice Office

It is recommended that British Columbia establish a small administrative justice office for the purpose of overseeing the implementation of the recommendations in this White Paper. The administrative justice office would report to the Attorney General through the Deputy Attorney General and work in conjunction with an administrative justice advisory committee drawn from across the senior ranks of government. The office would also build on the Administrative Justice Project's existing working relationships with the Circle of Chairs and the British Columbia Council

of Administrative Tribunals. The administrative justice office would have a two-year time-limited mandate to:

- provide leadership on behalf of government and administrative tribunals in implementing the recommendations in this White Paper;
- provide information and advice to host ministries and tribunals on administrative justice reform;
- participate in the review and development of policy and legislation for the design, structuring and powers of administrative tribunals, whether on an individual basis or as part of the overall reform agenda;
- in consultation with the Board Resourcing and Development Office, host ministries and administrative tribunals, implement an appointment process that addresses the unique needs and circumstances of administrative tribunals;
- in consultation with the central agencies of government, host ministries and administrative tribunals, implement a governance model and accountability framework that fosters the decision making independence of administrative tribunals and furthers their public accountability;
- monitor developments and practices in other common law jurisdictions, ensuring that decision makers and practitioners in British Columbia are positioned to take advantage of innovations that will enhance the overall effectiveness of the administrative justice system;
- provide the ongoing impetus for continuous improvement in the administrative justice system;
- report publicly through an annual report on progress to the Attorney General.

Reform Agenda for 2002/03

The reform agenda for fiscal 2002/03 is structured to address appointments, governance and accountability. In this respect, the focus of the reforms is on the role of the tribunal chair both in the appointment process and in overall tribunal management. The reform agenda is also intended as the starting point for a tribunal-by-tribunal review of essential administrative powers.

Appointments

As part of the legislative session for the Spring of 2003, it is recommended that government, with the assistance of the administrative justice office, address appointment issues and processes by amending the enabling statutes of the province's administrative tribunals and enacting legislation, where necessary, to:

- set out the critical elements and requirements of the appointment process, including open recruitment and appointments based on merit;
- subject to specific considerations in individual tribunals, confirm the appointment of tribunal chairs by Order in Council;
- confer on Cabinet the power to appoint tribunal members on the recommendation of tribunal chairs and after completion of a merit based recruitment process;
- implement more consistent terms and conditions of appointment across tribunals, encompassing provisions with respect to term, tenure and termination;
- allow for a variety of appointments, including full time, part time and contractual appointments and, where appropriate, cross-appointments to more than one tribunal;
- clarify how and to what extent the *Public Sector Employers Act* applies to administrative tribunals.

In addition to legislative initiatives, it is recommended that, by March 31, 2003, government, with the assistance of the Board Resourcing and Development Office and the administrative justice office:

- develop the standards and framework for annual tribunal appointment plans, setting out the respective roles and responsibilities of host ministries and tribunals and identifying anticipated recruitment requirements, critical dates and timing;
- develop common elements of job descriptions for tribunal chairs and members;
- develop common elements of appointment agreements for tribunal chairs and members;
- review and implement new standards on compensation and benefits for tribunal appointees;
- develop and implement an operating agreement clarifying the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals, amending

the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

Governance and Accountability: The Role of the Chair

As part of the legislative session for the Spring of 2003, it is recommended that government, with the assistance of the administrative justice office, address the interrelated issues of governance and accountability by clarifying the role of the tribunal chair through amendments to the enabling statutes of the province's administrative tribunals, enacting legislation, where necessary, to:

- confirm the status of the tribunal chair as the head of the tribunal;
- confer responsibility and authority, where appropriate, on the tribunal chair for the overall management of the tribunal;
- authorize the tribunal chair to assign cases to individual tribunal members or panels and, where appropriate, to designate leading cases and issue guidelines to tribunal members on adjudicative issues of interest to the tribunal;
- provide tribunal chairs with the statutory powers and authority they require to meet government's expectations and to fulfill their obligations under operating agreements with government in an appropriate and effective way.

Tribunal Powers

It is recommended that, by the Summer of 2003, government develop and issue, for discussion purposes, a policy framework for model statutory powers legislation. The policy framework should set out a comprehensive range or "menu" of powers that could be selectively applied, with any necessary adjustments, to each administrative tribunal. The powers appropriate to each tribunal would be determined following a case-by-case review. As a general rule, administrative tribunals would be given the power to establish their own rules of practice and procedure and to issue practice directions.

In support of this initiative, the administrative justice office would participate in the development of the policy framework and establish general guidelines and principles for determining whether particular powers are necessary and appropriate for individual tribunals. The office would also work with host ministries and individual tribunals comparing current powers with those set out in

the policy framework and developing recommendations for the legislative changes required to modernize existing powers.

Reform Agenda for 2003/04

The primary focus of the reform agenda in fiscal 2003/04 would be to review and enact essential powers legislation for each administrative tribunal. The reform agenda would also encompass further initiatives to improve governance and accountability. These initiatives would address a range of management and operational issues and include the development of guidelines for the design, review and assessment of administrative processes. Finally, government would undertake an assessment of the administrative justice office, identifying ongoing needs for a coordinated resource to address administrative justice issues and determining how the office should be continued.

Statutory Powers and Other Legal and Jurisdictional Issues

During the Spring session in 2004, government would implement the final package of legislative amendments arising out of this White Paper and its reform agenda. In addition to statutory powers for individual tribunals, the legislation would address the following legal and jurisdictional issues:

- standards of review;
- alternative dispute resolution;
- questions of standing before administrative tribunals and on appeal;
- the Charter jurisdiction of administrative tribunals.

Host ministries and individual tribunals would work closely with the administrative justice office to evaluate the appropriateness of the powers set out in the policy framework and to develop innovative administrative justice plans, detailing the powers each tribunal requires and recommending any other measures necessary to comply with the policy framework. Government would amend individual tribunal statutes, enacting provisions consistent with the policy framework and accommodating changes and recommendations approved by host ministries, tribunals and others.

Governance and Accountability: Policy Instruments and Techniques

It is recommended that government, with the assistance of the administrative justice office, develop appropriate policy instruments and techniques for improving governance and accountability, including the development of:

- standards for service plans;
- performance measures and evaluation techniques for tribunals, tribunal chairs and members;
- standards and guidelines for training and the assessment of core competencies;
- codes of conduct;
- complaint processes;
- shared services;
- technological innovations, including electronic filing and single window access;
- an appropriate legal and administrative framework for the appointment of staff, including the terms and conditions of their appointments.

Assessment of Administrative Processes

As part of its early work, the Administrative Justice Project developed a background paper, Reviewing Original Decisions: Guiding Principles and Options. This paper outlines a framework for determining how decisions of public officials can be reviewed and when it is appropriate to establish administrative tribunals for this purpose.

It is recommended that government use this framework in evaluating administrative processes over the one-year period from June 2002 to June 2003 – and that government then evaluate the framework and develop further guidelines and a checklist to assist public sector decision makers who are involved in the design, review or assessment of administrative tribunals, the self-regulating professions or occupations and any other new self-governing industry groups.

Administrative Justice Office Review

It is recommended that government carry out a formal assessment of the administrative justice office at the end of the 2003/04 fiscal year. Government should determine, at that time, whether

the office was successful in achieving the goals of its reform agenda, what ongoing needs government and tribunals have for a coordinated resource to address administrative justice issues and how the office should be continued either in its existing form or as part of another publicly supported or managed program or service.

SUMMARY OF RECOMMENDATIONS

The work of the Administrative Justice Project and the following recommendations have been guided by principles intended to ensure that, in the years to come:

- administrative tribunals will continue to be able to meet the needs of the people they serve;
- their administrative processes will be open and transparent;
- their mandates will be modern and relevant;
- government will be able to fulfill its obligations by providing the legislative and policy framework administrative tribunals require to carry out their independent mandates effectively.

Independence and Accountability

In order to provide a foundation for the development of a shared understanding about the role and purposes of the administrative justice system, it is recommended that government adopt the following guiding principles, namely that:

1. Government base its ongoing relationships with administrative tribunals on a commitment to the principles of:
   - independence for administrative tribunals in adjudicative decision making;
   - public accountability for administrative tribunals through the adoption of modern and innovative management practices.
2. Government reinforce the decision making independence of tribunals by:
   - continuing to respect decisions of tribunal members in individual cases;
   - formalizing relationships with tribunals through clear legislation, policies, practices and agreements;
   - establishing standard terms and conditions of appointment;

- acknowledging the role of organizations like the British Columbia Council of Administrative Tribunals and the Circle of Chairs;
- providing public information and education on the role and purpose of administrative tribunals.

3. Government strengthen public accountability for administrative tribunals by:
   - implementing an appointment process that is open, transparent and merit based;
   - establishing a management framework for tribunal governance that is proportionate to the scope of the tribunal's activities and sets out clearly the respective roles and obligations of both government and the tribunal.
4. In establishing the level of independence and accountability that is appropriate to the diverse mandates and operating circumstances of individual tribunals, government should be guided by the following additional principles:
   - tribunals should be accountable for producing fair and competent decisions in a timely fashion;
   - public confidence in the fairness, quality and impartiality of tribunal decisions should not be undermined through unnecessary or inappropriate government interference in tribunal operations;
   - government and tribunals should have shared obligations for using in a prudent manner public funds allocated to tribunal operations.

Appointments

By making sound appointments to administrative tribunals, government can foster public confidence in the administrative justice system, enhance the transparency of the appointment process, ensure fair and open recruitment practices and provide for appointments that are based on merit. Implementation of the following recommendations will allow government to achieve these objectives.

Recruitment and Selection

5. In order to support the development of an orderly recruitment and selection process, it is recommended that an annual appointment plan be prepared for each administrative tribunal setting out in advance:
   - the respective roles and responsibilities of government and tribunals;
   - the number of vacancies anticipated in a given year including the number to be filled by recruitment efforts and renewals;
   - the types of positions to be filled, whether chairs or members and whether full time or part time;

- the kinds of recruitment and outreach activities that will be required, including their potential costs;
- the critical timelines from initiation to completion for key deliverables and appointment decisions.

6. Within the framework of an annual appointment plan, it is recommended that a needs assessment be prepared or updated each time tribunal appointments are required.

7. It is recommended that tribunal chairs have the capacity to recommend a variety of appointments tailored to meet the needs and circumstances of individual tribunals. Where appropriate, it should be possible to make appointments on a full time, part time or contractual basis. Further, cross-appointments should be encouraged where the required adjudicative expertise is transferable and it would not be contrary to the public interest to do so.

8. It is recommended that job descriptions be developed for administrative tribunal appointees.

9. It is recommended that recruitment and selection be based on open, transparent and competitive processes that are proportionate to the nature of the position being filled and subject to monitoring and auditing by the Board Resourcing and Development Office.

Appointment Terms and Conditions

10. In order to implement polices and procedures that will further government's strategic goals, it is recommended that the following guidelines for appointments to administrative tribunals be adopted. While there should be a general commitment to the principle of consistency, there should also be sufficient flexibility in practice to allow individual tribunals to adjust or adapt to particular or unusual circumstances. Accordingly, government should:

    - discontinue the practice of making tribunal appointments at pleasure or for the term of an appointee's working life and instead establish fixed term appointments within a range of 3 to 5 years with appropriate provisions for tenure, reappointment, termination and severance;
    - in appropriate circumstances, permit initial appointments for terms of less than 2 years for the purpose of early performance reviews and assessments;
    - remove current policy restrictions on the number of subsequent appointments an appointee may expect or accept;
    - provide capacity to appoint tribunal members on a short-term acting or interim basis for the purpose of maintaining tribunal operations through transitional periods or for accommodating leaves of absence;
    - establish consistent practices for providing notice to appointees of decisions not to reappoint or to terminate;
    - clarify in legislation that tribunal members have the capacity to complete deliberations in proceedings that continue after they have resigned or their appointments have lapsed;

- initiate a review of current legislation and practices with respect to the appointment of staff to administrative tribunals and develop recommendations for further clarification and reform.

11. In order to enhance the overall effectiveness of tribunal operations, it is recommended that government provide tribunal chairs with the capacity to delegate responsibilities and duties to other tribunal members.

Compensation and Benefits

12. It is recommended that government review and implement changes to compensation and benefits for tribunal appointees in two stages:

- first, to reflect changes in overall compensation levels since 1990;
- second, to define appropriate benchmarks and provide more consistency in and accountability for compensation levels across tribunals.

Appointment Model

13. It is recommended that the Board Resourcing and Development Office continue to take the lead in the recruitment and selection of tribunal chairs and that tribunal chairs, in consultation with the Board Resourcing and Development Office, take the lead in the recruitment and selection of tribunal members, subject to formal approval and appointment by Cabinet.

14. Subject to specific considerations within individual tribunals, it is recommended that government:

- amend legislation, where necessary, to provide for the appointment of:
  - tribunal chairs by Order in Council;
  - tribunal members by Order in Council on the recommendation of tribunal chairs and after completion of a merit based recruitment process;
- reduce, from 17, the number of host ministries with responsibilities for administrative tribunals;
- provide centralized coordination and support to tribunal chairs in the development of appointment plans, recruitment strategies and processes.

15. It is recommended that the Board Resourcing and Development Office have an ongoing supervisory role in standard setting and in monitoring and auditing the recruitment and selection practices of host ministries and tribunals.

Policy Instruments

16. It is recommended that government clarify the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals through an operating agreement, amending the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

17. It is recommended that government:

    - develop and implement a standard form of appointment agreement for administrative tribunals setting out government's expectations with respect to term and tenure, reappointment, notice, termination and severance, compensation and benefits;

    - if necessary, amend the *Public Sector Employers Act* to clarify how and to what extent that Act applies to administrative tribunals.

Statutory Powers for Administrative Tribunals

It is the responsibility of government to provide administrative tribunals with the statutory tools they need to make their processes more accessible and transparent. In striking an appropriate balance between flexibility at the individual tribunal level and consistency across administrative tribunals, it is recommended that government adopt a principled approach to legislative decisions about what powers are appropriately granted to a tribunal and how such powers are described. To achieve these objectives and ensure both procedural fairness and effective tribunal administration, it is recommended that government:

18. Develop a policy document, Model Statutory Powers Provisions for Administrative Tribunals, setting out a comprehensive "menu" of statutory powers that can be selectively applied (with any necessary adjustments) to individual administrative tribunals. It will include alternative provisions in respect of some powers and guidelines governing the application of all tribunal powers. The statutory powers appropriate to each administrative tribunal will be determined by a tribunal-by-tribunal review. As a general rule, administrative tribunals will be given the power to establish rules of practice and procedure (subject to ministerial approval) and to issue practice directives.

19. Establish a special advisory body within the Ministry of Attorney General that includes representatives of the Office of Legislative Counsel, an administrative justice office, host ministries and the Dispute Resolution Office, with access to administrative law and policy experts in the Ministry of Attorney General. The advisory body will be responsible for developing the Model Statutory Powers Provisions for Administrative Tribunals policy document and guidelines, developing uniform rules of practice and procedure, assisting individual tribunals in the development of administrative justice plans and rules and making recommendations to the Attorney General about legislative reform.

20. Require administrative tribunals to develop administrative justice plans identifying and justifying the statutory powers each tribunal sees as being essential to its efficient functioning, having regard to the policy document and guidelines established by the advisory body. These plans will include existing or proposed rules of practice and procedure.

21. Establish a central review mechanism to ensure consistency in tribunal powers and procedures. This review mechanism will consist of a "sign off" of tribunal administrative justice plans and proposed rules of practice and procedure by the Attorney General. The advisory body will be responsible for making recommendations to the Attorney General as to whether this "sign off" is appropriate.

Dispute Resolution

Dispute resolution practices, other than formal adjudication, have been shown to be effective in the courts and in the few administrative tribunals where they have been tested. Better use of these practices will enhance public access to justice and improve the efficiency of administrative tribunals. Accordingly, it is recommended that government encourage broader use of consensual dispute resolution processes within the administrative justice system and that, where appropriate:

22. Administrative tribunals, as part of their service planning, identify opportunities for adopting early and alternative dispute resolution techniques.

23. Government contribute to the development of information, expertise and advice on:

    - how and when it would be appropriate to provide consensual dispute resolution processes in individual tribunals;
    - how to design comprehensive dispute resolution systems that do not rely solely on adjudication to resolve disputes.

24. Government amend the enabling statutes of administrative tribunals to include:

    - a power for tribunals to engage in consensual dispute resolution processes;
    - provisions dealing with the appointment of neutrals, confidentiality and enforcement of agreements.

Standing before Administrative Tribunals and on Judicial Review

Ambiguous rules about who can participate in administrative proceedings cause unnecessary confusion, uncertainty, delay and expense for individuals who come to tribunals for decisions or for the resolution of disputes. In order to identify those entitled to appear before administrative tribunals and avoid unnecessary proceedings over the scope of participatory entitlements, it is recommended that government:

25. Provide, as far as possible, in the context of tribunals engaged in party/party dispute resolution, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.

26. Provide, where open-ended standing provisions are necessary because tribunal decisions will affect a broad constituency:

    - consistency in the language of such open-ended standing provisions;
    - legislative guidance as to the types of interests that are intended to be captured by the standing provision.

27. Enact legislation, where appropriate, authorizing tribunals to add parties or intervenors to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.

28. Provide greater legislative guidance on the scope of tribunal standing on appeal or judicial review.

29. Ensure that while the general principle of restrictive standing should continue to apply, there is greater scope for participation by a tribunal on review or appeal where there is an interest, particularly the public interest, that would otherwise not be fully represented.

Charter Jurisdiction

As informal and less costly alternatives to the courts, administrative tribunals are not necessarily well-suited to deciding complex constitutional questions, including those that arise under the *Charter*. In order to contain the costs of administrative proceedings, eliminate uncertainties and delays and ensure that administrative processes remain open and accessible to people who may not be represented by legal counsel, legislative amendments are required to clarify which administrative tribunals have jurisdiction to hear a *Charter* challenge. Accordingly, it is recommended that:

30. Government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in the tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question Act*.

31. No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the *Charter* unless this jurisdiction is expressly enumerated.

32. The list of enumerated tribunals with this type of *Charter* jurisdiction be strictly limited.

33. A tribunal with jurisdiction to decide this type of *Charter* issue have a discretionary power to refer the *Charter* question to the British Columbia Supreme Court.

34. The *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.

Standard of Review on Judicial Review or Statutory Appeal to the Court

Questions about the appropriate standard of review can give rise to costly and time consuming litigation, although these questions are often not central to the substantive issues between the parties. In the absence of clear legislation, the courts have struggled to ascertain legislative intent, often, from a systemic perspective, with mixed and confusing results. Government has the capacity to address these questions on a comprehensive basis through legislation. By addressing these questions directly, government can modernize and streamline administrative processes, thereby allowing the individuals who appear before administrative tribunals to focus on the substantive issues and questions that concern them. Accordingly, it is recommended that:

35. The mechanism of statutory appeal be used where the tribunal's decisions on intra-jurisdictional questions are to be reviewed on a correctness standard. This should be reflected clearly in legislation.

36. Clear and consistent privative clauses be used where the tribunal's decisions on intra-jurisdictional questions are to be judicially reviewed only for jurisdictional error. This should also be made clear in legislation.

37. Government develop policy guidelines governing the criteria for determining (1) when a tribunal's decision should be subject to statutory appeal provisions rather than subject to judicial review only and (2) when a tribunal's decision should be insulated from review for other than jurisdictional error.

38. Government conduct a tribunal-by-tribunal review to address the question of whether an administrative tribunal's statute should include a statutory appeal provision or a privative clause and consider appropriate legislative amendments.

39. Government develop a *Statutory Appeals Procedure Act*, providing a uniform procedure for statutory appeals to the court.

40. The *Judicial Review Procedure Act* be amended to include a limitation period of not more than 6 months, subject to a discretion in the court to relieve against it.

Institutional Design: Tribunals and Review Processes

There are consistent and principled approaches to the design of administrative tribunals and review processes that will enhance the overall transparency and efficiency of the administrative justice system. To encourage the use of these approaches and foster the development of a system of administrative justice that is open and accessible, it is recommended that government:

41. Establish and publicize a policy framework setting out principles and alternatives for decision makers involved in designing administrative justice institutions and processes. This framework should be based on the Administrative Justice Project's background paper, Reviewing Original Decisions: Guiding Principles and Options.

42. Require that, as part of the approval process for legislative changes restructuring or creating new administrative tribunals or review processes, the Attorney General be afforded an opportunity to consider whether the proposed scheme has been analyzed according to the established framework and is justified within that framework.

Operating Agreements for Administrative Tribunals

Modern systems of public administration and concerns about independence and accountability within the administrative justice system itself call for innovative approaches to the effective development and management of the relationship between administrative tribunals and government. In order to establish a modern and relevant framework as the basis for ongoing operational relationships between administrative tribunals and government, it is recommended that:

43. Government, in consultation with administrative tribunals, review, reassess and update the model Memorandum of Understanding (MOU) incorporating, where appropriate, measures to give effect to government's strategic plan, its operational policies and the recommendations contained in this White Paper.

44. Where both parties are willing and the circumstances are appropriate, host ministries and tribunals be encouraged to negotiate, implement and evaluate the effectiveness of the revised MOU as an instrument for achieving a modern management framework.

45. Where a revised MOU would be inappropriate or too cumbersome and complex, host ministries and tribunals be encouraged to review existing operational arrangements, identify areas where improvements can be made and, wherever practical and appropriate, enter into written agreements addressing and clarifying areas of mutual concern.

46. The specific elements of the management framework that should be addressed on a tribunal by tribunal basis either within the MOU or within another type of operating agreement include the following:

    - assigning express responsibility for ensuring the tribunal achieves its purposes, either by designating the chair as the head of the tribunal (for large tribunals with full time members) or by adopting an approach based upon shared management responsibilities between the host ministry and the tribunal (for smaller tribunals or tribunals with part time chairs;

    - defining the role of the tribunal as it relates to government's general functions including policy development, legislative drafting, stakeholder consultations and communications;

    - specifying how the tribunal is to report on its activities and outcomes, whether through annual reports or service plans, either independently or through the host ministry;

- specifying what role the tribunal is expected to play in the annual budgeting process and in the handling of financial transactions;
- defining the role of the host ministry in providing administrative supports to the tribunal for matters such as human resource management or information technology;
- establishing arrangements for the provision of legal services to tribunals;
- identifying opportunities for providing shared services, either between the host ministry and the tribunal or between tribunals;
- setting out the role and contributions of the host ministry for training and for the development of the core competencies required by the tribunal.

47. Government develop a strategy for supporting training programs that build on current initiatives of the British Columbia Council of Administrative Tribunals and foster a better understanding of administrative justice issues within government and within the wider community. These programs should address issues such as the general purposes and functions of government and other public institutions, the operational implications of the concepts of independence and accountability within the administrative justice system, current issues in administrative justice reform and public sector management practices.

An Organizational Model for Tribunal Governance

It is incumbent upon the partners in the administrative justice system to develop an operational model for tribunal governance that is appropriate to the context and circumstances of the particular jurisdiction within which the tribunals operate. This model must be designed to ensure that scarce public resources are used effectively and that services to people and communities remain the central focus and purpose of the administrative justice system. To enhance the governance model as it exists in British Columbia today, it is recommended that government:

48. Retain the essential characteristics of the host ministry model for providing administrative supports to administrative tribunals.

49. Consider reducing the number of host ministries with operational responsibilities for administrative tribunals, thereby improving the capacity of government to provide effective support and expert advice to the tribunals.

50. Adopt a consistent, coherent and well-reasoned policy framework as the basis for amending the enabling statutes of individual tribunals to provide tribunal chairs with the statutory powers and authority they require to meet government's expectations and to fulfill their obligations under operating agreements with government in an appropriate and effective way.

51. Establish an administrative justice office within the Ministry of Attorney General to develop capacity and expertise within government to address administrative justice issues, policies, trends and legislation, law reform, organizational change, operating

agreements, administrative powers, rules of procedure and other issues of common concern to governments and tribunals.

Implementation

In order to move forward with the proposed agenda for reform, it is recommended that government:

52. Establish a small administrative justice office within the Ministry of Attorney General with a two-year time-limited mandate to provide leadership and oversight in implementing the recommendations in this White Paper.

53. Address, as a first priority in fiscal 2002/03, issues of appointments, governance and accountability. The reform agenda should address and clarify the responsibilities of government and tribunal chairs in appointments and in the overall management of administrative tribunals. In addition, the reform agenda should serve as the starting point for the development of a policy framework for a tribunal-by-tribunal review of essential statutory powers.

54. Address, as priorities in fiscal 2003/04, the enactment of legislation to clarify the statutory powers of each administrative tribunal. The reform agenda should also encompass further initiatives to improve governance and accountability, including the development of guidelines for the design, review and assessment of administrative processes.

APPENDIX 1: ADMINISTRATIVE TRIBUNALS, HOST MINISTRIES AND ENABLING STATUTES

Administrative Tribunal	Host Ministry	Statute
Agricultural Marketing Boards (13, including BC Marketing Board)	Agriculture, Food and Fisheries	*Natural Products Marketing (BC) Act*
BC Benefits Tribunal and Appeal Board[1]	Human Resources	*BC Benefits (Appeals) Act*
Board of Parole	Public Safety and Solicitor General	*Parole Act*
Building Code Appeal Board	Community, Aboriginal and Women's Services	*Local Government Act*
Children's Commission[2]	Attorney General and Minister Responsible for Treaty Negotiations	*Children's Commission Act*
Commercial Appeals Commission	Public Safety and Solicitor General	*Commercial Appeals Commission Act*
Commissions of Inquiry (under Inquiry Act)	Attorney General and Minister Responsible for Treaty Negotiations	*Inquiry Act*
Community Care Facility Appeal Board[3]	Health Services / Minister of State for Intermediate, Long Term and Home Care	*Community Care Facility Act*
Coroners Service	Public Safety and Solicitor General	*Coroners Act*
Criminal Records Review Program Adjudicators[4]	Public Safety and Solicitor General	*Criminal Records Review Act*
Criminal Records Review Appeal Panel[5]	Public Safety and Solicitor General	*Criminal Records Review Act*
Disaster Financial Assistance Appeal Board	Public Safety and Solicitor General	*Emergency Program Act*
Electrical Safety Appeal Board	Community, Aboriginal and Women's Services	*Electrical Safety Act*
Elevating Devices Appeal Board	Community, Aboriginal and Women's Services	*Elevating Devices Safety Act*

Administrative Tribunal	Host Ministry	Statute
Employment Standards Tribunal[6]	Skills Development and Labour	*Employment Standards Act*
Environmental Appeal Board	Water, Land and Air Protection	*Environment Management Act*
Expropriation Compensation Board	Attorney General and Minister Responsible for Treaty Negotiations	*Expropriation Act*
Farm Practices Board	Agriculture, Food and Fisheries	*Farm Practices Protection (Right to Farm) Act*
Financial Institutions Commission	Finance	*Financial Institutions Act*
Fire Commissioner	Community, Aboriginal and Women's Services	*Fire Services Act*
Forest Appeals Commission	Forests	*Forest Practices Code of British Columbia Act*
Forest Practices Board	Forests	*Forest Practices Code of British Columbia Act*
Gaming Commission[7]	Public Safety and Solicitor General	*(by Order in Council)*
Gas Safety Appeal Board	Community, Aboriginal and Women's Services	*Gas Safety Act*
Health Care and Care Facility Review Board[8]	Health Services	*Health Care (Consent) and Care Facility (Admission) Act*
Health Care Practitioners Special Committee for Audit	Health Services	*Medicare Protection Act*
Human Rights (Advisory Council, Commission and Tribunal)[9]	Attorney General and Minister Responsible for Treaty Negotiations	*Human Rights Code*
Labour Relations Board[10]	Skills Development and Labour	*Labour Relations Code*
Land Reserve Commission[11]	Sustainable Resource Management	*Land Reserve Commission Act*
Liquor Appeal Board[12]	Public Safety and Solicitor General	*Liquor Control and Licensing Act*
Manufactured Home Park Dispute Resolution Committee	Public Safety and Solicitor General	*Residential Tenancy Act*
Mediation and Arbitration Board	Energy and Mines	*Petroleum and Natural Gas Act*

Administrative Tribunal	Host Ministry	Statute
Medical and Health Care Services Appeal Board	Health Services	*Medicare Protection Act*
Medical Services Commission	Health Services	*Medicare Protection Act*
Mental Health Review Panels[13]	Health Services	*Mental Health Act*
Mineral Tax Review Board	Provincial Revenue	*Mineral Tax Act*
Motion Picture Appeal Board[14]	Public Safety and Solicitor General	*Motion Picture Act*
Motor Carrier Commission	Transportation	*Motor Carrier Act*
Motor Dealer Customer Compensation Fund Board	Competition, Science and Enterprise	*Motor Dealer Act*
Power Engineers and Boiler and Pressure Vessel Safety Appeal Board	Community, Aboriginal and Women's Services	*Power Engineers and Boiler and Pressure Vessel Safety Act*
Private Post-Secondary Education Commission	Advanced Education	*Private Post-Secondary Education Act*
Property Assessment Appeal Board	Sustainable Resource Management	*Assessment Act*
Property Assessment Review Panels	Sustainable Resource Management	*Assessment Act*
Public Service Appeal Board	Management Services	*Public Service Act*
Racing Commission[15]	Public Safety and Solicitor General	*Horse Racing Act*
Residential Tenancy Office	Public Safety and Solicitor General	*Residential Tenancy Act*
Review Board (Criminal Code)	Attorney General and Minister Responsible for Treaty Negotiations	*Criminal Code*
Securities Commission[16]	Competition, Science and Enterprise	*Securities Act*
Travel Assurance Board	Public Safety and Solicitor General	*Travel Agents Act*
Utilities Commission	Energy and Mines	*Utilities Commission Act*
Workers' Compensation Board[17] (Workers' Compensation Review Board, Related Agencies)	Skills Development and Labour	*Workers Compensation Act*

[1] See *Employment and Assistance Act* (Bill 26) and *Employment and Assistance for Persons with Disabilities Act* (Bill 27), 2002 Legislative Session: 3rd Session, 37th Parliament.
[2] See *Office for Children and Youth Act* (Bill 43), 2002 Legislative Session: 3rd Session, 37th Parliament.
[3] See *Community Care Facility Act* (Bill 16), 2002 Legislative Session: 3rd Session, 37th Parliament.
[4] See *Public Safety and Solicitor General Statutes Amendment Act, 2002* (Bill 51), 2002 Legislative Session: 3rd Session, 37th Parliament.
[5] Ibid.
[6] See *Employment Standards Amendment Act, 2002* (Bill 48), 2002 Legislative Session: 3rd Session, 37th Parliament.
[7] See *Gaming Control Act*, S.B.C. 2002, c.14.
[8] See *Health Care (Consent) and Care Facility (Admission) Amendment Act, 2002* (Bill 44), 2002 Legislative Session: 3rd Session, 37th Parliament.
[9] See *Human Rights Code Amendment Act, 2002* (Bill 53), 2002 Legislative Session: 3rd Session, 37th Parliament.
[10] See *Labour Relations Code Amendment Act, 2002* (Bill 42), 2002 Legislative Session: 3rd Session, 37th Parliament.
[11] See *Agriculture Land Commission Act* (Bill 21), 2002 Legislative Session: 3rd Session, 37th Parliament.
[12] See *Miscellaneous Statutes Amendment Act (No. 2), 2002* (Bill 54), 2002 Legislative Session: 3rd Session, 37th Parliament.
[13] See *Miscellaneous Statutes Amendment Act (No. 2), 2002* (Bill 54) 2002 Legislative Session: 3rd Session, 37th Parliament.
[14] See *Public Safety and Solicitor General Statutes Amendment Act, 2002* (Bill 51), 2002 Legislative Session: 3rd Session, 37th Parliament.
[15] See *Gaming Control Act*, S.B.C. 2002, c. 14.
[16] See *Securities Amendment Act*, S.B.C. 2002, c. 32.
[17] See *Workers' Compensation Amendment Act, 2002* (Bill 49) and Workers' Compensation Amendment Act (No. 2), 2002 (Bill 56), 2002 Legislative Session: 3rd Session, 37th Parliament.

APPENDIX 2: BACKGROUND PAPERS AND REPORTS

The following background papers and reports have been issued by the Administrative Justice Project. They are available on the Project's website at www.gov.bc.ca/ajp.

Background Papers	Release Date
Administrative Agencies and the Charter	December 2001
Appointments: A Policy Framework for Administrative Tribunals	May 2002
Human Rights Review	December 2001
Reviewing Original Decisions: Guiding Principles and Options	March 2002
Standard of Review on Judicial Review or Appeal	December 2001
The Statutory Powers and Procedures of Administrative Tribunals in British Columbia	February 2002

Reports	Release Date
Charter Jurisdiction	July 2002
Dispute Resolution	July 2002
Independence and Accountability	July 2002
Making Sound Appointments	July 2002
Providing Administrative Tribunals with Essential Powers and Procedures	July 2002
Standing to Appear before Administrative Tribunals	July 2002

APPENDIX 3: ADVISORY COMMITTEE

The following individuals have contributed to the development of this White Paper as members of the Administrative Justice Project's Advisory Committee.

Name	Affiliation
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Susan Christie, Secretary	Director, Agencies, Boards and Commission Division Ministry of Attorney General
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Fern Jeffries	Representing the British Columbia Council of Administrative Tribunals c/o Employment Standards Tribunal
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APPENDIX 4: LIST OF CONTRIBUTORS

The following individuals have prepared or contributed to the analysis and recommendations in this White Paper.

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Jill McIntyre	Administrative Justice Project	Institutional Design: Tribunals and Review Processes Standard of Review
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