

Submission to Minister Murray Coell
Ministry of Human Resources
for the consideration of
the Administrative Justice Review

Prepared by the Front Line Advocacy Workers (FLAW)
Sub-Committee on the Administrative Justice Review

November 13th 2001

Introduction

Front line advocacy workers (FLAW) assist thousands of people each year with the BC Benefits system. FLAW is comprised of several community groups that work on behalf of people seeking to access all facets of BC Benefits. Its members include professionals, paraprofessionals, and lay advocates.

Because of its years of experience and diverse composition, FLAW is uniquely qualified to provide an assessment of the BC Benefits appeal/tribunal system and to offer recommendations for the future.

FLAW has major concerns about changing a system that has been generally accessible to participants. However, there are some weaknesses that we hope will be addressed by the Administrative Justice Review.

When considering changes to the appeal/tribunal process it is crucial to first evaluate the current system provided by BC benefits. A valuable approach is to review the experiences of benefits applicants, such as those in the following two examples. To maintain client confidentiality all names have been changed.

Case Examples

Jane

Jane lives in a small town. She has been diagnosed with a severe disabling condition and can no longer work. She qualified for basic benefits, but her application for Disability Benefits was denied. Jane was not going to appeal this denial as she had very little understanding of the appeal system; however, at the last minute, after speaking with a friend who had been in a similar situation, she filed a reconsideration request.

It was not easy to obtain information to support her case because she had no money to pay for a doctor's letter. In fact, the reconsideration had been completed before she could acquire any supporting letters. Jane almost gave up at this point but with her friend's encouragement she chose to continue and requested a tribunal. A community agency gave her the name of someone who had tribunal experience and who was available to act as her nominee.

A few days before the tribunal hearing was to be held, her doctor finally agreed to write a letter after he read material Jane had been given by the community agency that explained the definition of disability used by the Ministry. This was good news, but Jane was still quite intimidated by the thought of having to appear before a tribunal. She was able to relax a little when she learned it was to be held at the local community centre and the tribunal members were from her own community.

At the hearing, Jane presented her doctor's letter and explained her circumstances. Although she had no one acting as her advocate, the tribunal listened to what she had to say and asked her questions. It was evident that the tribunal members had knowledge of the governing legislation and an understanding of what it was like to have to live on a low income with a disability. At the end of the day, Jane was satisfied that she had received a fair hearing.

Laura

Laura is a 39-year-old woman with depression and anxiety. She has been an income assistance recipient for most of her adult life. Her mental health deteriorated to the point where she was suicidal and had to apply for DB II.

In her application, Laura's primary therapist thoroughly detailed her condition. In spite of her debilitating conditions, Laura was denied DB II. The Ministry denied Laura's benefits on the grounds that she did not need extensive assistance or supervision, and that her disability-related costs were not sufficiently unusual and could be met through existing programs. The Ministry frequently gives these reasons in a standard letter when it denies benefits. However, as for many applicants, there were no programs available to cover Laura's expenses.

Laura sent her advocate a heart rendering letter saying that, even though she needed the extra support of DB II, she knew she could not handle the trauma of the appeal process.

These examples are not uncommon among Income Assistance participants. They highlight that even though the current system is relatively informal it is extremely intimidating to many participants.

As advocates, we have collectively assisted thousands of people. We have seen many Ministry decisions that demonstrate poor comprehension of participants' special needs. One way to help alleviate the type of intimidation demonstrated in the example above is to ensure that participants fully understand the decision against them. Unfortunately, this principle is frequently not applied until the tribunal level because BC Benefits legislation stipulates that the tribunal must provide reasons for decisions in writing.

If clients were afforded more opportunity to understand and address Ministry concerns, many tribunals would be unnecessary. One way to improve this area is to train Financial Assistance Workers (FAW) to better understand clients' diverse needs.

Initial Request

While many FAWs deal sensitively and productively with sometimes difficult clients, FLAW advocates have been contacted by clients who have experienced the opposite. Clients who are not provided with an adequate opportunity to explain their case to an FAW cannot be said to have had a fair hearing by the Ministry. A client who is told that their request is rejected without a written explanation specific to their situation has not experienced fundamental fairness in dealing with the Ministry. Further, participants must be provided with clear direction on their options.

Reconsideration Level: Regional Disparity

There is inconsistency between regions regarding the overturning of Ministry decisions at the reconsideration or internal appeal level. Frequently, information that will overturn a decision in one region will not necessarily be grounds for overturning a similar case in another region.

Tribunal

The external review process or Tribunal is a community-based system. This is crucial to maintaining the integrity of the appeal system generally. Prior to tribunal, all decisions are based on Ministry policy, which is one interpretation of the legislation. The arms-length independent panel provides the opportunity to reexamine the situation and possibly apply a different interpretation of the legislation.

The inclusion of a client nominee helps reduce the possibility that clients perceive the process to be biased. To balance the system, the Ministry also chooses a nominee; the two nominees select a chair. The appeal system must maintain its relatively informal and tripartite structure to remain accessible to clients.

BC Benefits Appeal Board (BCBAB)

The BCBAB provides a mechanism that helps ensure consistent assessments of tribunal decisions. While the Board's decisions are not precedent setting, they are a valuable tool for presenters seeking to clarify the intent of the legislation to tribunal panels. The Board has addressed situations in which tribunals have made a clear error or breach of natural justice. On the whole, the BCBAB's decisions have been fair and have reflected a knowledgeable approach to the issues under consideration.

Unfortunately, the creation of the BCBAB has resulted in the appeal system as a whole becoming more legalistic. The Ministry's submissions, increasingly written by co-op law students, have grown more complex. An overly legalistic approach is undesirable because of the nature of BC Benefits legislation. Often described by the Ministry as a program of last resort, BC Benefits must be able to address individual basic needs, poverty, and health issues.

Principles

To be open and accountable, the BC Benefits appeal/tribunal system must operate on the following principles:

Accountability

Tribunal panel members must be knowledgeable about income assistance regulations and the intent behind the legislation. It is also essential that they are knowledgeable of the social safety net- including community and government resources- and that they have a clear understanding of the principles of natural justice.

Fairness

Principles of administrative fairness and natural justice must apply to tribunal decisions; justice must be done and be seen to have been done. Panel members must remain at arms length from the Ministry and the client. As previously noted, it is important that clients and the Ministry have the right to elect impartial panel members to reduce the perception of bias.

Timely

Income assistance programs are described by the government as being the payee of last resort. As such, when income assistance recipients are appealing a discontinued or denied benefit, decisions of appeal must be immediately forthcoming. These benefit appeals are often for lifesaving healthcare goods or services, or for such basics as food and shelter. Often a request is not made to the Ministry until a situation is critical and a participant has exhausted time, energy, and resources searching for alternatives as mandated by the Ministry.

Informal

The unique situation of income assistance recipients must be acknowledged; they are generally poorly educated, have very few resources, and may have physical and/or emotional difficulties. It is unrealistic to establish a one-size-fits all system for all administrative appeal/tribunal procedures.

A system that decides cases brought to it by, for example, the business community will work to raise the requirements and expectation of its arbitrators. FLAW's concern is that by amalgamating income assistance with other tribunal processes, the system will become more intimidating, legalistic, and less accessible.

A change to an amalgamated system may mean that oral submissions will no longer be accepted. As well, it could mean a shift away from the trial de novo system. It is, then, essential that BC Benefits remain a stand-alone system.

Accessibility

Individuals who rely on income assistance are frequently unable to wade through technical and cumbersome mechanisms of appeal. Obviously law must govern income assistance programs. Any effective and accountable system of appeal will require some paperwork, and have a number of hoops that individuals must go through.

Accessibility is crucial if the system is to work for the good of British Columbians. As such, the government must ensure that there are adequately funded community advocates, and implement the proposals listed below.

Free of Bias

The Canadian Taxpayers Federation has alleged that there is bias in tribunal decision-making toward participants. Conversely, there is concern in some communities that tribunals are biased against the participants. FLAW does not want to wade into this debate, but believes the recommendations below will alleviate concerns from both perspectives.

FLAW Recommendations

Currently, the Ministry controls when tribunal training is held and advertised, what is taught, who passes the training, and who is accepted onto its roster of chairs. FLAW submits that tribunal training should be conducted by an independent body- such as the BC Association of Tribunals or the Justice Institute- in consultation with the Ministry and advocacy groups that work on BC Benefits. The training should have a regular schedule, and be advertised in newspapers and community publications.

The government should make every effort to ensure that the principles of diversity and equity are applied to the recruitment and training of tribunal members. FLAW submits that chairpersons should not be on a rotating roster, at least until the standard of training for chairs has been considerably improved. At present, there is relatively limited training for chairpersons. There is no ongoing training or evaluation of chairs, and no process by which participants can have their concerns about the conduct of panel members heard.

Once adequate training and accountability mechanisms are instituted, FLAW proposes that the Ministry maintain a tripartite, trial de novo system that accepts oral submissions. FLAW also suggests that a complaint system be established. As noted, there is currently no avenue of complaint for individuals who feel they have been unfairly treated by the tribunal system. Anyone who believes they have been treated unfairly by a ministry or a tribunal member should be able to lodge a complaint. Complaints should be responded to by the same body that trains and recruits tribunal members.

Conclusion

To review, FLAW believes that to provide an accessible, open, and fair service to British Columbians, the appeal/tribunal system must be characterized by the following:

- ❖ A tribunal system designed specifically for the Ministry of Human Resources
- ❖ A tribunal system that is at arms-length from the Ministry
- ❖ A requirement that clear reasons in writing for Ministry denials be provided to participants
- ❖ A requirement that the process and right to appeal be fully explained to participants
- ❖ A high quality recruitment, training, and monitoring system for panel members
- ❖ A tripartite tribunal system with members selected by the Ministry and participants
- ❖ Oral hearings.

FLAW thanks the Minister for his consideration of this document and its recommendations. We hope that it will assist the Minister in the Administrative Justice Review.
