

**BC Council of Administrative Tribunals
9th Annual Conference**

Keynote Address

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INTRODUCTION

Good morning. Thank you for inviting me to speak with you.

Last year, I thanked you for your work in reforming and modernizing British Columbia's administrative justice system. It is a pleasure to be able to express my thanks to you, once again.

I want to take the opportunity this morning to look at how far we've come since the administrative justice reform project was initiated in 2001. I also want to highlight the progress we have made since I last spoke to you, and compliment you on your efforts over the past year; efforts that contributed substantially to the enactment of the new *Administrative Tribunals Act*.

However, the work is not complete and, ideally, never will be. I also intend to talk today about my strongly held belief that reform is an ongoing process. Government and other stakeholders in the administrative justice system, especially the tribunals and their members, should continue to embrace opportunities to explore, study and adopt new and better ways to offer British Columbians the best administrative justice system possible.

INITIAL ACCOMPLISHMENTS

With your assistance, much has been done in just a very few years.

In 2002 - one year after I announced the comprehensive review of the administrative justice system, and with a great deal of effort and input from the administrative justice community - the White Paper, "On Balance: Guiding Principles for Administrative Justice Reform in British Columbia" was released.

As you recall, that White Paper set out more than 50 recommendations to modernize our administrative justice system and make it more consistent, transparent and predictable.

I am pleased to say that most of those recommendations have now been implemented, including a key recommendation in support of the on-going reform agenda, the creation in spring of 2003 of a permanent Administrative Justice Office. That Office is intended to be a resource, not just for government and its various ministries, but also for tribunals, tribunal members, and other stakeholders in the administrative justice community, as we continue our work together to maintain BC's new role as a leader in administrative justice reform.

ACCOMPLISHMENTS SINCE OCTOBER 2003

1. *The Administrative Tribunals Appointments and Administration Act*

Government's first legislative initiative to support the reform agenda - fulfilling key White Paper recommendations – was the enactment, in 2003, of the *Administrative Tribunals Appointment and Administration Act*. When I spoke to you at your conference last fall, that Act had just been given third reading, so I was able to tell you about it and what it was intended to achieve - the formal recognition of the importance to the government of ensuring high quality appointments to BC's administrative justice tribunals.

Merit-based appointments will provide the high quality service British Columbians are entitled to. Clearly entrenching that requirement in legislation guarantees that this principle will be respected now, and into the future.

Since last fall, that Act was given Royal Assent and its provisions were proclaimed into force. The Board Resourcing and Development Office guidelines are now being utilized, ensuring that all new tribunal members are appointed on the basis of merit, after processes that are open, transparent and consistent. And that Office's website is an excellent, publicly available source of current information about opportunities to serve on tribunals, so that all British Columbians who may be interested may put their names forward for consideration for this important area of public service.

But this Act did not just address appointments. It also formally addressed, in a consistent and clear manner, the very important and critical role of tribunal chairs in the effective management and operation of administrative tribunals. The result is enhanced public accountability for the tribunals, and increased support for the administrative justice system.

2. *The New Administrative Tribunals Act*

Let me turn now to the most significant change to our administrative justice system since I last spoke to you – a change to which many of you contributed time and expertise to help bring about. The Administrative Tribunals Act was given Royal Assent in May of this year. It reflects intensive work since the release in 2002 of the White Paper, and since last year's paper "Model Statutory Powers Provisions for Administrative Tribunals".

The consultation undertaken in developing the White Paper and the subsequent Model Statutory Powers Paper was extensive. It involved BCCAT, the Circle of Chairs, individual tribunal chairs and members, plus many others in the administrative justice community.

In particular, the Statutory Powers Paper was used by many of you, in collaboration with the Administrative Justice Office and Ministry officials, to identify - and this was something you were quite clear on - the right combination of powers and procedures to meet the unique circumstances of your tribunals and your stakeholder communities. (In other words, recognizing that one size fits all solutions don't work.)

The new Act is a comprehensive piece of legislation that will address issues common to most of BC's administrative tribunals. The Act's approach is flexible and innovative and codifies the powers that the courts have recognized over time. The consequential amendments specify which of those powers apply to individual tribunals. In this way, the Act is responsive to the diverse needs across the administrative justice system and establishes – based upon sound policy reasons - each tribunal's unique powers.

The general reform provisions of the Act --or menu of options as they are sometimes referred to-- and a number of consequential amendments were brought into force early this summer. Effective October 15, the consequential amendments affecting many other tribunals came into force. I expect that, by the end of this calendar year, the remaining consequential amendments will be brought into force.

3. Key Aspects of the ATA

I want to spend a few minutes reviewing some of the key aspects of the Administrative Tribunals Act, because I believe they will be critical to ongoing reform.

(a) Statutory powers

The first key area is the revised statutory powers.

During our discussions of reform, many of you expressed concerns that tribunals did not have all the powers needed to make proceedings and processes as fair, consistent and efficient as possible. There were public concerns over delays, costs, and the increasing complexities - or judicialization - of administrative justice processes. In light of the concerns, government recognized it had the responsibility to take action and create a comprehensive, principled, legislative framework.

(i) Rule-making powers

The *Administrative Tribunals Act* offers a wide array of rule-making powers that respect the need for independence, flexibility and timeliness. Under the Act, tribunals can make their own rules, without any requirement for pre-approval by the responsible minister or by Cabinet. The Act also gives tribunals greater rule-making flexibility, to enable them to respond to the unique needs of those who use them.

However, to make sure there are no gaps, government also has the power to enact rules of practice and procedure should a tribunal fail to do so. Because most tribunals supported the need for independent rule-making authority, I do not expect government will be required to take this step.

With increased power comes increased responsibility. Consistent with the objectives of greater transparency and accessibility, the authorization to make rules is coupled with the requirement to make those rules public.

Those objectives are also supported by the new requirement for most tribunals to issue practice directives, setting out the usual time frames that parties can expect for each of the steps in their processes. This includes how long parties should expect to wait for a tribunal to issue a decision and reasons.

This approach represents a compromise. One approach considered was legislated time limits. My hope is that the practice directives – although non-binding - will do the job of enhancing confidence in timeliness by providing the public and the parties with a better understanding of, and expectations for, each tribunal's processes.

(ii) Dispute resolution processes

The Act also gives tribunals, where appropriate, express power to establish dispute resolution processes, such as mediation. This is a major step forward. As you know, alternative dispute resolution processes offer opportunities for parties and tribunals to resolve matters without the cost, time and uncertainty of a hearing. As well, agreed upon settlements can produce more durable solutions.

Frankness and openness are also critical for parties involved in settlement discussions. Therefore, many dispute resolution processes depend for their success on their confidential nature. Unlike most tribunal proceedings, the Act explicitly protects the confidential character of the dispute resolution process.

(iii) Control over tribunal processes

The Act strengthens the authority of tribunals to enforce their orders and preserve the integrity of their proceedings, but in a manner that respects the rights of the parties.

Consistent compulsion and disclosure powers can now be applied by many tribunals, to ensure they get the evidence needed to decide the issues before them.

The Act establishes a tribunal's authority to ensure that individuals comply with their rules and orders. In this manner, tribunals can prevent parties from trying to use adjournments or other means as an unfair delaying tactic, wasting valuable tribunal resources and defeating the principle of timely resolution.

The ATA also includes a balanced and proportionate approach to clarify the steps a tribunal can take to maintain order in its proceedings where a person is disruptive or uncooperative. The new Act gives tribunals the capacity to ask the courts for assistance without conferring contempt powers directly on tribunals. This is consistent with the administrative role of tribunals and preserves the courts' jurisdiction in matters affecting individual liberty. The legislation also provides tribunals with authority to call on a peace officer to assist in removing or constraining a person who is disruptive or uncooperative.

The result of explicitly authorizing these statutory powers in the Act should be greater consistency and clarity. Once tribunals have appropriate rules and case management systems in place to take advantage of the new powers, tribunals should be able to move parties through the administration justice system more quickly and at less cost. Just as important, the parties will be more satisfied with how they were treated.

(b) Standards of review

One of the most innovative changes in the Act is the clarification of the standard a court must apply when it is asked to review tribunal decisions.

While the authority of the courts to oversee the work of administrative tribunals is vital and unquestioned, the jurisprudence in this area has tended to create confusion rather than certainty. The decisions are typically case specific and often difficult to apply in the contexts and circumstances of other cases.

With the *Administrative Tribunals Act*, this government has, for the first time, taken up the challenge of defining legislative intent for standards of review, simplifying and codifying the standards that we want courts to apply in their review of tribunal decisions.

Decisions of tribunals with a significant level of subject matter expertise will receive greater deference and the court should only substitute its view when the tribunal acted unfairly or its conclusion is patently unreasonable. For most aspects of the decisions of other tribunals, the court may apply a standard of correctness and decide whether or not the tribunal made the right decision.

In addition, the Act includes a statutory time limit of 60 days for filing applications for judicial review. This new time limit ends the uncertainty that previously existed, and brings judicial review applications into line with other appellate or review practices.

Codification of the standards of review should eliminate what has become a preliminary or threshold issue for the courts in many reviews of administrative tribunal decisions. It will shift the focus from a debate about fine points of law to the substantive matter of the review, which is the real concern to the parties. I believe these provisions offer the promise of greater certainty and finality for administrative tribunal decisions.

(c) Constitutional issues

Another major area of concern addressed in the *Administrative Tribunals Act* is the role of tribunals in dealing with questions of constitutional law that come before them.

The approach taken in the Act on this issue is innovative and unique. It recognizes the variance in structure and expertise of different tribunals. Under the Act, most tribunals will have no jurisdiction to consider constitutional issues. As a result, those tribunals will be able to proceed to a decision - without undue delay.

This is admittedly a fairly restrictive approach. We chose it for a number of reasons.

The first is simply the complexity of constitutional litigation. It requires a wide-ranging consideration of a great number of legal issues. Decisions may have far-reaching public policy implications.

Complexity breeds cost, both for parties and for tribunals. Clearly, most lay litigants are not well equipped to deal with complex constitutional arguments without legal representation. In a constitutional matter this works to the disadvantage of both the lay litigant and the tribunal, by delaying decisions.

As well, the expertise required to decide constitutional issues often goes beyond the specialized expertise of most tribunals. Even where a tribunal's membership includes lawyers, not all lawyers have a high degree of expertise in constitutional law.

In addition, constitutional law issues inevitably involve an extensive commitment of public resources. Even if a tribunal may have the institutional capacity to deal with constitutional issues, its decisions are not binding. As a result, there may be little value gained from the resources expended.

The concerns I have outlined illustrate why, in many ways, it is fundamentally inconsistent with the basic objectives of an administrative justice system for significant amounts of resources, time and effort to be expended — often at the expense of the parties — on tribunals' consideration of complex questions of constitutional law.

What we really want tribunals to do is problem-solve within their areas of subject matter expertise. If there are complex constitutional law questions raised, most often those are questions best left to the courts to decide.

The Act does make two types of exceptions. First, the Labour Relations Board and the Securities Commission will have the jurisdiction to determine constitutional questions raised in the course of their proceedings.

And while the legislation does recognize the deference given those tribunals by the courts, I have already expressed some reservations about that. The subject matter expertise at the Labour Relations Board and Securities Commission is intended to be in the areas of labour relations and securities regulation respectively; not constitutional law. There is a risk that the consideration of constitutional issues at those tribunals will be a distraction from the real issues. As I indicated in the Legislature during second reading of the Act, I am going to continue to monitor this matter.

The legislation also recognizes that some tribunals have the expertise and need to deal with constitutional issues related to the division of powers between federal and provincial governments. This exception is limited to the Employment Standards Tribunal, the Farm Industry Review Board, and the Human Rights Tribunal, because division of powers questions can arise in the course of those tribunals' proceedings.

I believe that these provisions of the Act allow tribunals to focus resources on their areas of specialized expertise, so they can continue to provide high-quality services to the people of

British Columbia. The provisions also recognize that the courts are usually the most appropriate forum for the determination of most constitutional questions.

(d) Information access and privacy issues

The requirement that tribunals make their rules, directives, decisions and orders accessible to the public supports a major goal of reform – to make tribunal processes more open and transparent. However, there are special circumstances where tribunals require the ability to receive evidence or conduct a hearing in private, such as when sensitive personal or financial information is involved. The Act provides this ability in section 42, balancing the interest in providing access to information with the need to protect the privacy of personal information. Section 61 of the new Act addresses how the *Freedom of Information and Protection of Privacy Act* affects tribunal processes and will help overcome the uncertainty about the application of that Act to tribunal records and proceedings.

Documents submitted during dispute resolution processes and *in camera* hearings are not subject to the *Freedom of Information and Protection of Privacy Act*. As well, tribunals no longer have to address the issue of severing personal information from recorded proceedings, transcripts and decisions.

Section 61 of the *Administrative Tribunals Act* eliminates some areas of overlapping jurisdiction and the resulting possibility of inconsistency between decisions of the Information and Privacy Commissioner and tribunals. The provisions recognize the importance of transparency and accessibility to administrative justice, while taking into account the specific fairness needs of tribunals and the special nature of quasi-judicial decision-making.

(e) Immunity and protection from compulsion

The inclusion in the Act of immunity for tribunal members responds to concerns you expressed. The paper on Model Statutory Powers recommended that tribunal members be protected from compulsion to testify about their proceedings, but it did not recommend the inclusion of immunity protection. Despite our initial belief that this was not necessary because the *Crown Proceeding Act* already provided immunity for actions of a “judicial nature” and also the Province indemnifies tribunal members acting in good faith, we listened to the concerns of the tribunal community and fully addressed them. Sections 55 and 56 of the Act protect you from being compelled to testify and provide immunity from law suits related to your role as “decision makers”.

The work that we have done over the past three years, culminating in the new Act, has gone a long way to reflecting the changing needs of the administrative justice system. However, we cannot now simply sit back and say that these recent accomplishments are enough. Instead, we have to recognize that the system will continually need to be adapted to reflect future societal changes.

ONGOING REFORM

As I noted at the outset of my comments this morning, I believe very strongly that reform should be an on-going process, and that administrative justice institutions, like all public institutions, must remain responsive to the needs they are intended to serve.

Governments, tribunals and stakeholders will all experience changing circumstances and needs. So too should a truly effective administrative justice system keep pace with, and perhaps even lead that change.

My government is committed to that on-going reform, both in the short term and over the long term, and I would like to share some of my thoughts on that with you.

The immediate next step in the reform process is to fully implement the new Act. Much has already been done — especially respecting the merit based appointment process. As I described last year, merit based appointments are critical to the best possible system. Merit based appointments will reflect expertise in administrative processes and also in the tribunal's area of jurisdiction. And high quality, merit based appointments will lead to high quality decisions that will be respected and accepted by the parties and granted the deference they deserve by the courts. And so I would like to commend the tribunal chairs for their participation to date in the appointment process and for their anticipated continued support in improving the transparency and quality of the appointment process.

As additional implementation efforts, I encourage tribunal chairs to take steps to put their legislated responsibilities for board management and operations in writing, through Memoranda of Understanding with the Minister responsible for their tribunal. By signing off on these memoranda, the roles and responsibilities of both chairs and Ministers will be clarified and understood.

Those Memoranda will serve to formally recognize and maintain the proper balance between independence and accountability in the on-going relationship between the tribunal chair and the Minister and, perhaps more importantly, Ministerial staff. This can be very important for those tribunals where the ministry is a party to tribunal proceedings.

And on-going reform will be achieved by tribunals making use of those provisions of the Act that give them new or enhanced powers and authority to make rules and establish case management and dispute resolution processes.

And as you implement rules to establish new - or in some cases, to improve on existing – procedures, I encourage you to learn from each other and to share and build on your collective wisdom. I believe that many of you already have excellent processes in place and that by sharing information and adapting it to individual tribunal's special circumstances, the effectiveness of the administrative justice system will be enhanced.

And I believe that reform will be achieved through tribunals adopting rules that provide for more effective case management, and consequences for non-compliance. This will provide clear guidance and expectations for the parties and should alleviate some of the operational pressures.

Parties will no longer be able to simply refuse to comply with tribunal requirements and intentionally cause unreasonable adjournments, and unnecessary delays. This will free up tribunal resources, and permit their more effective allocation.

However, I do want to impress on you and encourage you when making new rules of procedure, to keep in the forefront the first principles why administrative tribunals are used: to provide an accessible, affordable, and timely alternative to the courts. Rules should not present a barrier to parties. Instead they should be easy, especially for non-lawyers, to read, understand and comply with. And they should set the right balance by making sure parties take all necessary steps to move their disputes forward in a timely way, but not be so complicated or time consuming and expensive that parties will feel overwhelmed and perhaps give up pursuing legitimate claims.

I have especially high hopes for the adoption of dispute resolution processes as the primary means to achieve significant administrative justice reform. As many of you will know, dispute resolution is helping to transform the civil justice system, and you now have the opportunity to similarly transform your system. I think it goes without saying that dispute resolution has been shown to be highly successful, not just in resolving disputes, but resolving them in a manner that the parties themselves have found to be highly satisfactory. And when parties are part of the solution, especially when there are on-going relationships, a mediated resolution can achieve much better, long term results than a traditional win-lose adjudicated result.

New to many tribunals, if not most, this clear statutory authority to actively engage in dispute resolution gives tribunals the opportunity to adopt mediation and settlement conferencing, together with other case management processes, to achieve early and timely resolution of disputes.

I encourage you to embrace this opportunity and to participate in the reform of the administrative justice system by adopting these processes.

And again, I encourage you to work together and build on your collective experience and expertise to share the knowledge you have on best practices, to make those processes as effective as possible.

And as part of government's commitment to on-going reform, as those new rules and processes are adopted and implemented, we will be working to ensure that the powers given to each tribunal continue to reflect that tribunal's needs. And I know some tribunals may already be looking for additional powers, and we will be reviewing those requests and looking to work with those tribunals.

We will also be monitoring the effectiveness of the new legislative provisions, to ensure they achieve the goals we intended, especially in terms of the standard of review and constitutional jurisdiction.

While I am very proud of the new Act, which I believe is of a high standard due in no small part to the in-depth participation and work by you and your tribunals, changes may be needed in the future, to meet the changing needs of tribunals and to respond, if necessary, to any directions of the court.

In addition, I remain positive that there are and will be other opportunities to engage in further reform. That reform may be the result of opportunities that you - as individuals or as members of this organization or as a tribunal chair or member - may identify to improve the system, and I welcome and encourage you to come forward with those ideas.

Having set a new standard in administrative justice reform in this province, the next challenge will be to maintain the high quality of research, study and review, so that we never again find ourselves addressing current issues with outmoded legislative structures and processes. In the context of reform, I also want to comment on some very recent changes enacted for the Expropriation Compensation Board. Some of you may have questions about these changes, so allow me to explain what we are doing and why these changes are being made.

As many of you may be aware, earlier this month I introduced Bill 67 – which will give the Supreme Court of British Columbia the jurisdiction to determine expropriation compensation, and dissolve the Expropriation Compensation Board.

Why was this done? The reasons for this change exemplify the need for administrative justice institutions to stay true to the principles that make them an alternative to the courts to determine rights and resolve disputes. Tribunals are intended to be more accessible and less costly – not just for the government - but also for the parties, by:

- using simple processes and informal hearings so that legal representation is not required;
- applying special skill in terms of either the statutory scheme, understanding of the policy considerations, or specialized knowledge the courts do not have; and
- resolving disputes in a timely and efficient fashion.

The Expropriation Act provides for the independent adjudication of expropriation compensation, to ensure that when private land is taken for a public purpose, the landowner receives fair compensation. Since 1988, the Expropriation Compensation Board exercised this responsibility - however - the benefits of having an administrative tribunal exercise this jurisdiction were not being realized.

That board's proceedings were typically very formal – indeed the rules of the Court were adopted to govern its processes--and typically both parties were represented by legal counsel, who conducted themselves with all the formalities of a court. And if legal counsel was to be involved, absent other compelling reasons, the advantages of using an administrative tribunal to resolve these disputes was substantially diminished.

This caused government to ask the question; were there other compelling reasons to use the Expropriation Compensation Board as a viable alternative to the courts? Quite frankly, the answer was a clear and resounding “No”.

I want to take a few minutes and review that analysis.

A compelling reason for using a tribunal instead of the courts is because either the case load is high or the scheme is complex, requiring specialized knowledge or expertise that the courts

could not readily bring to the issues. Neither of these applied to the Expropriation Compensation Board. The Board had a low caseload. And while taking someone's land for a public purpose can involve complex expert evidence on property valuation, that kind of evidence is often considered, and effectively interpreted and applied by the court in the ordinary course of other types of litigation, for example: business disputes, divisions of marital property and contested estates.

A second compelling reason for using an administrative tribunal is timeliness and early finality. This was not occurring at the Expropriation Compensation Board. The Board's hearings were often protracted, with frequent interim decisions that which were often appealed to the courts and then referred back to the Board. Duplication in process became a reality, and as a result, delay the norm. By moving the jurisdiction to the court, the process will be streamlined.

So Bill 67 reflects government's commitment to continuously evaluate BC's administrative justice agencies to ensure they remain responsive to the needs they are intended to serve, and to take active steps if it becomes apparent that an agency no longer serves those needs in the most effective way.

THE ROLE OF THE AJO

I want to make some brief comments about the Administrative Justice Office and my expectations for the role it will play in keeping BC's administrative justice reform agenda current and relevant.

When I established the Administrative Justice Office as a permanent office, I set as one of its primary responsibilities to act as a centre of excellence on administrative justice reform issues. This was clearly in recognition that reform is an on-going process, and I do not expect that process to end now.

While I expect the Administrative Justice Office will continue to work with tribunals on implementing the new Act, and with chairs and their responsible ministries to define and formalize their relationships through memoranda of understanding, I expect that the office will also be providing the lead in researching and monitoring administrative justice reform activities, and bringing those to my attention, to keep BC's administrative justice system current, modern and relevant to the people it is intended to serve.

CONCLUSION

The *Administrative Tribunals Act* is a noteworthy step forward in modernizing British Columbia's administrative justice system - one that I believe will directly and substantially improve the experience of the thousands of people whose lives are affected every year by tribunals, by making the administrative justice system fairer, more open and more accessible to the people it serves. And again I thank you for the very important role you played in making that Act the excellent piece of legislation it is.

Your participation sets the groundwork for on-going collaborative efforts for reform. Key to our joint success in continuing reform will be:

- Continuing to foster positive relationships with each other and maintaining an open and honest dialogue;
- Research, by the Administrative Justice Office and others, on emerging issues and developments in other common law jurisdictions and how they might be best adapted for application in British Columbia; and,
- Participating in forums, like this conference, to identify and discuss new ideas and exchange views.

We need to remain open to those new ideas and, where they make sense, to take the necessary steps to implement them, to ensure that British Columbia keeps its place at the forefront of administrative justice reform in common law jurisdictions.

I am proud, not only of the progress that has been made on the legislative agenda, but also of the level of participation by you and your tribunals in contributing to make this Province's administrative justice system accessible and responsive to the thousands of British Columbians who use it every year, to resolve disputes in a timely and effective way.

And I am proud that this project has served as a symbol of the government's commitment to achieving the appropriate balance between independence and accountability in the administrative justice process, and also as a symbol of my government's commitment to excellence in the appointments to the tribunals that carry out this important public service.

And I am proud that our joint reform efforts, and especially the new legislation, will serve as a successful model for others engaged in justice reform efforts, both across Canada and in other jurisdictions.

Lastly, I want to thank Wendi Mackay for her leadership and stewardship of the Administrative Justice Project over the past three years, and to wish Dianne Flood well as she carries on the commitment to reform at the helm of the Administrative Justice Office.

Thank you.