

BC Tribunal Dispute Resolution
Needs Assessment Project

- Report 2 -

Follow-up Research and Updated Assessment

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Introduction

In December 2005, the Administrative Justice Office (AJO) and Dispute Resolution Office (DRO) of the Justice Services Branch, Ministry of Attorney General, initiated a project to assess the need to enhance or expand dispute resolution¹ capacity in the BC administrative tribunal environment (the “needs assessment”).

The initial research² included a tribunal survey, which revealed that the participating tribunals do not see a need to expand or enhance their dispute resolution capacity. Generally, the tribunals in the study sample indicated that:

- the users of their dispute resolution processes are satisfied, and
- tribunal dispute resolution programs are adequate.

These perceptions, together with tribunal reports of limited demand for enhanced or expanded alternative dispute resolution processes, suggest overall satisfaction with the status quo. However, this preliminary indication was qualified by three factors:

1. The project’s time, budget and resource limitations precluded direct interviews with tribunal chairs, making it difficult to determine the basis for the tribunals’ optimism.
2. The written survey primarily sought information about the ‘quantity’ not ‘quality’ of tribunal dispute resolution services, leaving some gaps in the baseline information.
3. Few tribunals evaluate their dispute resolution programs, and of those who do, most rely on ad hoc and informal methods with uncertain data collection and performance measures, making it difficult to objectively substantiate their positive ‘self-assessment’.

The preliminary needs assessment recommended that:

¹ For the purposes of the needs assessment project and this report, dispute resolution process means “a process established by the tribunal to facilitate the settlement of one or more issues in dispute.” (Sec 1, [Administrative Tribunals Act](#), RSBC, 2004).

² See Darling, Craig R. *BC Tribunal Dispute Resolution Needs Assessment Project: Initial Research and Preliminary Assessment*. Administrative Justice Office and Dispute Resolution Office, Ministry of Attorney General, 2006.

1. Gaps in the baseline information be addressed, through more research and if possible, in interviews, to permit a more fully informed assessment of the need to enhance or expand tribunal dispute resolution capacity.
2. More work on the nature and quality of evaluation is required to enable a meaningful assessment of tribunal dispute resolution processes.

A 'follow-up' project was designed by the AJO and DRO to implement these recommendations.

Research Tasks

The first goal of the follow-up project was to further inform the needs assessment by:

1. verifying the results of the preliminary assessment with tribunal chairs; and,
2. completing further research to substantiate baseline data.

This work was undertaken by inviting participating tribunals to:

1. review and comment on the accuracy of a brief summary of the tribunal's response to the phase one survey of tribunal dispute resolution capacity
2. where necessary, provide additional information to fill gaps in the survey results, and
3. comment on various elements of the dispute resolution capacity issue in interviews primarily designed to explore dispute resolution program evaluation.

This phase of the project also included meetings with representatives of the DRO and AJO to discuss government policy regarding tribunal dispute resolution programs.

This report summarizes the results of the follow-up research.

The second goal of the follow-project was to begin work on a general organizational framework for dispute resolution program evaluation designed to enhance understanding and help tribunals identify the skills and resources

required to conduct useful evaluation. The results of evaluation framework research are described in a separate report.³

Study Sample

The AJO and DRO identified eighteen BC administrative tribunals for the needs assessment study sample:

- Agricultural Land Commission (ALC)
- Community Care and Assisted Living Appeal Board (CCALB)
- Employment Standards Tribunal (EST)
- Environmental Appeal Board (EAB) / Forest Appeals Commission (FAC)
- Farm Industry Review Board (FIRB)
- Financial Services Tribunal (FST)
- Forest Practices Board (FPB)
- Hospital Appeal Board (HAB)
- Human Rights Tribunal (HRT)
- Labour Relations Board (LRB)
- Mediation and Arbitration Board (MAB)
- Mental Health Review Board (MHRB)
- Passenger Transportation Board (PTB)
- Property Assessment Appeal Board (PAAB)
- Safety Standards Appeal Board (SSAB)
- B.C. Utilities Commission (BCUC)
- Workers Compensation Appeal Tribunal (WCAT)

In February 2006, the AJO and DRO invited the chairs of the eighteen tribunals in the study sample to answer a brief questionnaire⁴ exploring:

- the nature and scope of the tribunal's dispute resolution processes

³ See Darling, Craig R. *BC Tribunal Dispute Resolution Needs Assessment Project: Building Tribunal Dispute Resolution Program Evaluation Capacity*. Administrative Justice Office and Dispute Resolution Office, Ministry of Attorney General, 2007.

⁴ See [Initial Research and Preliminary Assessment](#), supra note 1.

- current rates of utilization
- perceived barriers to utilization of dispute resolution processes
- perceived level of client satisfaction with and adequacy of tribunal dispute resolution processes
- the nature and extent of monitoring and evaluation of dispute resolution processes

Seventeen tribunals responded to the survey⁵, fifteen of which confirmed that they use dispute resolution processes. The Financial Services Tribunal (FST) and the Mental Health Review Board (MHRB) reported that they do not use dispute resolution processes in their case management system.

In October 2006, the fifteen tribunals in the study sample who use dispute resolution processes were asked to verify the accuracy of a brief summary of the tribunal's response to the phase one survey of tribunal dispute resolution capacity⁶, and, where necessary, provide additional information to fill gaps in the survey results. Thirteen tribunals replied⁷, confirming that the summaries are accurate, and providing additional information, where possible.

Limitations

The study sample for the follow-up research included a cross-section of large, small, newer and established members of the tribunal community. The sample was not selected according to any criteria. Participation was voluntary and open to all interested tribunals. While there may be parallels in the broader tribunal community, the assessment is limited to the tribunals in the study sample. And, even within the study sample, generalizations are difficult given the range of tribunal dispute resolution programs at different stages of development.

Results

The 2006 survey of tribunals revealed information gaps related to: the integration of dispute resolution processes with case management systems; the nature and quality of early screening and streaming of cases; the use of pre-

⁵ The Mediation and Arbitration Board did not reply to the survey in time to incorporate the response into the results.

⁶ See [Initial Research and Preliminary Assessment](#). – Appendix 1, supra note 1.

⁷ The Agricultural Land Commission (ALC) and Labour Relations Board (LRB) did not reply to the request.

hearing conferences to advance resolution of disputes; the use of dispute resolution processes for complaint management functions; and utilization rates by type of dispute resolution process.⁸ The follow-up project sought to fill these gaps by requesting further information from particular tribunals, with the following results:

1. **Integration:** The initial research indicated that dispute resolution processes are part of most tribunal case management systems. The follow-up research sought to gather more information on the extent to which dispute resolution processes are being integrated into case management systems – from initial contact through to final disposition.

Result: Indications are that there is ‘threshold’ level integration among the smaller tribunals. That is, some form of dispute resolution is considered at some stage of the process, but not necessarily throughout. The larger tribunals with established dispute resolution programs appear to have higher levels of integration.

2. **Screening:** The survey question about how dispute resolution processes are initiated indicated that all but two of the tribunals in the study sample screen their cases for settlement opportunities. However, the initial research did not reveal the nature and quality of early screening or how successful the screening process is. The follow-up research sought to gather more information on early screening.

Result: The survey results indicate that most tribunals initiate case management with screening, suggesting that dispute resolution processes are integrated at the outset of case management. However, the follow-up research revealed that screening is often informal and irregular⁹, implying less integration than indicated by the survey. There is insufficient information to draw a conclusion about the overall level of integration in the tribunal environment.

3. **Pre-Hearing Conference:** The survey question on dispute resolution processes characterized a ‘pre-hearing conference’ as a dispute resolution

⁸ The preliminary research also indicated the need for more information regarding the effect of case volume on the need and justification for dispute resolution processes, and perceived barriers to utilization or increased utilization but these issues were not included in the follow-up research project.

⁹ The exceptions include the Human Rights Tribunal, Labour Relations Board, and Farm Industry Review Board, where early screening appears to be well-integrated with case management.

process. However, in some tribunals, pre-hearing conferences are convened for administrative rather than dispute resolution purposes. The follow-up research sought to determine how many tribunals use pre-hearing conferences for strictly administrative purposes (e.g. to set a hearing date) and how many use them to advance resolution of the matter or streamline the adjudication process.

Result: While the survey results indicated that the pre-hearing conference is a process common to most tribunals, the follow-up research revealed that a number of tribunals use pre-hearing conferences primarily to organize for the hearing and, if possible, to narrow the scope of issues. This implies a lower level of dispute resolution integration with case management than indicated by the survey results.

4. **Complaint Management:** The initial research focused primarily on dispute resolution processes in appeal management. Some tribunals also have a complaint management function. The follow-up research sought to gather more information on the use of dispute resolution tools to facilitate the settlement of complaints (where tribunals have a complaint management mandate).

Result: The Human Rights Tribunal, Farm Industry Review Board and Forest Practices Board were the only the tribunals with a complaint management mandate participating in the follow-up research. All use dispute resolution tools to facilitate the settlement of complaints, but in the case of the Forest Practices Board, complaints are addressed in the context of audit and investigation (rather than dispute resolution and adjudication).

5. **Utilization:** The initial research appropriately focused on the nature and scope of dispute resolution processes – what processes are used and how often. The follow-up research sought to gather more information on utilization rates by type of dispute resolution processes (e.g., negotiation or mediation, etc.) and confirm the objective of the processes used (e.g., dispute resolution or administration).

Result: The participating tribunals confirmed that data on utilization rates by type of dispute resolution process are not currently available.

Analysis

1. Administrative tribunals in BC are very different from one another. They have diverse mandates, vary in size, caseload and stage of development, operate in distinct cultural and statutory contexts, have differential reporting relationships with the responsible ministries and receive different levels of resources, and are led by unique individuals from various professional and experiential backgrounds. These factors help explain the mixed evolution of dispute resolution programs in the tribunal sector.
2. Tribunal dispute resolution programs are context-dependent. The tribunals tailor their programs to fit their unique environments, often reflecting resource limitations. This has resulted in a variety of tribunal dispute resolution programs, ranging from limited to comprehensive and from *ad hoc* to fully integrated.
3. Government policy regarding tribunal dispute resolution is not well-articulated. In some cases dispute resolution is required by legislation, but otherwise the nature and scope of a dispute resolution program is largely at the discretion of the tribunal. The government encourages but does not require the use of dispute resolution by tribunals. The legislation is generally enabling (e.g., section 28 of the Administrative Tribunals Act, RSBC, 2004), not prescriptive. This approach respects the diverse mandates and context dependency of dispute resolution programs. On the other hand, the Attorney General has called on tribunals to show leadership in delivering dispute resolution services, moving disputes away from formal adjudication and towards quick and effective settlement wherever possible. This initiative anticipates tribunal dispute resolution services that are 'proportionate' to the nature and scope of the dispute and the needs of the disputants – ranging from expeditious to comprehensive as required. Proportionate dispute resolution assumes the right tool for the job as opposed to one tool for all purposes, potentially requiring a wider array of services and changes in tribunal case management and service delivery. Clear policy direction is required to initiate changes in current practice.

4. The perception among tribunals that their dispute resolution programs are adequate and users are satisfied is, for the most part, either intuitive or based on ad hoc or informal assessments that may not be reliable and are difficult to defend. Consequently, it is hard to support or contest the tribunals' perception and determine if additional dispute resolution capacity is required.

Conclusions

1. Dispute resolution processes are part of most tribunal case management systems. The nature and extent of these processes is largely at the discretion of the tribunal. Most tribunals perceive that their dispute resolution programs are adequate and users are satisfied, but few systematically evaluate their programs.
2. The research suggests there is room for improvement in many tribunal dispute resolution programs, bearing in mind the context-dependency of such programs.
3. Meaningful program evaluation is required to assess the need to expand or enhance dispute resolution capacity in particular tribunals or across the tribunal community generally.¹⁰
4. Government leadership, resources and policy direction are likely required to expand or enhance dispute resolution capacity beyond current levels.

Recommendations

It is recommended that:

1. The Administrative Justice Office (AJO) and Dispute Resolution Office (DRO), in consultation with administrative tribunals, articulate an overarching dispute resolution program policy framework that:
 - clarifies government expectations regarding the nature and scope of tribunal dispute resolution services, and
 - recognizes the context-dependency of dispute resolution processes in the administrative justice system.

¹⁰ See *Building Tribunal Dispute Resolution Program Evaluation Capacity*, supra note 3.

2. Administrative tribunals, as part of their service planning, evaluate their dispute resolution programs to optimize service delivery in keeping with program goals and objectives, and overarching government policy.¹¹

¹¹ See *Building Tribunal Dispute Resolution Program Evaluation Capacity*, supra note 3.

Appendix

Summary of Follow-up Information Requests

Appendix

Summary of Follow-up Information Requests (Written Responses)

The 2006 survey of tribunals revealed information gaps related to: the integration of dispute resolution processes with case management systems; the nature and quality of early screening and streaming of cases; the use of pre-hearing conferences to advance resolution of disputes; the use of dispute resolution processes for complaint management functions; and utilization rates by type of dispute resolution process.¹² The follow-up project sought to fill these gaps by requesting further information from particular tribunals, with the following results:

Agricultural Land Commission (ALC)

Question:

1. I note that ALC's response to the survey focuses on section 13 community dispute resolution processes. More generally, it would be helpful to know if the ALC is using alternative dispute resolution processes/methods (e.g., negotiation, facilitation, mediation) to facilitate settlement in complaint investigation and management, and in section 55 appeals. If so, I'd appreciate learning more about your utilization and success rates.

Answer: (No reply)

BC Utilities Commission

Question:

1. I note that the BCUC investigates and helps resolve disputes between utility customers and their respective utilities. Do you use dispute resolution processes in the investigation of these disputes (public complaints)? If so, what processes are used?

Answer:

1. Our guidelines were developed in the early 90s, and have been found to work very well and are particularly well suited for our circumstances. So we do not see any need for generic guidelines. If we can be of assistance to others through the project that you have initiated we will be pleased to make a contribution, but given the work that was done to develop our

¹² The preliminary research also indicated the need for more information regarding the effect of case volume on the need and justification for dispute resolution processes, and perceived barriers to utilization or increased utilization but these issues were not included in the follow-up research project.

guidelines and the familiarity of our stakeholders with our guidelines, we currently have very little, if any, interest in changing our guidelines to "match" the generic guidelines.

Community Care and Assisted Living Appeal Board (CCALB)

Questions:

1. The CCALB uses early screening, pre-hearing conferences and mediation during the course of case management. Can you provide a breakdown of utilization by type of dispute resolution process? I understand that the CCALB screens all cases for settlement opportunities, but of the 8 cases that went through a dispute resolution process in 2005, how many cases involved pre-hearing conferences and in how many was mediation attempted? How does your early screening process work? Particularly, what criteria are used to screen and stream cases towards a dispute resolution process?
2. The survey response indicates that the CCALB believes that its clients are generally 'satisfied' with the tribunal's dispute resolution processes. Can you tell me how you assess client satisfaction?

Answers:

1. The volume of cases for this board is quite low and varied. We do not have or require any formalized early screening process and do not stream cases into different processes. However the board is aware of the benefits of early alternative dispute resolution and is always attuned to the possibility of resolution in individual cases. Each case is dealt with individually by the Director who in dealing with the parties, looks for possible areas of resolution as the case moves along in the case management process. Sharing of information and clarification of issues can sometimes result in resolution of the appeal, one or more issues or a decision on the part of the appellant to withdraw the appeal. Where it becomes apparent that the parties are willing to engage in a more formal alternate dispute resolution process, the Director will explore options with the parties, however formal mediation is not used without the consent of all parties. On occasion a Pre-hearing conference may be used to discuss alternate dispute resolution or to engage in informal settlement discussions but it is usually done more informally through discussions individually with the parties to explore the issues and their attitudes towards potential resolution as the case moves along towards a hearing. In the 8 cases mentioned in 2005, there were 2 pre-hearing conferences and more formal mediation was considered in 2 other cases but only used in one of those.
2. Due to the very limited volume of cases and even fewer that go through any formal dispute resolution process, the board does not evaluate or formally assess client satisfaction. Our assessment is only based on comments made to the director or general impressions from the parties where such processes are used.

Employment Standards Tribunal

(No questions)

Environmental Appeal Board (EAC) / Forest Appeal Commission (FAC)

Questions:

1. The EAB-FAC uses early screening, settlement meetings, pre-hearing conferences and mediation during the course of case management. Could you provide a breakdown of utilization by type of dispute resolution process?
2. How does your early screening process work? Particularly, what criteria are used to screen and stream cases towards a dispute resolution process?

Answers:

1. This information is not available for the EAB and FAC generally. Our appeal tracking system was developed some time ago and this type of information is not accounted for in the current system. The only statistic we have available is for appeals under the Forest Act. Since all appeals filed under this enactment are held in abeyance for 30 days to allow parties an opportunity to resolve the issues under appeal, the statistic we provided to the AJO in the first phase of this project simply reflects the number of appeals filed under the Forest Act in 2005. This procedure came about as a result of discussions with the Ministry of Forests, which led to a January 11, 2005 directive from the Director of Revenue Branch, Ministry of Forests and Range: it is unique to Forest Act appeals.
2. We have not created criteria, and have not formalized an early screening process. The screening is based on an initial review of all appeals by the Chair, myself and the Registrar. Given our experience with appeals over the years, we may note that the issues raised in a notice of appeal (or in subsequent documents) suggest there may be some opportunity to resolve some or all of the issues prior to a hearing.

Farm Industry Review Board

Questions:

1. The FIRB uses early screening, settlement meetings, pre-hearing conferences and mediation during the course of case management. Can you provide a breakdown of utilization by type of dispute resolution process? I understand that all cases were screened for settlement opportunities, but in how many cases were settlement meetings, pre-hearing conferences or mediation used?
2. How does your early screening process work? Particularly, what criteria are used to screen and stream cases towards a dispute resolution process?

Answers:

No written reply (the questions were discussed in the interview process).

Forest Practices Board (FPB)

Questions:

1. I understand that FPB dispute resolution/problem solving processes are an informal adjunct to your audit responsibilities. Do you also use dispute resolution processes in your investigation of public complaints? If so, how?
2. How does your early screening process work? Is it an informal process, or are there criteria to screen and stream cases towards a dispute resolution?

Answers:

1. The approach to conflict resolution taken in our complaint process can be summarized as follows:
 - The FPB promotes resolution at any stage during complaint investigations. Board staff will generally seek solutions. However, staff does not promote resolution actively as their main purpose. They expedite and encourage, but do not insist on a resolution as part of completing a complaint investigation. Accordingly, they do not invoke formal dispute resolution procedures such as settlement conferences, mediation or arbitration.
 - The FPB has concluded that it should continue, with caution, to utilize informal resolution-seeking processes, but not insist on resolution or make such procedures a mandatory part of audits or investigations.
 - Because the Board has recommending authority, but no enforcement capability, we tend to indicate how complaint situations might be improved through the recommendations attached to an investigation. We track the fate of recommendations systematically.
2. We do no screening, and there are no criteria employed to stream investigations toward a resolution. Instead, we explore potential solutions with all of the participants on every complaint investigation - if a solution arises among the parties as a result of an investigation process, well and good, but the formal part of our work is the assessment of facts and if situations need repair, then to craft appropriate recommendations.

One of our ongoing concerns is that an explicit conflict resolution role would make the Board a committed party, and potentially remove us from being able to make independent and objective comment. It is a fine line.

Hospital Appeal Board (HAB)

(No questions)

Human Rights Tribunal (HRT)

Questions:

1. At the time of the survey (Feb 2006), your case statistics for 2005 were not complete. Are the numbers now available?
2. The HRT uses early screening, settlement meetings, pre-hearing conferences, mediation and other processes during the course of case management. Can

you provide a breakdown of utilization by type of dispute resolution process for 2005? I understand that all cases are screened for settlement opportunities, but in how many cases were settlement meetings, pre-hearing conferences, mediation or other processes used?

3. How does your early screening process work? Particularly, what criteria are used to screen and stream cases towards a dispute resolution process?

Answers:

No written reply (the questions were discussed in the interview process).

Labour Relations Board

Questions:

1. The LRB uses early screening, settlement meetings, pre-hearing conferences, and mediation during the course of case management. Can you provide a breakdown of utilization by type of dispute resolution process for 2005? I understand that all cases are screened for settlement opportunities, but in how many cases were settlement meetings, pre-hearing conferences or mediation used?
2. How does your early screening process work? Particularly, what criteria are used to screen and stream cases towards a dispute resolution process?

Answers: (No Reply)

Passenger Transportation Board (PTB)

Questions:

1. The survey question on dispute resolution processes characterized a 'pre-hearing conference' as a dispute resolution process. Your response suggests that PTB pre-hearing conferences are used primarily to streamline case management, and only incidentally as a dispute resolution tool (e.g., to narrow the scope of issues). Is this an accurate characterization?
2. The survey response indicates that the PTB believes that its clients are generally 'satisfied' with the tribunal's dispute resolution processes. Could you tell me how you assess client satisfaction?

Answers:

1. I would say, yes, this is an accurate characterization.
2. The feedback we have had is anecdotal; some of the legal representatives who have dealt with licencing issues on an ongoing basis through the Motor Carrier Commission era and into the PTB era have made comments that this is helpful in focusing the parties and minimizing some of the contentious issues. In my view (and perhaps my clients) it has eliminated the "ambush" that used to occur at hearings. This frequently resulted in increased conflict.

Property Assessment Appeal Board (PAAB)

Questions:

1. The PAAB uses early screening, settlement meetings, pre-hearing conferences, mediation, and non-binding case evaluation during the course of case management. Am I correct in assuming that these 'processes' are integral to appeal management and settlement conferences (i.e., a settlement conference might involve mediation or non-binding evaluation)?
2. How does your early screening process work? Particularly, what criteria are used to screen and stream cases towards a dispute resolution process?

Answers:

1. You are correct in assuming that the "processes" are integral to appeal management and settlement conferences.
2. As to early screening, all appeals are subject to case management and there will be an effort (of some sort) at dispute resolution other than adjudication in virtually every appeal. The extent of dispute resolution processes beyond an initial appeal management conference will depend on factors like the nature and complexity of the appeal, the likelihood of resolution, the ability and/or willingness of parties to participate in particular processes. The criteria are not written down and there is a lot of discretion involved. We have a lot of different kinds of cases, some very simple and some very complex, some involving lots of money and some involving very little money, some with highly sophisticated participants and some with very unsophisticated participants, some with legal issues and some without. Our appeal management and dispute resolution processes are designed to be flexible so that they can be tailored to meet the needs of a particular appeal and to choose processes that will be helpful and proportionate in the particular circumstances. If you want more information or want me to be more descriptive, it might be easier if we just chatted over the phone, or if you would rather meet, that is fine too.

Safety Standards Appeal Board (SSAB)

Question:

1. It would be helpful to learn more about how your early screening process is working (assuming you have now had enough experience with the process). Particularly, what criteria are you using to screen and stream cases towards a dispute resolution process?

Answer:

1. There are three appeals at various stages of the process but none of them have presented an opportunity to pursue dispute resolution processes other than going to a hearing. ... We need more cases to be able to respond further with any degree of confidence.

Worker's Compensation Appeal Tribunal (WCAT)

Question:

1. I note that WCAT pre-hearing conferences are used most frequently to settle issues. Please clarify that by 'settling issues', you mean identifying or narrowing the scope of issues for determination at a panel hearing.

Answer:

1. "Settling issues" means identifying or narrowing the scope of issues for determination on their merits in the appeal. It may also mean settling evidentiary and procedural issues, particularly in complex proceedings involving multiple parties.