

BCCAT'S RESPONSE TO THE WHITE PAPER

INTRODUCTION

We provide our comments on the White Paper by first addressing the objectives set for the Administrative Justice Project. We then go on to comment on specific recommendations. We have not commented on all the recommendations, and on some only very briefly. Where there is minimal comment, BCCAT is essentially neutral on the recommendation.

ADMINISTRATIVE JUSTICE RECOMMENDATIONS

One of the objectives of the Administrative Justice Project is to ensure that "administrative tribunals are able to meet the needs of the people they serve". To date, the Project has focussed on the other three objectives and these have been generally well addressed. However, the Project has not assessed the needs of people served by administrative tribunals in order to ensure that those needs are met. It has not identified the people being served or how they assessed their needs. This may be an issue that could be addressed in future in the context of operating agreements and organizational model.

We note that budget cuts to tribunals have or will make it more difficult to provide the services and meet the needs of the people served by the administrative justice system. The cuts may also inhibit the ability for tribunals to carry out the recommendations surrounding operating agreements.

We believe that government should undertake an analysis of the people served, the needs served and the resources required to meet the tribunals' mandates. Many of the White Paper recommendations rely on agreement being achieved between tribunals and some level of government. We note that there is no discussion of a dispute resolution mechanism in the event of disagreement. Although some of this might be included in operating agreements, some issues may go beyond those. Generally, BCCAT recommends that this issue be reviewed, perhaps through the AJO in consultation with BCCAT and the Circle of Chairs.

INDEPENDENCE AND ACCOUNTABILITY

We appreciate that the Administrative Justice Project acknowledges the role of BCCAT. Further, we generally endorse the recommendations. We do note that many of them set out broad principles, which do not offer guidance to take the recommendations forward for further development.



We believe there should be broader articulation on independence particularly as it relates to appointments and institutional independence. Further, the statement that *all* tribunals are in one sense part of the executive arm of government is overly simplistic and not entirely true in relation to the balance between independence and accountability. We also comment that there may be differing independence and accountability requirements for different tribunals.

Although it is generally accepted that government must ensure that tribunals are accorded adjudicative independence, we observe that the White Paper and the background papers do not undertake an analysis, or definition, of how to ensure adjudicative independence. In our view, adjudicative independence involves considerations of the tribunals' processes, such as development of rules of practice and procedure, as well as a number of issues around the relationship between the tribunals and their stakeholders, host ministries and other government bodies.

We recommend that further analysis be undertaken to provide definition to appropriate adjudicative and institutional independence.

Resourcing for tribunals is an issue, but not just a financial one. In terms of independence there is a serious issue for some tribunals who review decisions of either organizations or lower level tribunals in the same Ministry.

APPOINTMENTS

General

Appointments and the Appointment process has long been an area of confusion and frustration both for Board Chairs and for appointees waiting to see if their appointment "goes through" or for individuals awaiting renewal or reappointment. The recommendations move towards what appears to be an orderly procedure for appointments, treatment of appointees and fair remuneration. BCCAT supports the objectives the recommendations are attempting to meet. Our concerns are set out in specific comments.

Specific Recommendations

Recruitment and Selection - Recommendations #5-#9 .

Annual appointment plans cannot be the same for each administrative tribunal. Some may be similar if the tribunals' purposes and objectives are similar. However, it must be emphasized, there cannot be a cookie cutter approach to the appointment plans. We strongly



support Chairs having the capacity to recommend a variety of appointments tailored to meet the needs of specific tribunals. However, the extent to which the Board Resourcing and Development Office (BRDO) can "monitor and audit" those recommendations must be carefully considered, in light of where that office is situated. Authority to veto or influence the final appointment decision by the BRDO must be avoided in order to prevent interference with the independence of tribunal appointees and hence, administrative justice in B. C.

Currently, the BRDO has not demonstrated an understanding of the concepts of and "open, transparent and competitive processes". There is a difference between "merit based" appointments and "merit based appointments that are open, transparent and competitive". The first may result in qualified people being appointed, but the second will ensure not only that qualified people are appointed but that everyone has confidence that qualified people are appointed; that the appointments are strictly based on merit without political interference; and, will ultimately foster greater public confidence in the administrative justice system. BRDO, being situated in the Premier's Office cannot avoid being seen as political, and as long as it is "monitoring and auditing" appointments, it will be difficult to escape criticism that there is political interference in the process.

Although referred to in the mandate of the BRDO, there is no acknowledgement in the White Paper that complementary to a merit based appointment process, is the need for orientation and training programs for new appointees. The appointment process plan should set out who is responsible for orientation and training, and the funding.

Further, BCCAT recommends recognition in the appointment plan of the need for a balance in appointments based on gender, ethnicity, and background of candidates.

Developing a job description fits with the requirements to have a managed appointment process that is open and transparent, subject to meritorious candidates being considered and subsequently appointed. Developing job descriptions should not tell the adjudicator how to do the job in the sense that it sets out what the adjudicator is to decide. This may have at a minimum, the perception there will be no independent decision making.

Appointment Terms and Conditions - Recommendations #10 & #11

BCCAT supports the notion that there be fixed term appointments and that they be of varying term, depending on the nature and the needs of the tribunal. There should be no policy restrictions on the number of subsequent appointments an appointee may expect or accept and there should be consistent practices for providing reasons and notice to appointees of non-renewal.

Compensation and Benefits - Recommendation #12



BCCAT strongly supports that government review and implement changes to compensation and benefits for tribunal appointees. Fair and competitive compensation will ensure that tribunals can draw the best candidates for tribunal appointments.

Appointment Model - Recommendations #13 - #15

As noted previously, BCCAT does not support the recommendation that monitoring and auditing of recruitment and selection rest with the BRDO. BCCAT continues to recommend the formation of an independent Administrative Justice Council that would guide and assist tribunals who require assistance in the appointment process. Within the context of the White Paper recommendations, to eliminate any suggestion of political interference by the BRDO, the tribunal appointment process might better rest with the Administrative Justice Office.

We agree that tribunal Chairs should take the lead in the recruitment and selection of tribunal members. In the context of the recommendations for BRDO's ongoing supervisory role, it should be an auditing and monitoring role to ensure a consistent and effective appointment process. Unless there are reasons based on demonstrated merit issues, the BRDO should not have veto power on reappointments for Chairs or members.

BCCAT supports the recommendation to reduce the number of host ministries. We recommend that careful consideration be given to criteria to determine healthy relationships between host ministries and tribunals. As an example, unhealthy tensions arise when the host ministry appears before the tribunal or also hosts a government organization or crown corporation that appears before the tribunal, or from whose decisions the tribunal hears appeals. The resulting tensions can give rise to actual or perceived lack of independence in the tribunal.

Policy Instruments - Recommendations #16 & #17

The proposed operating agreement between the BRDO, host ministries and tribunals, cannot be the same for each tribunal. The government must approach the creation of such operating agreements in a flexible manner, recognizing the distinct differences in the many tribunals in B.C. Likewise the "standard for of appointment agreement" must be flexible enough to address the unique characteristics of some tribunal appointments. The appointment agreement must also ensure that there is no impact on the independence and accountability of the tribunal appointee.

Recommendations 18 through 21

To the extent that these recommendations acknowledge the need for flexibility in selecting statutory powers and rules on a tribunal by tribunal basis, BCCAT supports the recommendations. BCCAT takes issue with the recommendations for not proposing autonomy or independence to tribunals to design their own processes.

Recommendation 18 proposed that tribunals would have to obtain ministerial approval before adopting rules of practice and procedure. Recommendations 20 and 21 anticipate that Rules will be included in the administrative justice plans, which would be subject to a "sign off" by the Attorney General based on recommendations from the "advisory body." BCCAT notes that there may be some need to define the roles of the ministry and the "advisory body" more clearly as there appears to be some confusion or overlap.

In BCCAT's view, tribunals should be given the authority to select rules of practice and procedure. Tribunals have more experience and expertise in determining appropriate rules than the Ministry would have. Further, since it is not unusual for some arm of the Ministry, or another body within the host Ministry, to appear before the tribunal, it could be perceived as undermining adjudicative and institutional independence of the tribunal to rest final decision making on the rules with the Ministry. It could also undermine public confidence in the impartiality of the tribunal. BCCAT is also concerned that this provision could result in obstructing rule development.

BCCAT recommends that BCCAT and the Circle of Chairs be formally recognized as advisors to the AJO, the "advisory body" and any other policy initiative in this field.

DISPUTE RESOLUTION

Recommendations #22, 23, and 24

BCCAT supports these recommendations. There is a need for dispute resolution processes within the administrative justice system. The background paper for this area produced by the Dispute Resolution Office is thoughtful and thorough. It pulls together many thoughts on the various issues involved for tribunals.

BCCAT welcomes these recommendations and is encouraged that government will provide resources for assisting tribunals to adopt appropriate dispute resolution mechanisms.

STANDING

Recommendations 25, 26, 27 and 28:

The major concern of tribunal members is clarity so there is consistency before different panels of a tribunal. Each tribunal, whether it uses the inquiry model or principles similar to the courts to decide issues of standing, should be consistent in its approach to standing before each panel of that particular tribunal. To do so, the legislative directive needs to be clear, or at least it should direct that the Tribunal set out its policy or criteria on the issues of standing.

Recommendations 28 and 29:

BCCAT shares the concern expressed by the Circle of Chairs that there is no analysis regarding standing on matters of judicial review in the White Paper and the rationale for recommendations 28 and 29 could be more clearly set out. It is not clear, for example, how an interest, and particularly the public interest, can be represented before the tribunal if there is no standing for that interest.

CHARTER JURISDICTION

Recommendations 30 to 34:

The recommendations are clear concerning enumerated tribunals who will have jurisdiction to deal with Charter challenges. What is missing and is the concern of most BCCAT members is what happens if they are on a panel of a tribunal, which is not an enumerated tribunal, and a Charter challenge is made. What should they do and does the panel have options? To direct the parties to go to judicial review may be an onerous burden for one or more parties financially or by reason of delay alone. Making a Charter challenge without an expeditious process could be an unfair strategy for a party to a proceeding.

STANDARD OF REVIEW ON JUDICIAL REVIEW OR STATUTORY APPEALS TO THE COURT.

Recommendations 35 to 40 :

BCCAT supports these recommendations. We have the advantage of seeing the comments of the Circle of Chairs. Apart from their recognition that the courts could complicate the designations of the "correctness" standard or "jurisdictional error", we do not take their comments as making any different recommendation than the two options recommended in the White Paper.

INSTITUTIONAL DESIGN: TRIBUNALS AND REVIEW PROCESSES

Recommendations 41 and 42 are generally helpful. This does not mean that BCCAT necessarily endorses the background paper, "Reviewing Original Decisions: Guiding Principles and Options".

OPERATING AGREEMENTS FOR ADMINISTRATIVE TRIBUNALS

BCCAT supports Recommendations 43 to 47 in general, subject to the following comments.

The White Paper points out in several places that administrative tribunals were created by the legislature for the purpose of providing an alternative to the courts, while still acting at arm's length from government. For example, page 28, refers to the need for a common understanding about why each tribunal was established and the "reasons for its positioning at arm's length from government". It would be useful to reinforce this point in the recommendations themselves. Including a reference in Recommendation 43 to the importance of the arm's length relationship could do this.

A related concern is that Recommendation 43 states that the model MOU should, where appropriate, "give effect to government's strategic plan". We believe the model MOU needs to be very cautious about applying current government priorities to the administrative justice system, outside the legislative framework. There is a risk that this could undermine public confidence in the impartiality of tribunals and reduce their usefulness to government and the public.

Consideration should be given to revising Recommendation 43 to include BCCAT and the Circle of Chairs in the consultation process on the model MOU. With respect to the individual MOUs, consideration should be given to including central agencies and perhaps the new Administrative Justice Office.

We hope that Recommendation 47 will lead to continued government support for BCCAT training programs that are designed to enhance the competence of tribunal members and their staff. Some aspects of this Recommendation may be outside the mandate of BCCAT.

AN ORGANIZATIONAL MODEL FOR TRIBUNALS GOVERNANCE

Recommendation 51 to establish an administrative justice office within the Ministry of Attorney General is a step in the right direction. We are pleased that there will be a resource within government on the administrative justice system. In March 2002, BCCAT



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recommended establishment of an Administrative Justice Council. Some of the functions of the AJO are similar to those recommended for the Administrative Justice Council. However, BCCAT had recommended that the Council be established by legislation, include members from government, the tribunal community and the public, and function in an independent manner. There is a recommendation that there be a review of the AJO at the end of 2003/2004. We recommend that consideration be given to possible future expansion of the role of the AJO at that time if not before.

We appreciate the acknowledgement that the AJO will build on the existing relationships with the Circle of Chairs and BCCAT. BCCAT would like to confirm its desire to have the opportunity to take an active role in whatever capacity deemed appropriate in association with the AJO and also with the proposed administrative justice advisory committee.

BCCAT maintains the view that government should establish an independent AJC. We appreciate that resource issues affect government's decision. However, government has voiced its desire to ensure that the new system of administrative justice in B.C. is professional and leading edge. We believe that the way to ensure the goals of the AJP is to establish an independent body. Although BCCAT and the Circle of Chairs can provide a strong voice on important policy considerations that is not a substitute for ensuring that our system of administrative justice meets the demands placed upon it by the modern day Rule of Law.

The AJO, seemingly, has been given a 2 year reviewable mandate. BCCAT recommends that during the next 2 years, government and the AJO work towards establishing an independent AJC, as a model of administrative justice.