



The following address was given by Mr. Justice David Vickers at the BCCAT Annual Conference on Sunday, October 27, 2002.

**BCCAT 7 TH ANNUAL CONFERENCE
ADMINISTRATIVE JUSTICE: CHARTING THE COURSE FOR BRITISH COLUMBIA.**

1. This 7 th Annual Conference of BCCAT has as its theme, Administrative Justice: Charting the Course for British Columbia. No doubt that theme is one that has blown in on the winds of change. Charting a Course does not suggest that the present course will be stayed. Rather it implies the need for a new or altered course and invites you, as the participants, to engage in a process to set that course.

2. Setting a new or altered course involves change. I am convinced that no generation of people, in the history of mankind, has had to deal with change as much as those generations of people following World War II. As human beings we all seem to be programmed to accept some degree of change in our day to day lives. We understand and accept the changes that come with new seasons; and, we even appear to have the coping mechanisms that allow us to accommodate the advent of new life and the inevitability of death. But the kind of change we encounter daily in our lives is much different. Firstly, in our daily lives change appears constant. Secondly, the impact of change is often profound and life altering. Often we are asked to conclude that the decisions we made yesterday, while correct then, are no longer valid or appropriate. I do not limit that observation to just tribunal decisions. Think of your daily personal lives and ask how often decisions you make within your own family get changed or altered because yesterday's decision has been overtaken by events.

At times, change challenges the value of our work contributions. This kind of change appears to be part of the fabric of our complex world. It is important to be aware that change can be extremely stressful and there is a real need to develop an appropriate set of coping mechanisms. So this is a warning. Charting a new or altered course can be stressful, particularly as you venture into new and challenging waters.

3. The harbingers of change for you are the Core Services Review and the Administrative Justice Project. The Administrative Justice Project signalled government's intention to review the delivery of administrative justice services in this province and opened the possibility for charting a new course. The stated objectives for the Administrative Justice Project bear repeating. These objectives mark the landfalls towards which you are invited to assist in plotting a new or altered course. They were to ensure that:

administrative agencies meet the needs of the people they serve

their administrative processes are open and transparent

their mandates are modern and relevant, and

government fulfills its obligations in providing the administrative agencies require to carry out their

legislative and policy framework independent mandates effectively



4. The Administrative Justice Project resulted in some very thorough research into many issues affecting the delivery of administrative justice. As you know, it has culminated in the White Paper released this past summer and I congratulate Ms. Wendy Mackay on an excellent piece of work. The White Paper makes numerous recommendations which on their face provide generally positive reform to the delivery of administrative justice. I say "on their face" deliberately because no person knows what will flow from this paper. Two questions are particularly relevant at this time.

Is there the political will to actually chart a new course for the delivery of administrative justice? And,

Will there be sufficient resources to accomplish appropriate reforms? Or, put another way, in a climate of cutbacks and downsizing will decisions about the delivery of administrative justice be made from a principled perspective that reflects the objectives and recommendations of the Administrative Justice Project or will they be simply budget driven?

5. In short, will the White Paper be the catalyst that is needed? Will it be the important navigational tool required to plot a new or altered course? Or will it sit on a shelf?

6. The recommendations for the most part address the last three of the stated objectives. As to the first objective there is little discussion identifying who "the people they serve" are, or identifying what their "needs" are. I want to spend a moment discussing an issue arising out of this first objective, directed to the question of administrative agencies meeting the needs of the people they serve.

7. Who are the people served by any particular administrative tribunal? There is no single answer to this question because it varies from tribunal to tribunal. Let me suggest that the answer, for each individual tribunal, may ultimately have a bearing on the need for adjudicative independence.

8. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor control)*, 2001 SCC 52, McLachlin CJ said the following:

... tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as a part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.

9. Now I know this is not what many administrative tribunal members wanted to hear when this long awaited decision was finally released. If nothing more was said these words would, without a doubt, put an end to any argument that an administrative tribunal could or ought to be able to assert a guarantee of independence. But more was said because in the very next paragraph the Chief Justice went on to identify the particular characteristics of the Liquor Appeal Board. She said:

It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function... The exercise of power here at issue falls squarely within the executive power of the provincial government.

10. It is those words which have allowed some academics (and even non academics) to argue



that the question of independence remains open where a tribunal is not exercising a licensing authority. What of the tribunal adjudicating disputes between parties? I have in mind, Human Rights Tribunals, and tribunals determining labour relations and landlord and tenant issues. In the adjudication of these issues there is a parallel between the adjudicative function they perform and the adjudicative function of a court. In these circumstances does an argument remains open for a level of adjudicative independence?

11. It is of course, not open for me to answer that question here today. Let me just say that in addressing the "needs of the people they serve" it is difficult to avoid the issue of adjudicative independence. I do not think the last word has been spoken or argued on this important subject.

12. One last thought on the issue of independence and accountability. The thought comes from the advice of Polonius to Laertes in Hamlet:

This above all: to thine own self be true, And it must follow, as the night the day, thou canst not then be false to any man. Act 1 Scene 3

Above all else, be true to yourselves for that is the hallmark of independence.

13. I thought it might be of interest to this group to know how many petitions are filed in the Supreme Court of British Columbia, seeking judicial review. The figures are only available for the Vancouver Registry of the Court and they are as follows:

1996-----	106
1997-----	81
1998-----	109
1999-----	80
2000-----	92
2001-----	93
2002-----	73 (data not complete)

14. Now those numbers do not reflect the balance of the court registries and my guess is that you could add 25 to 30% for those registries. In addition there may be some tribunal reported elsewhere, e.g., Labour Relations Board under a separate category of Labour. But while the figures are not to be relied on they do give a sense of the overall numbers. They would come in at about 10 petitions per month. Judicial Review petitions bring with them an inordinate amount of paper and the time spent in court is a fraction of the time a judge would spend before a decision was rendered. So overall, I would characterize Judicial Review as a significant part of the Court's workload.

15. A brief word about the process of judicial review. Many of the words I am about to speak are directly extracted from decisions of the Supreme Court of Canada. As you no doubt know, that Court has directed trial judges to take a "pragmatic and functional" approach in determining the appropriate standard of review. We are directed to consider 3 possible



standards of review; correctness, unreasonableness and patent unreasonableness. The central question to be asked is: "Was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the board?" *Pasiechnyk v. Saskatchewan (Workers Compensation Board)*, [1997] 2 S.C.R. 890 at para 18, per Sopinka J.

16. Four factors are to be taken into account:

The presence or absence of a privative clause. The absence of such a clause does not necessarily imply a high standard of scrutiny where other factors lead to a different conclusion. But a full privative clause is compelling evidence that a court should show deference to the decision of a tribunal.

Expertise. Here the court must characterize the expertise of the tribunal in question, consider its own expertise relative to that of the tribunal and identify the nature of the specific issue relative to the expertise.

The purpose of the Act as a whole and the provision at issue, in particular. Purpose and expertise will often overlap because the purpose of a statute is more often than not indicated by the specialized nature of the legislative structure and dispute resolution mechanism. And finally,

The nature of the problem. Is it a question of fact or of law? Courts are generally less deferential on questions of law. The justification for this position is found in the question of relative expertise. Sometimes the line is difficult to draw, particularly where an issue involves a question of mixed fact and law.

17. These are the four factors a trial judge must take into account on judicial review. There are cynics who will tell you there are but 2 factors, namely reasonableness and "just plain stupid." Obviously there is more to it than just a consideration of 2 or four factors. Deference is also a by-product of the quality of the process and the quality of a tribunal's decision. By that I mean that if tribunals expect deference then there is a need to demonstrate competence in their respective fields.

18. Tribunals need to conduct the hearing process fairly and they need to provide well written and well reasoned decisions. To achieve those obvious goals members of tribunals need to remain constantly aware of changes in administrative law that affect their particular work. In short, there is a need for continuing adequate training and education.

19. Let me congratulate BCCAT for recognizing those needs 7 years ago. Your work has been outstanding. It will continue to be a major contributing factor leading to tribunal credibility in this Province. The White Paper has expressed confidence in your role and I am confident you will make a significant contribution to the process of charting any new or altered course. The next few days are the beginning of a continuing process.

20. Administrative tribunals are established by government, in part, to provide an alternative form of dispute resolution to that provided by courts. For that reason, in charting a new or altered course, I suggest tribunals should look at the best ways to provide dispute resolution in their particular fields. Naturally anything that is done in that regard must be consistent with the statutory mandate, consistent with a fair process and consistent with meeting the needs of the persons served by the tribunal.



21. From the perspective of one trial judge let me say that efficient and effective delivery of administrative justice in British Columbia is absolutely critical. In my view it would place an impossible burden on the courts if the disputes now handled by administrative tribunals were to revert to the courts. Indeed, it would put the Administration of Justice into disarray. Administrative tribunals are engaged in the resolution of many and various important disputes. I am confident that tribunals can provide a much more effective and cost efficient way of dealing with these disputes and for that reason the status quo need not be disturbed.

22. I suggest that any reform to the administrative justice system should be directed at strengthening the system of administrative justice. There are some obvious improvements that come to mind arising out of the White Paper. They include:

- The development of a competency based transparent appointment process;
- Providing tribunals with sufficient authority and the resources to develop innovative dispute resolution models, including effective case management techniques;
- Considering the combination of or merger of some tribunals for a more effective use of resources;
- Enhancing the ability of tribunal members to upgrade their skills on a regular basis.

23. Administrative tribunals are an essential part of the administration of justice. Your work in performing adjudicative or other dispute resolution functions provides a much needed service to communities throughout British Columbia. Any new or altered course should lead to reforms aimed at assisting you, as tribunal members, in the provision of those services and increasing your competency and abilities to perform your statutory duties.

24. While this might sound like judicial heresy, let me say that administrative dispute resolution is, essentially, not any different from judicial dispute resolution. While the subject matter may differ there are central threads that remain. They include, first and foremost, the need to be heard in some fair process and secondly, the need to give reasoned, honest and independent decisions. In the end, administrative justice is the provision of a dispute resolution service without which society and government could not function. It is an integral part of the rule of law that sustains and nurtures the freedoms and peace we are all so fortunate to enjoy.

25. You are asked to chart a course. You are the navigators in an exercise that will have profound implications for British Columbia. I suggest that in this process you might want to address some of the following concerns:

Any new or altered course for administrative justice should recognize and foster the professionalism, skills and abilities of tribunal members. Training, education and renewal of skills should form a part of the commitment made by a tribunal member on appointment. Training, education and renewal of skills should form a part of the commitment made by Government to each tribunal member on his or her appointment;

Tribunal appointments should not be seen as political rewards but should be filled on the



basis of the competencies required to perform the job. You are not engaged in a public service in the nature of volunteer work. The appointment process requires the recognition of the skills and abilities that are required to effectively perform the duties imposed by statute. In short there is a recognized need to implement an appointment process that is open, transparent and merit based as outlined in the White Paper;

Government cannot avoid the need for adequate resources to attract qualified individuals with appropriate compensation packages. Insufficient resources will have an impact on the ability of tribunals to independently determine how they are to discharge their statutory mandate. Insufficient funding also impacts on the workload of tribunal members and their staff, making the environment in which they work more stressful.

Where qualified and capable people are currently performing the duties of tribunal members, whether appointed by this or any previous government, their professionalism and abilities should be recognized and supported. Where the opportunity arises to appoint new people to the administrative tribunal community, those appointments, as I have already said, should be made following an open, transparent and merit based appointment processes.

26. These concerns tie directly to a recognition and respect for the rule of law. The rule of law is an expression of the shared values we have in our Canadian society. It is at the core of the fabric that constitutes our nation. We are individually sworn to uphold and apply those laws. If we are to adequately perform our duties the rule of law deserves no less than attention to the important concerns I have raised.

27. There are bi-products to administrative justice credibility. The more credible the administrative justice system can be, the more willing the judiciary will be to defer to a tribunal's decision. In addition, the acceptance of your decisions by litigants and the community will be reflected in a reduction of cases on judicial review. Your credibility will reflect well on the administration of justice in British Columbia.

28. So I urge you to chart a reasoned steady course. Plot your course with vision and with courage. And in so doing I trust you will avoid all the hazards of unwelcoming rocks and reefs. I am confident you will find the right course for British Columbia, one that will lead you into calm and accepting waters.

October 27, 2002
