

**Keynote Address by Attorney General Geoff Plant
to the
CBA's Continuing Legal Education Conference
"Reaction and Reality: The Future of Tribunals in Canada"**

Saturday, November 23rd (9:10 a.m. to 10:15)

**The Attorney was asked to speak on the topic of:
*"The Administrative Justice Project in B.C.
or Do Governments Take Tribunals Seriously?"***

Thank you for the opportunity to speak to you today about a reform initiative of the Government of British Columbia known as the Administrative Justice Project. This project – which began in July 2001 – represents the first system-wide review of administrative agencies in the history of British Columbia. It springs from a recognition of the importance of administrative agencies as the front line of our system of justice – indeed, the only point of contact that many citizens will ever have with our justice system. It builds on excellent work that has been done in many other parts of Canada and throughout the common law world. And it aims to establish a platform for a public law for the twenty-first century that is citizen-focused, relevant, practical, accountable, fair, affordable and accessible.

These are ambitious goals, perhaps unattainably so. But let me take the time allotted to me this morning to outline what we are doing to try to achieve them. At the very least, I am confident you will agree that we in British Columbia are taking tribunals seriously.

To this end, I will touch briefly on the related issues of:

- the growth and development of administrative tribunals in British Columbia, to place what we are doing in some of its context;
- the impetus for our current reform initiatives and our vision for administrative justice;
- an overview of our Administrative Justice Project – what we have accomplished and what remains to be done; and
- finally, my perspective on the balance between independence and accountability.

THE FORMATIVE YEARS IN BRITISH COLUMBIA

British Columbia's first administrative tribunal, the Workman's Compensation Board, was set up in 1916 to administer a scheme for assessing and collecting premiums from employers and to adjudicate and pay claims to injured workers.

Over the ensuing decades, additional tribunals were established to meet the needs of the expanding social welfare state through a process which Norman Ward described almost forty years ago as “a comprehensive shifting of power.” (The Government of Canada, R. MacGregor Dawson, (5th ed.), revised by Norman Ward, 1970, p. 266.)

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Parliament discovered that it could not take over all the additional burdens which fell to its lot under this new conception of state activity, and the judiciary was also unable to bring its functions into perfect harmony with the new demands which were made upon it.

Tribunals were expected to provide subject matter sensitivity and expertise to ensure the achievement of government's policy objectives. They were also expected to be a more accessible and less costly alternative to the courts and a forum for decision making at arm's length from the day-to-day operations and pressures of government.

After the Second World War, the British Columbia government, like its counterparts elsewhere, embraced the concept and values of administrative decision making as a vehicle for delivering its policies and programs. In the years that followed, statutory powers were conferred upon a group of decision makers as diverse as the Superintendent of Motor Vehicles and the Chief Forester. Some were decision-makers of first instance with or without internal powers of review; still others were established only to hear appeals from the decisions of frontline officials. Some provided avenues of direct appeal to the courts on all matters; still others were protected by strong privative clauses intended to shield all but serious jurisdictional error from judicial review. Some agencies were staffed by ministerial appointees; others were appointed by Cabinet; and there was little consistency of tenure. To be fair, some of these differences and distinctions are inherent in all complex systems, but nonetheless, viewed from a distance, the dominant

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characteristic of our system of administrative justice is the lack of any dominant characteristic. Accordingly, when the newly elected government took office in my province June 2001, a freeze frame camera would have captured more than 100 arm's length provincial administrative agencies operating in British Columbia.

THE IMPETUS FOR REFORM

I do not for a moment pretend that the analysis I have just summarized is new. In fact, as the field of administrative law has matured over the past 80 years, practitioners everywhere have come together to address issues of mutual concern and to develop innovative solutions to challenging questions.

Administrative law sections are an established part of most provincial and territorial bars. In British Columbia, tribunal members have taken initiative in forming the British Columbia Council of Administrative Tribunals and the Circle of Chairs. National organizations like the CBA and C-CAT (Council of Canadian Administrative Tribunals) also provide important forums for the exchange of information and ideas across the country and beyond. These organizations have helped us identify the need for reform, and their ideas have informed the critical elements of our reform proposals.

But the case for reform does not depend entirely upon the issues identified by the practitioners of administrative justice. There is also, to put it bluntly, the question of cost. Governments everywhere are facing significant

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challenges in delivering affordable public services. The good news is that tough times stimulate creative thinking. Difficult choices must be made in allocating scarce public dollars to areas where they are most needed and most likely to be effective.

Our approach to administrative justice reform proceeds from a fundamental premise that administrative tribunals continue to offer great promise as informed, informal, accessible and inexpensive alternatives to the courts. From that premise however, our observation is that in British Columbia at least, we have not been entirely successful in fulfilling this promise. And we continue to face challenges in providing:

- timely and cost-effective services (in some tribunals it can take three years or more for matters to be resolved);
- qualified experts to adjudicate disputes (external factors and considerations have often influenced the appointment process);
- less formal alternatives to the courts (in one tribunal, there are more than 35,000 regulations that must be applied and interpreted; in others, it would be unthinkable to appear without counsel);
- a system that has independent decision making responsibilities yet remains accountable to government (there are continuing uncertainties about how to achieve the right balance of authority and responsibility for matters legislative, executive and judicial).

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If we believe in the values of administrative justice, then we must address these challenges. Government can and indeed should do more to ensure that administrative tribunals have modern mandates and the statutory tools and processes they need to operate effectively in a complex, changing society. We must continue to support the work of administrative tribunals by keeping abreast of developments in the law and by providing leadership in the design of administrative processes and institutions.

It is as a consequence of these issues and challenges that I initiated the Administrative Justice Project in July 2001. Its purpose is to carry out the first ever comprehensive review of the administrative justice system in British Columbia. Seventeen months on, the work is incomplete, but I believe we have made significant progress in our commitment to the reform of this vital part of our justice system.

OUR VISION FOR ADMINISTRATIVE JUSTICE

We have a vision for an administrative justice system in British Columbia that starts from the humble yet critically important objective of treating everyone who comes to a tribunal for a decision courteously, fairly and with respect. In realizing this vision, it is my view that the administrative justice system must:

- provide high quality services to people and communities;
- reflect government's core values and principles; and
- achieve the right balance between independence and accountability.

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As set out in the Terms of Reference for the Administrative Justice Project, my objectives for the systemic reform of administrative institutions are to ensure:

- that administrative tribunals meet the needs of the people they serve;
- that administrative processes are open and transparent;
- that the mandates of administrative tribunals are modern and relevant; and
- perhaps most importantly from my perspective as Attorney General, that government fulfills its obligations by providing the legislative and policy framework administrative tribunals require to carry out their independent mandates effectively.

WHAT WE'VE DONE SO FAR

With the assistance of the Administrative Justice Project, the British Columbia government has already achieved the following three important objectives:

- first, we have completed a comprehensive assessment of administrative tribunals as part of government's broader Core Services Review;
- second, we have enacted legislation to reform and restructure a number of major administrative institutions; and

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- third, we have begun implementing reforms recommended in the Administrative Justice Project’s White Paper, “On Balance: Guiding Principles for Administrative Justice Reform in British Columbia”.

I will expand upon each of these objectives.

1. Review of Tribunals

One of the first initiatives we engaged in as a new government was a “Core Services Review” of all ministries and programs, including more than 700 corporations and public agencies. The review was comprehensive. It provided an opportunity for us, as government, to “rethink” fundamental assumptions about mandates, responsibilities, programs and service delivery.

The Core Services Review was a key part of our administrative justice work over the fall and winter of this past year. It had a number of important implications for all of us who are involved in administrative justice and its outcomes have guided our subsequent work. In particular, I believe that in reforming and modernizing the administrative justice system, government has an opportunity and the responsibility:

- first, to enhance administrative decision making and dispute resolution by directing resources to improvements in the quality and timeliness of initial decisions and by providing more opportunities for informal reviews and reconsiderations earlier in the adjudicative process – so that first level administrative decisions are not only good ones but also, wherever possible and appropriate, final ones;
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- second, to amend enabling legislation so that administrative tribunals are able to access a full range of early dispute resolution techniques and adopt those that are appropriate, proportionate and likely to be effective within the unique context and operating environment of each administrative tribunal;
- third, to foster greater certainty and finality in administrative decision making by eliminating unnecessary review and appeal processes, reducing the number of times parties can request a review or file an appeal and reducing the length of time required to reach a final determination in individual cases;
- fourth, to be guided in decisions about whether to establish or restructure administrative tribunals by determining whether existing or anticipated workloads are in fact large enough to allow tribunals to develop a sufficient body of specialized knowledge and expertise;
- finally, to structure the mandates of administrative tribunals so that they are indeed an alternative to the courts where specialized professional or technical expertise can be brought to bear in addition to or as an alternative to the strict application of legal principles.

The Core Services Review allowed us to consider fundamental questions about what government can and should be doing and to reconfigure, streamline and reconfirm the essential mandates of administrative tribunals. At the outset of the review, there were 67 administrative tribunals in British

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Columbia. As a result of the review, 21 tribunals have been eliminated or replaced with internal review processes within government. Twenty-eight tribunals have also been streamlined and restructured.

Implementation of the Core Services Review recommendations is ongoing and I expect will be completed over the next 12 months.

2. Reform of Administrative Institutions

I now want to turn to several legislative initiatives we have undertaken to reform and restructure a number of large administrative institutions.

Workers' Compensation

We have passed new legislation reforming the workers' compensation system to provide for a modern governance structure and a more streamlined review and appeal process. Recognizing that compensation issues are complex, highly technical and have significant long-term impact for both employers and employees, we have chosen a two-step review process that consists of an initial reconsideration within the WCB itself and a formal appeal to a new, external Appeal Tribunal.

The new legislation, the *Workers Compensation Amendment Act (No. 2)*, 2002, S.B.C. 2002, c. 66, is important not only for what it says about our objectives for the reform of the workers' compensation system but also for what it says about our commitments to the reform of the tribunal appointment process. For example, in this legislation, you will see a clear

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role for the tribunal chair in the appointment process and a commitment to merit based recruitment and selection.

Employment and Assistance

On September 30, 2002, we implemented new legislation reforming the former BC Benefits (income assistance) system. Under the new *Employment and Assistance Act*, S.B.C. 2002, c. 40, we have replaced a multilayered review and appeal process with an internal reconsideration and external appeal to a new tribunal.

The members of the new tribunal are being appointed as impartial adjudicators replacing the former appeal panels which consisted of members nominated by the parties and a neutral chair.

We expect these reforms will relieve against the length, complexity and adversarial nature of appeal proceedings under the former legislation.

Human Rights

We have also undertaken a significant reform of the human rights process in British Columbia. We knew from the outset of our mandate that we faced significant challenges in protecting fundamental human rights through a system that had ceased to function effectively.

What was happening in other jurisdictions around the world and in Canada told us that the old way of doing things – a tripartite approach borrowed from labour law – was no longer meeting the essential needs of people and

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their communities. The only good news we received from human rights advocates was their consensus that the existing system could not be made to work.

We engaged two experienced practitioners in the field, Deborah Lovett, Q.C., and Angela Westmacott, to prepare a comprehensive *Human Rights Review* and to conduct thorough public consultation. This work confirmed what we had suspected about the existing system, including:

- delays in intake and investigation;
- unevenness and inconsistency between decisions; and
- an investigative process carried out by the Human Rights Commission that did not add value to, or assist in, the resolution of many complaints.

The message was clear. The investigative model had failed. In too many cases, complaints evolved into causes to be championed, when all the parties needed was a problem to be solved. We needed to reform the system to give people the tools required to effectively resolve or adjudicate human rights complaints.

In deciding how to reform the human rights system, we applied the same critical lens we used in examining other core functions across the public sector. We addressed overlap and duplication. We considered advanced

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techniques for early dispute resolution and we provided clear authority for the tribunal to make its own procedural rules.

To focus the discussion on solutions and reforms, I introduced legislation in May 2002 setting out an innovative “direct access” model – allowing complainants to proceed directly to the Human Rights Tribunal.

Under the new system, the tribunal will be responsible for receiving, mediating and adjudicating all human right complaints. With the tribunal as the only body responsible for this work, overlap will be eliminated and decisions will be made earlier and more quickly throughout the process. Mediation and the early resolution of disputes will be encouraged so that issues are finally settled and people can move on with their lives.

We received a great deal of positive and helpful input on the proposed model. With this input in hand, I tabled a revised bill and the Legislature has now passed the *Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62. Over the next several months, we will be laying the groundwork for proclamation of the legislation and for implementation of a new, streamlined human rights system.

At the same time, we will be working with independent organizations to ensure that people who need publicly funded legal advice can get it and to see that the critically important task of public education remains a priority.

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In each of these three reform initiatives: WCB, social assistance, and human rights, our institutional reform was guided by the basic principles of the Administrative Justice Project.

3. The White Paper Process

Against the backdrop of the Core Services Review and our reforms of a number of specific administrative tribunals, the Administrative Justice Project is also engaged in a wide-ranging review of administrative law and practice. This review culminated in August 2002 with the release of a White Paper “On Balance: Guiding Principles for Administrative Justice Reform in British Columbia”.

The White Paper reflects government’s commitment to improving the administrative justice system as a *system* rather than as a constellation of discrete and unrelated agencies. It includes more than 50 recommendations to government that constitute a framework for discussion and implementation over the next 18 to 24 months.

The White Paper was the culmination of much hard work not only for the Administrative Justice Project but also for the many tribunal members and lawyers in British Columbia who met and worked with the Project.

Over the fall and winter last year, the Project released a number of background papers for discussion and debate. Very broadly, these papers addressed three important areas.

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1. Administrative Justice Review

- **Standard of Review** – What role should the courts play in reviewing administrative decisions? Should we legislate in this area? (December 2001).
- **Administrative Agencies and the Charter** – Should administrative tribunals have the authority or jurisdiction to apply the Charter? Under what circumstances and which tribunals? (December 2001).
- **Statutory Powers and Procedures** – What types of legislated powers and procedures should tribunals have? What can government do through legislation to facilitate the work of administrative tribunals? (February 2002).
- **Reviewing Original Decisions** – How many levels or layers of review or appeal are necessary or appropriate to ensure that the principles of natural justice are observed? What are the principles that should inform government's decision making in this area? (March 2002).

2. Human Rights Review

- How do we restore the balance between advocacy and adjudication? How can we improve the timeliness of decisions? (December 2001)
This is the work I referenced a few minutes ago. It served as a foundation for our new human rights legislation.

3. Appointments

- How do we reform the appointments process so that appointments are merit-based and appropriate to the needs of the tribunal? Is there a role for the tribunal chair in this process? (May 2002).

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We received some very thoughtful submissions on the background papers which informed our subsequent work on the White Paper. The Project also released a further series of reports in support of the White Paper on issues such as standing, dispute resolution, independence and accountability, statutory powers, standards of review and appointments.

A copy of the White Paper is included in your materials. Our background papers and reports are available on our website at www.gov.bc.ca/ajp.

We have invited public comment and feedback on our work and are also now planning more broadly based public consultations over this fall and winter.

ADMINISTRATIVE JUSTICE REFORMS

The White Paper proposes a two-year plan that I believe will give British Columbia the most modern and balanced tribunal system in the country.

There are three significant components to this plan that will affect how the partners in the administrative justice system work together and what policies and legislation will be put in place to further the objectives of the system as a whole.

1. We have established a new administrative justice office within the Ministry of the Attorney General. This new office will help develop

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and implement modern systems and practices for tribunal management and accountability. The Administrative Justice Office will be a resource to government, to the bar and to members of the administrative justice community as we work together to establish a centre of excellence on administrative justice issues within the provincial public sector.

2. In the spring legislative session in 2003, our government plans to implement legislation that will guarantee an open and transparent process for tribunal appointments. The legislation will acknowledge the formal role of the tribunal chair in the appointment process and recognize the chair's responsibility for leadership and accountability for tribunal operations. It will also foster improvements in the overall relationship between government and tribunals through operating agreements that achieve the right balance between independence and accountability.
3. In the spring legislative session in 2004, there will be common, consistent and comprehensive legislation that sets out appropriate statutory powers and procedures for each administrative tribunal. This legislation will also address the related substantive issues of standing, alternative dispute resolution and standards of review.

In all of these initiatives, we are committed to accommodating the diversity and uniqueness of individual tribunals within a framework that promotes

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greater consistency, transparency and accessibility. Reforms need not and cannot be a straight jacket that limits innovation, flexibility and responsiveness.

We are not looking for blanket solutions but rather for solutions that are responsive to the needs of individual tribunals and consistent with an overall set of guiding principles and goals. The goal is coherence, not uniformity.

INDEPENDENCE AND ACCOUNTABILITY

I want to make some remarks about the values of “independence” and “accountability” and about my views on how these values can be given practical effect in the administrative justice system.

Perhaps no other issue has provoked more discussion or debate within the administrative justice community than the interrelationship between the concepts of “independence” and “accountability”. Clearly, one of our challenges is to determine how we achieve the right balance between what are often perceived as potentially competing values.

On the one hand, tribunals are established by government through legislation for the express purpose of isolating decisions in certain key policy areas from the influence of government ministers and public officials. This is accomplished by establishing an impartial administrative process at arm’s length from the day-to-day operations of the line ministries of government.

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On the other hand, it is government that decides whether it is in the public interest to establish an independent tribunal or some other process for conducting investigations and resolving disputes and complaints.

A tribunal's enabling legislation reflects the broad policy goals and objectives of government. A tribunal's jurisdiction does not extend beyond the four corners of its legislation and it is through the legislation itself that government creates and defines the framework within which a tribunal must operate.

Within our parliamentary system of responsible government, it is a minister of the Crown who is ultimately held to public account for a tribunal's performance. Whenever there is a question of public confidence, this question always engages government. The principle of accountability is inescapable. It applies across all areas of public endeavour and, in this respect, administrative tribunals are no exception.

The dichotomy between independence and accountability is not without tension. However, this tension can be a positive force when it is used to construct an appropriate and respectful relationship between government and tribunals. Our challenge within British Columbia's administrative justice system is to ensure that administrative tribunals have:

- the freedom they require to make decisions that are timely, impartial and fair; and

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- the obligation to act responsibly in the use and allocation of scarce public resources.

I believe that the essence of independence in administrative proceedings is found in the right of individual tribunal members to deliberate freely without the real or apparent prospect of interference by others in decisions in individual cases.

I also believe that the essence of public accountability is grounded in the openness and transparency of tribunal processes and in the mutual obligations and arrangements that develop between the responsible minister and the tribunal chair and between the tribunal chair and its members.

These principles are important and fundamental. They provide the focus for the White Paper's recommendations and implementation plan.

Fostering Independence

The Administrative Justice Project sets out a number of initiatives that will support greater independence in decision making in administrative tribunals. For example:

- We are trying to move from appointments “at pleasure” to appointments for fixed terms with express provisions for tenure, termination and reappointments so that everyone understands what the terms are and when the terms will expire. This will foster the

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independence of administrative tribunals by protecting tribunal members from arbitrary terminations.

- We are removing restrictions against successive appointments to the same tribunal so that tribunal members will be able to continue to develop their expertise over time. This will allow tribunal members with specific, specialized expertise to serve for terms that are not constrained by rules unrelated to performance. It will also strengthen arguments for greater deference from the courts on judicial review.
- We are removing the long-standing prohibition against simultaneous appointments to more than one tribunal so that the administrative justice community as a whole can benefit from the expertise of seasoned tribunal members. This will enhance the overall level of professionalism within the administrative justice system.
- We are creating a formal role for the tribunal chair in the appointment process so that appointments are made after open recruitment and after an assessment of merit in relation to the operational needs of the tribunal. This will foster greater public confidence in the independence and impartiality of administrative tribunals. It also raises squarely issues about public accountability.

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Enhancing Accountability

To this end, we are proposing a number of initiatives that will enhance the public accountability of the administrative justice system. For example:

- By clearly articulating the responsibilities of the chair for the management and operation of the tribunal, the chair will be held to account for the overall performance of the tribunal and its use of public resources. This concept of internal accountability is an essential goal of our government in the effective management of all public resources.
- By shifting from appointments “at pleasure” to appointments for fixed terms, we will be providing a formal and specific opportunity for the review of agreed upon performance issues with tribunal chairs and members. This will make appointments more defensible in public and enhance the accountability of tribunals in an open, transparent and expected way.
- By enacting more consistent statutory powers and procedures legislation, we will be addressing the specific requirements of the administrative justice community and tailoring legislation to meet those needs. In appropriate circumstances, this will provide for greater transparency in procedures across the administrative justice system.

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- By entering into management agreements with tribunal chairs, we will be clarifying our mutual expectations and obligations. This will increase the opportunities for collaborative decision making on the systemic policy issues and questions that put pressure on the administrative justice system as a whole.

These are just some examples of how our reform initiatives will provide greater support for independence in decision making and, at the same time, enhance the public accountability that goes along with it. I believe that our approach in British Columbia is both practical and workable.

CLOSING COMMENTS

Our society is complex and changing. I believe that government can *and indeed should* do more to ensure that administrative tribunals have modern mandates and the statutory tools and processes necessary to carry out those mandates effectively.

Building on the experiences of jurisdictions outside British Columbia and our own ongoing work, it is the goal of our government to have an administrative justice system that is modern, relevant and affordable – a system that is easy to access for all members of society and that treats all parties courteously, fairly and with respect.

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I am excited about the work we have been doing in British Columbia and am very pleased to have had this opportunity to speak today. I hope I have succeeded in convincing you that, through the work of the Administrative Justice Project, the government of British Columbia does indeed take the work of administrative tribunals seriously.

Thank you.

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