



The following memorandum was submitted to the BCCAT Board of Directors

Prepared by: BCCAT Policy and Research Committee

Topic: Issues in Restructuring Tribunals

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Introduction

The purpose of this memorandum is to identify the issues – goals and challenges – involved in restructuring Tribunals across Canada and other common law jurisdictions. The Policy and Research Committee canvassed the following provinces: Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, and Alberta; and the following jurisdictions: Australia, New Zealand, and the United Kingdom.

Summary

Administrative tribunals are recognized for their expertise, timeliness, and flexibility. Maintaining subject matter expertise reflects the reason why most tribunals were created and serves to meet the needs of the public. Several provinces have sought to restructure tribunals in order to improve the efficiency and effectiveness of service delivery. Several concerns were identified in provinces with a large number of single-mandate tribunals:

- Lack of independence
 - Capture by the host ministry and stakeholders
- Inefficient use of infrastructure resources
 - Separate corporate services and physical building space
- Lack of flexibility
 - Tribunals were becoming legalistic, insular and self-referential
- Lack of consistency
 - Tribunals were slowly evolving in their own way with different legal, policy, and regulatory approaches
- Untimely delays
 - There were varying service standards, procedures, and long wait times that undermined public confidence in the administrative justice system



- Loss of capacity
 - Small case loads and inability to incorporate developments in public policy, societal values, demographics, or technology

Across Canada, there have been different responses to these concerns:

- Full merger and amalgamation
- Amalgamation for specific subject areas
- Clustering tribunals into a single organization, with each tribunal maintaining its own statutory jurisdiction and membership
- Co-location of tribunals to share common resources
- Cross-agency cooperation and coordination of operations, administration, and dispute resolution services

Some provinces, like Nova Scotia, have amalgamated a number of smaller tribunals into one tribunal that is responsible for all employment and labour relations matters. Other provinces, like Quebec, have created a “super tribunal” that is responsible for a full range of employment, property, and social justice matters. Ontario has clustered tribunals in two areas (environment and social justice) with the goal of improving efficiency and generating better substantive resolutions. This is in contrast to approaches that would group Tribunals by reference to other considerations:

- Types of adjudicative models (adversarial approaches compared to inquisitorial approaches)
- Types of service users (tribunals where most of the users are well-resourced institutional parties, compared to tribunals where most of the users are self-represented individuals with limited resources; or where users are homeowners addressing property tax and renovation issues; or businesses addressing licensing and regulatory compliance)

In regards to clustering or amalgamating tribunals, the following issues have been identified:

1. How do you maintain and enhance common administrative tribunal principles?
 - (a) Independence
 - With amalgamated or clustered tribunals, how does one eliminate the potential for conflict of interest issues to arise that may not have arisen within a Tribunal-specific context? For example, there may be more part-time members, with active business practices, in the broader areas dealt with by an amalgamated or clustered tribunal.
 - (b) Fairness
 - (c) Transparency
 - (d) Accountability
 - Should one move a Tribunal from the host ministry to the Ministry of Attorney General?



- One advantage is that this reflects the role of administrative tribunals in the broader justice system and underscores the importance that tribunals are justice agencies, independent from host ministries, as opposed to bodies delivering government programs.
 - How do tribunals align reporting relationships for the transition? How do tribunals retain sufficient contact with host ministries?
 - Legislation is required to establish the legal framework to formalize the handover. How do tribunals expedite the process? Can this be done through enacting regulations?
 - How do tribunals sever associated staff from host ministries, address salary concerns, or other resource constraints?
2. Increase service effectiveness
- (a) Access
 - How does one eliminate multiple access points to justice, overlapping jurisdictions, and multiple timelines and administrative systems?
 - How does the tribunal provide a single access point for the public and create a structure that unifies and simplifies processes?
 - How does the tribunal improve access in a province with a relatively small population that is geographically dispersed?
 - (b) Capacity
 - (c) Consistency
 - (d) Timeliness
 - How does one optimize dispute resolution mechanisms by resolving cases without a formal hearing, if possible?
 - How does one preserve innovative adjudicative techniques, which may be challenged if a tribunal using them is amalgamated or clustered with a number of more traditional tribunals, given the propensity to standardize across large organizations?
 - (e) Quality
 - How does one promote “effectiveness” in relation to “substance”, and not just “efficiency”?
 - Should the goal be to improve outputs or improve outcomes for those who are affected by tribunal services?
 - Assessing outcomes rather than outputs moves the focus from the pace and volume of resolutions to the results achieved by those resolutions. Is this desirable?
 - For example, the kinds of results to which amalgamation or clustering may be expected to lead include decisions that contribute to jurisprudence that provides coherent and meaningful guidance to those affected by tribunal decisions.
3. Share common resources



- Can one achieve efficiencies by consolidating “back office” functions and sharing resources for corporate services and core business support?
 - How does one create integrated office environments without losing the benefits of close collaboration around particular subject areas?
4. Expertise
- How does one share the expertise and experience of adjudicators?
 - Can adjudicators be encouraged or required to gain a broader range of knowledge and experience? Is this desirable? Will this result in the loss of specialization and responsiveness to the issues dealt with by the Tribunal prior to the cluster or amalgamation?
 - How does one maintain subject matter expertise and public confidence in that expertise?
5. Organizational
- (a) Culture
 - There are significant challenges in attempting to create a new culture and common set of values. Members of organizations will legitimately feel pride in providing services to a community. While this knowledge base and professionalism can be a source of strength for an amalgamated or clustered tribunal, it may also lead to unwillingness to change.
 - How does one integrate different organizational cultures when amalgamating or clustering tribunals? How does one deal effectively with organizational transformation?
 - (b) Managing Change
 - Staff, adjudicators, and other stakeholders may want to understand and seek a level of certainty about where the change is leading, while at the same time, take part in defining the direction of that change.
 - How does one build and maintain support for the agenda among staff given the long period of time over which change will occur?
 - (c) Time Constraints
 - How do senior adjudicators balance the time required to lead the overall strategic development of the amalgamation or cluster, to modernize tribunals, to oversee day-to-day operations, to meet the service expectations of the public, and to perform key adjudicative assignments?