

**NEW DEVELOPMENTS IN TRIBUNAL REFORM:
LESSONS FROM BRITISH COLUMBIA**

A Presentation to “The Future of Administrative Justice” Symposium
Faculty of Law, University of Toronto
January 18, 2008

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Introduction

One of the most pleasant aspects of addressing the topic of lessons to be learned from tribunal reform in British Columbia is that there is actually a significant story to be told. This was not true during much of the time I spent teaching at the Faculty of Law of the University of British Columbia, and it is not true of tribunal reform in my current home province of New Brunswick. My goal in this brief paper is give an account of the circumstances that led to the creation of the Administrative Justice Project (“AJP”) in British Columbia between 2001 and 2004, and that enabled tribunal reform in British Columbia to take the shape it did, culminating in the enactment of the *Administrative Tribunals Act* (“ATA”).¹ Flowing from that account I would like to extract some more general observations that I hope will be of value to tribunal reformers in other jurisdictions.

¹ British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. A year prior to the enactment of the ATA, the British Columbia *Administrative Tribunals Appointment and Administration Act*, S.B.C. 2003, c. 47, made a number of important changes to the legal rules governing the appointment and terms and conditions of appointment of tribunal members, and the management authority of tribunal chairs. This *Act* was subsequently repealed by section 190 of the ATA.

It is also fortunate for me that a great deal of material about the work of the Administrative Justice Project is readily available to the public. In a keynote address delivered to a Canadian Bar Association Legal Education Conference in November 2002, the political architect of the AJP, British Columbia Attorney General Geoff Plant, Q.C., offered a concise statement of his vision for administrative justice reform, what the Project had accomplished in its first year of existence and what he expected the AJP to accomplish during the remainder of its lifetime.² After the AJP had completed its work, Project Director Wendi Mackay published her own assessment of the Project's work and the more general lessons this work offers for the review and design of administrative institutions.³ And most importantly, the British Columbia Administrative Justice Office ("AJO"), one of the most significant institutional elements of the AJP's legacy, has archived the key working documents created during the lifetime of the Project.⁴ These documents include the Project's terms of reference, guidelines for the Core Services Review of Administrative Agencies, work plans, advisory committee meeting minutes, and the Project's White Paper entitled "On Balance: Guiding Principles for Administrative Justice Reform in British Columbia" ("White Paper")⁵ along with

² G. Plant, Q.C., "The Administrative Justice Project in B.C. or Do Governments Take Tribunals Seriously?" (2002), 16 *C.J.A.L.P.* 1. In a keynote address to the British Columbia Council of Administrative Tribunals Annual Conference in October 2004, online at http://www.gov.bc.ca/ajo/down/bcaat_edited.pdf, Attorney General Plant offered another assessment of the Project's accomplishments after the enactment of *ATA*.

³ W. Mackay, "Administrative Institutions from Principles to Practice: Guidelines for Review and Design" (2006), 19 *C.J.A.L.P.* 63.

⁴ Online at <http://www.gov.bc.ca/ajo/popt/archives.htm#tor>

⁵ Online at http://www.gov.bc.ca/ajo/down/white_paper.pdf

background reports on a variety of topics,⁶ and a brief summary of submissions received in response to the White Paper. As a result of the availability of this information, I do not feel constrained to provide a detailed description of the work of the Project, and will offer a more general overview of the AJP, its successes and its limitations.

I must acknowledge at the outset that mine are not the comments of an entirely disinterested observer. Prior to the election of the Campbell government in 2001, I was one of a number of people interested in the tribunal scene in British Columbia who were approached by Wendi Mackay for our views on the direction that tribunal reform ought to take if the Liberals came to power. I was quite happy to offer my thoughts on the subject and eventually served as a member of the Advisory Committee that oversaw the development of the White Paper. That confession having been made, I would not want to leave the impression that I was one of the major architects of the Project or its design. A more accurate description of my observations today is that they are those of an academic commentator who has the benefit of a certain amount of inside knowledge.

A. The Creation and Conditions for Success of the AJP

In his address at the launch in 2007 of the Administrative Justice & Tribunals Council in the United Kingdom, Lord Justice Carnwath observed: “I have been particularly struck

⁶ Some of these reports are available online on the Administrative Justice Office’s Publications and Research page, http://www.gov.bc.ca/ajo/popt/publications_and_research.htm, and others are available in the AJO’s online archives.

by the degree of consensus as to both the need for reform and the objectives of reform.”⁷ I think that many Canadians who work in the administrative justice field would agree with these sentiments. This is not to say that there are not significant disagreements on matters of detail, but it seems to me that there is a substantial consensus on the broad outlines of the kind of administrative justice reform that is needed. The burning issue is not what direction tribunal reform should take, but how to create the circumstances that transform the ideas of reformers into action. It seems to me that three distinct factors contributed to the creation and success of the Administrative Justice Project in British Columbia, some of them fortuitous and some of them matters of design. They are (1) the political environment in British Columbia leading up to the election of the Campbell government in 2001; (2) the shape that administrative justice reform has come to take in Canada and to some extent internationally; and (3) the design and management of the Administrative Justice Project itself. Let me address each of these factors in turn.

1) The British Columbia Political Environment

Administrative justice reform does not typically make for very exciting politics. While decisions of certain tribunals occasionally attracted public attention, there were no particular scandals in the tribunal sector in British Columbia that cried out for reform in 2001. Certainly it would be difficult to find evidence of the media drawing attention to the need for tribunal reform at that time. So what was it that made the Campbell government think that devoting a significant amount of energy to a comprehensive

⁷ Sir Robert Carnwath, “Getting there at last!”, *Adjust Newsletter*, December 2007, online at http://www.ajtc.gov.uk/adjust/articles/speech_carnwath.htm.

review and overhaul of British Columbia's system of administrative tribunals would be a worthwhile thing to do?

Part of the answer to this question surely lies in the personalities involved. Wendi Mackay, I think rightly, attributed much of the AJP's success to Attorney General Geoff Plant. In her published assessment of the work of the AJP, she wrote: "It was through the Attorney General's vision and leadership that the project was able to proceed, that it received essential resources, direction and support throughout its work and that the new legislation was finally implemented and enacted."⁸ It is certainly the case that as ambitious a reform as the Administrative Justice Project could not have succeeded without a political champion, and Attorney General Plant played that role very ably. Without in any way diminishing the significance of his personal contribution, however, I think it is useful to make note of a number of factors that made it easier for him to play that leadership role than might have been the case had circumstances been different.

The first of these factors is that the Campbell Liberals narrowly lost the election of 1996, and had five years in opposition developing a better sense of what they would like to do if and when they came to power. Moreover, by the time Premier Ujjal Dossanjh called an election in 2001, it had become apparent even to casual political observers in British Columbia that it would take a miracle for the New Democrats to be re-elected. As a result, the Campbell Liberals had the luxury of spending less time worrying about how to get elected than they did on deciding what they were going to do once they formed the government. They had developed a sense that they wanted to do something ambitious

⁸ Mackay, *op. cit.* note 3, at p. 106.

when they came into government and, as we will see shortly, there were elements of tribunal reform that fit very comfortably into a larger agenda of reform of the institutions of government.

The second factor was that when the Liberals won in 2001 they won big, taking 73 of 75 available seats in the Legislative Assembly. This had two consequences for the Administrative Justice Project. The first was that the government was able to take the long view of initiatives that had little short term political payoff. In a different environment, the argument that there were no votes to be garnered for undertaking administrative justice reform might have carried a good deal more weight than it did in the early days of the first Campbell administration. The second consequence was that the government could afford to take some unpopular decisions at the beginning of its mandate since it did not need to worry about the security of its majority. In particular, the first task of the Administrative Justice Project, which involved a Core Services Review of all the tribunals under its purview, resulted in some decisions to abolish or consolidate tribunals that might have been more difficult to take for a government that was less secure in the strength of its mandate.

The final element was the role played by Gordon Campbell himself. From an internal governmental perspective, the real challenge for the Administrative Justice Project was that it required a number of different Ministries that hosted tribunals to make changes in the way they did business in order to satisfy the concerns of the Attorney General. The opportunities for this exercise to stall because of infighting at either the bureaucratic or

political level were obvious. In this situation, it was extremely comforting for those involved in the work of the AJP to know that the Attorney General had the confidence of the Premier. Partly this was the result of the personal friendship the two men enjoyed, but Plant's cause was also aided by Premier Campbell's personal interest in the machinery of government and its effective operation. This did not mean that the Attorney General would invariably prevail in disputes between himself and his Cabinet colleagues when AJP proposals interfered with the relationship between host Ministries and the tribunals for which they had responsibility, but it did mean that that the Project enjoyed a level of support from the Premier that was very useful in smoothing out the inevitable bumps in the road.

2) The Shape of Administrative Justice Reform

I have suggested that certain aspects of the political environment in British Columbia at the time of the election of the first Campbell administration provided a particularly favourable window of opportunity for the creation of the AJP. I also believe, however, that more general trends in thinking about tribunal reform helped not only to bring about the AJP but encouraged the designers of the Project to take a particular approach to tribunal reform. The key elements of this approach included (1) serious consideration of tribunal independence along with a related concern for the establishment of a merit-based appointment system; (2) a deep concern with the effective operation of tribunals and the quality of service they provided to users, along with a systematic approach to ensuring

that tribunals had the powers, procedural tools and support to provide good service; and (3) a commitment to viewing tribunals as part of an administrative justice system.

The focus on tribunal independence and appointments was hardly surprising. The literature on tribunal reform in Canada has had as its centerpiece a debate over questions of appointments, independence and accountability for more than 30 years.⁹ The program of this symposium illustrates that while the ground of debate may have shifted, these considerations retain their central place in the tribunal reform agenda. There were, however, a number of developments in the latter part of the 1990s and the early part of the current decade that helped to give these issues more prominence in government circles than they had enjoyed 10 or 15 years earlier.

First of all, the case for strengthened independence as a key element of tribunal reform was being made more effectively than it had been previously, at least in British Columbia. A major reason for this was the foundation of the British Columbia Council of Administrative Tribunals (“BCCAT”) in 1996. BCCAT not only provided an opportunity for people from different tribunals to engage in joint education activities, it helped to develop a sense that there was such a thing as a tribunal community in British Columbia. Moreover, BCCAT became the focal point for thinking about tribunal reform and an effective advocate for reform. Indeed, any small measure of credit I can take for the success of tribunal reform in British Columbia flows from the work I did as co-author of the BCCAT Research and Policy Committee’s Report on Independence,

⁹ See, for example, the publications cited in P. Bryden and R. Hatch, “British Columbia Council of Administrative Tribunals Research and Policy Committee – Report on Independence, Accountability and Appointment Processes in British Columbia Tribunals” (1999), 12 *C.J.A.L.P.* 235 at pp. 239-240, notes 7-9.

Accountability and Appointment Processes in British Columbia¹⁰ rather from the modest role I played in the work of the AJP itself. Of course, BCCAT was neither the first nor the only organization serving the needs of the tribunal community in Canada, and its success was in part a reflection of broader national and international trends in thinking about tribunal education, organization and reform.

Allied to this development was the fact that, at least in some situations, courts had begun to find that enhanced guarantees of tribunal independence were not merely desirable public policies but legal requirements.¹¹ It must be said that sometimes it seemed that this process involved taking two steps forward and one step back,¹² but by the beginning of the 21st century it had become increasingly difficult for governments to ignore the possibility that failure to adopt measures to enhance the independence of tribunals might result in litigation that had negative implications for the ongoing operation of the tribunal in question. Moreover, the prospect that the law might impose new and more stringent constraints on the design and operation of administrative tribunals made the Attorney General a natural leader of a cross-government initiative intended to ensure that tribunals complied with these requirements, whatever they might ultimately turn out to be.

¹⁰ *Ibid.*

¹¹ See, for example, *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; 2747-3174 *Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, 2003 SCC 36.

¹² For examples of the “steps back”, see *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (“*Ocean Port*”).

Significant as these developments have been, however, I do not believe they were sufficient in and of themselves to make the political case for tribunal reform in British Columbia. In my estimation, two other aspects of the way thinking about tribunal reform had evolved were equally important. The first was that independence was explicitly linked by BCCAT and others to accountability. Independence was certainly an important element of the reform agenda for the tribunal community, but independence could be seen not only as a requirement of justice but also as one of a number of characteristics that tribunals needed in order to carry out their statutory mandates effectively. Indeed, if tribunals were to be both independent and accountable, it was essential that they be given the proper tools to do their job. These tools included not only appointment systems and terms and conditions of appointment that made it possible to recruit and retain effective adjudicators, but also access to appropriate financing, facilities, staff and technical support; appropriate opportunities for training and development; effective management systems; and the types of powers and procedures that each tribunal required to carry out its particular mandate.

Ironically, I believe that the ability of the Attorney General's Ministry to play a leadership role in providing tribunals with the tools to do their job effectively was enhanced significantly by the work it had done in supporting the initiatives British Columbia courts had taken in such areas as effective case management, the use of technology and dispute resolution. More broadly, effective service to users of the justice system had become part and parcel of the reform agenda in both courts and tribunals. This focus on tribunal reform as a vehicle for enhancing the quality of government

service enabled the Administrative Justice Project to fit very comfortably within the Campbell administration's "good government" agenda, and it gave tribunal reform an appeal that extended, at least potentially, beyond the narrow confines of the tribunal and legal communities.

The Administrative Justice Project's Terms of Reference leave no doubt about the importance of the connection between tribunal reform and the quality of service British Columbians receive from their administrative tribunals. The Executive Summary states:

. . . At the very heart of this review are fundamental questions about the nature, quality and timeliness of the services that administrative agencies offer to people and their communities.

This document sets out terms of reference for a review of administrative justice. Its objectives are 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 by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.¹³

The second significant aspect of the evolution in thinking about tribunal reform was the growing belief that administrative tribunals are part of a system, and more specifically a system of justice. To some extent, of course, the creation of organizations like BCCAT and its counterparts in other jurisdictions represented recognition that tribunals have common concerns that cut across the boundaries of subject matter jurisdiction. The significant new development was the explicit acknowledgement that what brings

¹³ Online at http://www.gov.bc.ca/ajo/popt/archives/terms_of_reference.htm.

tribunals together and makes them distinct from other governmental decision-makers is the characteristics they share as part of the justice system.

The more traditional view of tribunals, one that finds expression in Chief Justice McLachlin's decision in the *Ocean Port* case, is that tribunals are simply arms of the executive that are "created precisely for the purpose of implementing government policy."¹⁴ For purposes of government organization, this approach suggests that a tribunal is fundamentally no different than any other mechanism through which a government Ministry carries out its policy functions, and that the host Ministry should have responsibility not merely for policy initiatives affecting the tribunal's enabling legislation (and therefore its statutory mandate) but also for the tribunal's structure, financing and administration. Of course, the Ministry could choose to put forward legislation that granted the tribunal substantial independence, or it could as a matter of day to day administration adopt an arms length relationship with the tribunal, but with the exception of direct interference with cases that were under adjudication by the tribunal, the degree of freedom the tribunal had from ultimate control by the Ministry was a policy choice to be made by legislature and the Ministry. To be sure, if the Ministry wanted to have the legal right to exercise a considerable degree of control over tribunal personnel, for example by making appointments "at pleasure", it might have to obtain the consent of the legislature by embedding that power in statute.¹⁵ Nevertheless, at a practical level the responsible Ministry was in a position to exercise significant influence over the

¹⁴ *Ocean Port*, *supra* note 12 at para. 24.

¹⁵ See *Ocean Port*, *supra* note 12, at paras. 21-22.

legislature's choices through the advantages it enjoyed in putting forward legislative proposals.

An alternative perspective is that once a choice has been made to use a tribunal to carry out a statutory mandate, that decision carries with it certain implications about the relationship between the host Ministry and the tribunal. The precise boundaries of that relationship might be subject to dispute, but in principle the outer boundaries of Ministry control are set by the characteristics of the tribunal as a justice institution and not by Ministry policy. To adopt this view is not necessarily to accept the proposition that there is a constitutional guarantee of tribunal independence, though of course this is one possibility.¹⁶ A more modest assertion would be that even if the legislature has the legal right to set up tribunals that are vulnerable to different forms of government interference, it is unwise for it to exercise that right. Moreover, a reasonable implication that could be taken from this state of affairs is that the role within government of drawing the precise boundaries between those forms of control are necessary and acceptable and those that are not falls properly within the purview of the Attorney General's Ministry. On this way of thinking, policy responsibility for the substantive mandate given to the tribunal would likely remain in the hands of the host Ministry, and it would typically retain a significant degree of formal responsibility for the tribunal's personnel, budgeting and other forms of administrative control. That control should, however, be exercised in a manner that is consistent with justice principles, and the Attorney General's Ministry or some other

¹⁶ See *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, 2006 BCSC 1372, currently under appeal.

justice organization would have at least an advisory role in ensuring that the host Ministries understood and adhered to those principles.

Obviously there is room for difference of opinion on which approach offers a better model for our thinking about administrative tribunals, and it would be rash to suggest that the justice system approach won the day in British Columbia in all respects and for all time. What is evident, however, is that the Administrative Justice Project was based on this way of thinking about tribunals and that this approach reinforced the leadership role that a project supervised by the Attorney General took in reviewing tribunals that crossed a wide variety of subject matters and Ministerial boundaries. Moreover, the system focus helps to explain the Project's preoccupation, especially in its early stages, with trying to develop principles to determine whether the use of a tribunal or some other decision-making structure was appropriate, and putting those principles into action by proposing a significant overhaul of the existing institutions. In addition, it helps to explain why the Project sought to establish a principled and consistent basis for making choices about the review of tribunal decisions, whether by way of reconsideration, internal administrative appeal, or appeal or review in the courts. In both instances there was a sense that if the justice system approach to tribunals was to be taken seriously, the Project could not simply look at tribunals as a disparate group of organizations that had evolved in different ways over a long period of time. It was necessary to try to construct the logic of the system, and makes decisions about its operation conform to that logic.

3) The Design of the Administrative Justice Project Itself

If the AJP was the beneficiary of favourable political circumstances and an evolving consensus around the proper approach to tribunal reform that managed simultaneously to embrace the justice-oriented concerns of lawyers and move beyond them to capture concerns about efficiency and quality of the service tribunals provided to the public, it was still the case that there were ample opportunities for the initiative to fail. And I think the people who bore ultimately responsibility for the design of the Project – Geoff Plant as its political sponsor and Wendi Mackay as its Director – deserve a great deal of credit for the decisions they took that made the AJP a success. This is not to suggest that everything the AJP touched turned to gold. For example, the Project’s review of workplace tribunals was not, in my estimation at least, quite as successful as other elements of the Project in achieving its objectives.¹⁷ Nevertheless, I think it is fair to say that for the most part the Project accomplished what its sponsors expected of it.

In my view, the design and administration of the Project had several features that contributed significantly to its ability to achieve its most important objectives. The first, and perhaps most important, decision was the choice of Wendi Mackay as Project Director. Initially some people – and I must admit to my chagrin that I was one of them – wondered about this decision because Ms. Mackay was not a significant actor in the tribunal community in British Columbia at the time, or even particularly well-known within the community. With the benefit of hindsight, however, I believe that her

¹⁷ For an expression of these objectives, see “Workplace Tribunals Review, Workplan for Background Paper”, online at http://www.gov.bc.ca/ajo/popt/archives/wp_tribunals.htm.

selection for this role was an inspired choice. This is not simply the result of the dedication and skill she showed in carrying out her responsibilities as Project Director, but because the skills and attributes she brought to the role were more important than initial familiarity with the tribunal scene. The key challenge for the Project Director was not mastery of the workings of tribunals or even developing a deep understanding of current thinking about tribunal reform. There were many people who were well-positioned to offer that type of expertise. The difficult part of the task was convincing Ministers and senior officials in Ministries whose tribunals were affected that the relationships they had traditionally enjoyed with the tribunals they hosted were no longer entirely appropriate and might need to be modified. The understanding Ms. Mackay had of the internal operation of the British Columbia bureaucracy and her ability to gain the confidence of senior officials and politicians were much more important to the Project's eventual success than an initial mastery of current thinking about tribunal reform.

The second important feature of the Project was its creation as an organization that was separate from the ordinary operations of government. This gave the Project the freedom to function as a policy-making body without operational responsibility, and helped to manage the inherent conflict of interest that arises when a Ministry that acts as a host Ministry to a tribunal sets policy that establishes the rules governing the working relationship between tribunals and their host Ministries.¹⁸ The Project was staffed by

¹⁸ During the relevant period the Ministry of the Attorney General was the host Ministry for a number of important tribunals, including the Children's Commission, the Human Rights Commission and Human Rights Tribunal and the Review Board established under the *Criminal Code*. See White Paper, *supra* note 5, at pp. 52-54. Even though the Ministry of the Attorney General had overall responsibility for the AJP, it was important for this reason that the Project operated at some remove from the persons who had operational responsibility for these tribunals within the Ministry.

people working on short-term secondment or on contract, and this structure gave it considerable flexibility to take advantage of the services of a number of talented and experienced individuals.

Third, the Project was wisely focused on the workings of specific administrative tribunals. While the list was fairly comprehensive it was not exhaustive, and the reasons for the exclusion of some adjudicative bodies from the review had as much to do with practicality as with principle. For example, in British Columbia certain officers of the Legislature, notably the Information and Privacy Commissioner, carry out important adjudicative functions. Some aspects of the operation of the Commissioner's Office would have fit well within the Project's deliberations, for instance questions of powers, procedure and the use of mediation and other dispute resolution techniques. On the whole, however, the differences between the relationship the Commissioner has to the Legislative Assembly and the more "mainstream" tribunals have to their host Ministries were sufficiently great that inclusion of the Commissioner's office within the Project's mandate would have distracted from its focus. For similar reasons, the adjudicative activities of professional governing bodies and municipalities were not given consideration by the Project. Nor was the work of decision-makers within Ministries that exercise adjudicative authority under statute but are not organized as tribunals. It is not that the work of these bodies is an unimportant part of the administrative law landscape, but the designers of the Project believed (in my estimation correctly) that any effort to embrace the full range of adjudicative activities of government would undermine the AJP's ability to make progress on the concerns of its core constituency, which was the

organizations whose structure corresponded to our classic image of the quasi-judicial tribunal.

Finally, it seems to me that the Project's designers wisely followed the traditional political wisdom that government should make its toughest decisions in its first year in office and then recover its popularity by delivering the "good news" part of its agenda. The Core Services Review was unnerving for the entire tribunal community, and for many tribunals it meant abolition or consolidation into other tribunals that was not welcomed by those directly affected. At the end of the day, however, I believe that the AJP developed a considerable measure of respect for its efforts to find and employ a principled and consistent approach to deciding whether the establishment or maintenance of a tribunal was justified. Examples of these principles can be found in the White Paper, for instance:

- Government can foster greater certainty and finality in administrative decision making by eliminating unnecessary review and appeal processes, thereby reducing the number of times the parties can request a review or file an appeal and reducing the length of time required to reach a final determination in individual cases.
- Government can be guided in its decision making about whether to establish or restructure administrative tribunals by considering existing or anticipated workloads and determining whether workloads are in fact large enough to allow tribunals to develop a sufficient body of specialized knowledge and expertise.
- Government can structure the mandates of administrative tribunals so that their primary purposes are to apply specialized professional or technical expertise rather than legal principles which are more properly within the jurisdiction of the courts.¹⁹

¹⁹ White Paper, *supra* note 5, at p. 8.

In and of themselves the principles are not particularly remarkable, but their rigorous application produced a significant change to the tribunal landscape in British Columbia. These principles were particularly devastating to low-volume, highly specialized tribunals composed exclusively of part-time members, of which there were many at the commencement of the review, but they also contributed to the sense that a modern and effective tribunal system had to be dominated by full-time adjudicators who brought to their work professional skills that needed to be recognized and rewarded. It seems to me that the transition from a system dominated by part-time adjudicators to one dominated by full-time adjudicators is one that British Columbia needed to make, and that the failure of smaller jurisdictions like New Brunswick to take that step is a major impediment to making progress on other aspects of tribunal reform.

In addition, the principles had implications for the approach the Project was to take to other issues down the road, for example jurisdiction to address constitutional challenges to the tribunal's enabling legislation. Since the basic Project philosophy was that cases based on general legal principles should normally be adjudicated in courts and tribunal adjudication should focus primarily on the use of specialized professional or technical expertise, it is not surprising that the White Paper recommended that tribunals rarely be given the jurisdiction to entertain constitutional challenges to their enabling legislation.²⁰ This thinking largely runs counter to the approach taken by the Supreme Court of Canada to this issue in situations in which the legislation conferring jurisdiction on the tribunal in

²⁰ White Paper, *supra* note 5, at pp. 22-23. The ATA provisions governing this question, sections 44 and 45, are even more restrictive of the exercise of jurisdiction by tribunals over constitutional questions.

silent on this question,²¹ and it is certainly arguable that allowing parties to administrative proceeding to bring constitutional challenges to the tribunal's enabling statute before the tribunal itself enhances access to the rights guaranteed by the constitution. The value of the illustration is not to defend the merits of the position taken by the Project in this instance, but to suggest that there was a systematic logic that ran through the recommendations made in the White Paper and that the British Columbia legislature in significant measure followed that logic in enacting the *Administrative Tribunals Act*.

B. Lessons for Other Jurisdictions

Someone from another jurisdiction looking at my description of the political circumstances leading to the creation of the Administrative Justice Project in British Columbia might reasonably despair at the prospect of those conditions being replicated elsewhere. It must be said that the confluence of those circumstances – an influential Attorney General who wanted to sponsor the initiative; a government at the beginning of an overwhelming mandate that could afford to pursue an initiative that had no short-term political payoff; and a supportive Premier who could connect tribunal reform to a broader “good government” agenda to which he was personally committed – created “perfect storm” conditions for a systematic approach to tribunal reform that are not likely to be easily replicated. Nevertheless, I do not believe that the lesson to draw from the AJP is that the kind of systematic review that took place in British Columbia is the only way to

²¹ See *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54.

engage in meaningful tribunal reform. And in my view there are some lessons from the British Columbia experience that can be applied to more modest reform efforts that focus on a particular issue or tribunal.

The first lesson I would draw is that a case for reform that is based on the synergy between justice considerations and improvements to the efficient operation of tribunals is more effective than a case for reform that is based on abstract principles of justice alone. This is particularly important if you believe, as I do, that effective tribunal reform requires the cooperation of the legislative and executive branches of government. I should not be taken as suggesting that litigation, whether based on the constitution or otherwise, never has a place in advancing the tribunal reform agenda. It is my view, however, that litigation can only take one so far and that creating an appropriate balance between tribunal independence and accountability requires the development of structures and policies that it is extraordinarily difficult if not impossible for courts to impose.

My second lesson is that thinking about tribunals as part of an administrative justice system is an enormous advantage in moving forward with the types of reforms that were initiated in British Columbia. There will always be situations in which it will be expedient for government officials to address tribunal decisions they do not like by attacking the tribunal member who made the decision. And no doubt there will be situations in which the criticisms leveled by the government have some merit. As long as tribunals are seen simply as vehicles by which government policy is pursued, the temptation to have recourse to tactics that would not be acceptable if used against judges

is ever present. Reinforcing the idea that independence is a justice system imperative regardless of whether the independent adjudicator is a judge or a member of an administrative tribunal seems to me to be the most effective means of protecting that essential value.

The third observation I would make is that the case for independent adjudication is strengthened rather than weakened by linking independence and accountability. This is a bit different than arguing that guarantees of independence are actually essential in order to enable tribunals to play their role effectively. It is an explicit recognition that tribunal independence is not about avoiding accountability, but about defining the types of accountability mechanisms that are and are not appropriate in different settings.

My fourth lesson is that while reform is easier to initiate if the focus is kept at the level of broad principle, there may come a time when this proves to be insufficient. For example, I think the requirement found in section 3(1) of the *ATA* that tribunal members may only be appointed “after a merit based process and consultation with the chair” represented a significant step forward in improving the way appointments were made in British Columbia. Of course, a great deal more could have been said about what steps had to be taken to satisfy the requirement that the process was “merit-based” and that the “consultation” was meaningful. In fact, the White Paper²² and the background papers²³

²² *Supra*, note 5, at pp. 12-16.

²³ See “Appointments: A Policy Framework of Administrative Tribunals” (May 2002), online at http://www.gov.bc.ca/ajo/down/appt_policy_paper_final_may_16.pdf; and “Making Sound Appointments: Report and Recommendations” (July 2002), online at http://www.gov.bc.ca/ajo/down/appointments_final_july_2_2002.pdf.

had a great deal to say about the types of structures that needed to be put in place to make the appointments system work effectively. I think it was a good decision not to imbed more of that material into legislation in the first instance, but it may be that over time it will be seen that greater elaboration in statute is needed in order to prevent abuse. It is always difficult to tell where the line ought to be drawn when it comes to setting out detailed structures in legislation, and on the whole I am sympathetic with the overall bias of the *ATA* in favour of broad principles rather than detailed prescriptions. Nevertheless, I tend to agree with the criticism that the complete absence of detail on the process for reappointment in section 3(2) of the *ATA* is disappointing.²⁴

This observation flows nicely into a fifth lesson, which is that administrative justice reform is not a one-time phenomenon that is capable of a permanent solution, but an ongoing process that needs some time to grow and develop. One of the most important results of the AJP was the creation of the British Columbia Administrative Justice Office. This office is housed in the Ministry of the Attorney General and is currently headed by Executive Director Diane Flood. The AJO is a source of ongoing initiatives, monitoring and guidance on best practices in tribunals, and is also a wonderful source of information about administrative justice reform initiatives around the world.

The sixth and final lesson that I will offer today is that is that tribunal reform through the political system is possible but it is not for the faint of heart. Its success requires a combination of hard work on the part of many people and organizations in preparing the

²⁴ Section 3(2) of the *ATA* simply reads: “A member may be reappointed by the appointing authority for additional terms of up to 5 years.”

case for reform, and a measure of good luck in getting the right people in place to pursue a reform initiative at the right time. Most fundamentally it requires a champion within the political process itself. This does not have to be the Attorney General, though I think it helps if it is, and it does not have to be someone who is in a position to initiate the kind of system-wide review that Geoff Plant had charge of in British Columbia. It does, however, have to be someone who has an interest in the tribunal sector (or part of it) and who is willing to take on a task that may not have a lot of glamour attached to it but can make a difference to how effective the administrative justice system is in addressing the problems that are brought before it. These politicians do not appear every day, but neither are they so vanishingly rare that it is folly to prepare for the possibility that one might appear.

Conclusion

The Administrative Justice Project was an important milestone in the evolution of administrative tribunals in British Columbia and it was a pleasure for me to have had the opportunity to participate in a small way in its work. I hope that I have convinced you that the work the Project undertook was worthwhile, and that my observations have provided you with some food for thought about the ways in which the initiatives undertaken in British Columbia might be of some assistance to you in your own endeavours to further the cause of tribunal reform.