Administrative Justice Project

FAIR FOR ALL

Submission by Poverty Law Reform Committee

November 2001

FAIR FOR ALL

A Principled Approach to Administrative Justice
For Low Income People in British Columbia

WHO WE ARE

This submission is the result of a collective effort made by seven advocates (lawyers and paralegals) representing six offices funded either directly or indirectly by the Legal Services Society. In order to qualify for our services, clients must be low income. They are vulnerable for this reason and most are also vulnerable because of cognitive or physical disabilities. Legal Services advocates assisted over 3500 clients with administrative law problems in fiscal 2000/2001 and summary advice was provided to 4430 more in that year alone. (Legal Services Society Annual Report 2000 – 2001 pp. 52 – 53) No other group in British Columbia has as much knowledge and experience with the tribunals listed in this paper as the lawyers and paralegals working in the Legal Services system. We submit that we are acknowledged experts in this field.

WHY ARE WE MAKING THIS SUBMISSION?

Impartiality and fairness were identified as the cornerstones of the administrative justice sector in *Everyday Justice*, the April 1998 report of Ontario's Agency Reform Commission. Administrative justice processes in British Columbia are similarly defined by "twin pillars": impartiality and the right to be heard. This foundational structure is in turn supported by principles of natural justice, all of which must be considered within the context of the core review principles and specific objectives, which guide the Administrative Justice Project.

We have chosen "fair for all" as our guiding principle and worked within tight timelines to make this submission because we believe that the answers to many of the questions being asked in the course of the Administrative Justice Project may be different for the people we assist. Our clients will perhaps be the best indicators of the success or failure of this project: A system that does not take into consideration the needs of the most vulnerable people in the province will not support the twin pillars described above, regardless of its articulated goals.

HOW THIS SUBMISSION IS STRUCTURED

The Terms of Reference of the Administrative Justice Project (July 27, 2001) state that the work that is carried out as part of it will be undertaken within the framework of the government's core review principles. In this submission, we look at the specific objectives of the Administrative Justice Project within these six guiding principles with a view to the impact on marginalized people in British Columbia.

PUBLIC ACCOUNTABILITY AND TRANSPARENCY
PUBLIC SERVICE EXCELLENCE AND PROFESSIONALISM

In considering changes that would improve the accountability and professionalism of the bulk of administrative tribunals in the province, we essentially support the eight principles listed by the Society of Ontario Adjudicators and Regulators (SOAR). Principals of Administrative Justice: A Proposal (at *www.soar.on.ca*) for the appointment and re-appointment of tribunal members. Our comments with respect to each of these are in Italics. Our comments on the continued need for some lay, community-based administrative tribunals are listed under the second heading in this section.

1. The appointment process should be open and fair, including wide public notice of appointment, a job description, the criteria used for selecting a member and the selection process. A committee to select these members should include representatives from the public service, the premier's office and the client communities.

2. The tribunal Chair should participate in the selection process because the Chair is responsible for the operation of the tribunal, both for efficiency and effectiveness.

   In order for a Chair to carry out their responsibilities, we submit they be required to have some formal legal training. Not only will this improve the efficiency and effectiveness of the appeal process, but also it will reduce the number of appeals resulting from a lack of knowledge of the law, in particular, the principles of natural justice. This requirement is especially important if there are lay members on the tribunal, as in BC Benefits Tribunals and Mental Health Review panels.

3. Persons chosen for the appointment must be competent to carry out the work of the tribunal.

   In order to be competent to carry out the work of the tribunal, we submit that persons chosen for the appointment reflect the diversity of our population with regard to gender, ethnic origin, culture, background and source of income.

4. Party membership or loyalty should be irrelevant in the consideration of whether a person should be appointed or re-appointed, as long as the person is otherwise qualified.

5. To ensure specialized competence, tribunal members should be entitled to adequate training, both initially and continuing education.

   In this regard, we submit that the training members receive include more than procedural and substantive information relevant to the legislation empowering the tribunal. On both an initial and ongoing basis, appointees should receive training on issues intrinsic to the client or client group that may effect the outcome of the process if not properly understood. Examples include the effects of extreme poverty, Fetal Alcohol Syndrome, mental and physical disabilities and different

cultural practices and attitudes – all of which have the potential for negative stereotyping.

We submit that it is very important for training to be at arms length from the interested Ministries. We suggest that what we have called the "Administrative Justice Service" be responsible for organizing, advertising and conducting training for tribunal members and chairs. (The Administrative Justice Service would be independent of any particular ministry and would be responsible for the central management of a collectivity of agencies. Our vision of how the Service would operate is discussed in greater detail later in this submission).

6. Appointments should be for a fixed term and re-appointments should be based on merit based on a performance evaluation measured against set performance criteria.

7. The duration of appointments, and the basis for compensation, should be specified in legislation.

8. A contract at the beginning of the appointment should outline details of a members' obligations and responsibilities, including a job description, conflict guidelines, code of conduct, discipline and complaint procedure, other benefits and the termination and re-appointment process.

   There should be provision for review of the quality of work by adjudicators as part of performance evaluation. This should include a review of such things as the quality of decision writing and conduct of hearings. The results of performance reviews should be the determinant for reappointments.

Lay, community-based tribunals

While the SOAR Principals provide good guidelines for many administrative tribunals, our Committee believes that it is very important to recognize the important role of lay, community-based tribunals when dealing with issues such as BC Benefits or the Mental Health Review Panel. In these tribunals, both parties involved appoint a representative, and consult together to choose a chair. The ability of the client to appoint a representative to the tribunal is important in making the client feel they have some power in the processs. The format, to some extent, rebalances the power between an individual applicant and the government agency making a decision about their rights.

There are several reasons why the issues raised in cases dealing with BC Benefits or Mental Health Reviews are best resolved in a community-based lay tribunal system. These tribunals make decisions about very basic needs such as a person's ability to obtain food or shelter. In the case of the Mental Health Review Panels, the issues involved are as fundamental as a person's liberty. The current system of constituting lay tribunals is effective because it is fast and informal and allows a quick resolution of these issues for people suffering significant hardships while waiting for a decision.

(a) It is our experience that clients dealing with BC Benefits and Mental Health issues are often very unsure of themselves. Some have difficulty in presenting their case in a formalized forum.

(b) Lay tribunals create an environment which facilitates, for our clients, the disclosure of personal information relevant to the tribunal reaching a fair decision. They further provide the opportunity to be judged by our peers, which may increase user satisfaction with the review process regardless of outcome.

We believe it is also important for the community to be involved in these tribunals because they bring unique experiences and because they should be aware of what is happening to the most vulnerable members of our society when they are dealing with issues that affect their liberty or when they are applying for benefits of last resort. Involving community members in these tribunals increases their awareness of important social issues.

The principle set out above (point 5) that all tribunal members should be adequately trained and that training should be administered by a group separate from government clearly applies to the training of members of community-based tribunals.

It is especially important to maintaining an effective community-based tribunal system that the recruitment of tribunal members and the opportunity to participate in training sessions be publicized widely in the general community as well as among groups that advocate on behalf of clients using the administrative justice system. Currently, training programs are scheduled and publicized by government. We believe the tripartite nature of the community-based tribunals would be best maintained through this process.

The government should always make every effort to ensure that the principles of equity and diversity are considered in recruiting and training tribunal members. This is a principle which is important in dealing with all administrative tribunals.

Effective complaint process

In addition to the comments above, we also submit that critical to the principles of accountability and transparency is an effective complaint process. The Ombudsman's office has listed clearly defined complaint procedures as an essential element of administrative fairness (Administrative Fairness Checklist, 1990 Annual Report to the Legislature. See also 1998 Annual Report: Fair First).

At the agency level, we submit that the Office of the Ombudsman (with proper internal training, adequate staff and extensive publicity about the service) be responsible for responding to complaints.

When there are complaints about procedures or staff outside of the agency (for example, complaints about the behaviour or competence of tribunal members), we submit that appellants be able to make complaints to what we have called the "Administrative Justice Service" that is independent of any particular ministry. (This service would be responsible for the central management of a collectivity of agencies. It is discussed in greater detail later in this submission). In this way, agencies will no longer have the statutory authority to publicly supervise the activities of their own ministries.

*FAIR AND IMPARTIAL ADMINISTRATIVE PRACTICES AND PROCEDURES

Parties involved in arbitration

In order to comment on this principle, we felt it was first necessary to distinguish between tribunals that decide cases where an individual opposes the state (individual V. State) and tribunals which adjudicate disputes between individual parties (party v. party). The administrative law we practice falls into both categories i.e. party v. party (Employment Standards Tribunal, Human Rights Tribunal, Labour Relations Board, Manufactured Home Park Dispute Resolution Committee and Residential Tenancy Arbitrators) and individual v. state (currently BC Benefits Tribunal, BC Benefits Appeal Board, Mental Health Review Panels, Workers' Compensation Review Board, Workers' Compensation Appeal Division, Workers' Compensation Medical Review Panels) disputes.

In *Tribunals for Users: One System, One Service* (*Report of the Review of Tribunals*, March 2001 ("Leggatt Report"), at 3.22 – 3.24) Sir Andrew Leggatt discusses this distinction at some length. He concludes tribunals that decide party v. party disputes should not become courts for two reasons: The specialized knowledge and experience of tribunal members and the simplicity of the process. We agree with this conclusion and submit that it supports the interests of low income people.

Keeping party v. party disputes in the administrative arena (rather than the courts) is necessary in order to provide marginalized people with reasonable access to justice. The cost and complexity of court proceedings would effectively eliminate the right for most of these people to appeal an incorrect decision, even where it has the potential to impact their ability to feed, clothe or house themselves. For example, without the ability to present their case before an arbitrator, a <<flawed decision (either procedurally or substantively) to end a tenancy >> could result in an eviction before any recourse could be had to the courts.

Where the dispute is between an individual and the state, we are equally concerned that the highest standard of fairness and impartiality prevail.

The people we represent are the most vulnerable and therefore the least powerful in any dispute. This power imbalance increases in a dispute between a person who depends on the state for their income (BC Benefits and Workers' Compensation matters) or personal freedom (Mental Health Review Panels). Although fair and impartial administrative practices and procedures must be respected in any dispute (either party v. party or individual v. state), in order to address the inherent power imbalance where the state is a party, these principles must be strictly followed.

Standard of review

Within this same guiding principle, we also looked at the questions of whether or not there should be a legislated standard of review along with the place of privative clauses. The decision of the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [(1998) 160 D.L.R. (4^{th}) 193 (S.C.C.)] makes it clear that the presence of a privative clause is only one factor to consider in determining the appropriate standard of review. We therefore chose to consider these issues together.

With respect to standard of review, we accept the definition of David Philip Jones, Q.C. in "A Year 2000 Review of Standards of Review" (Notes for an after dinner address, Canadian Bar Association British Columbia Branch, Administrative Law Section, Vancouver, 1 June 2000 ["Jones Speech"] at 1): The degree of intensity by which a decision will be examined or to put it another way, the extent of the deference that will be granted to a particular decision-maker. We also accept the following reasons for supporting the extension of deference: "Respect for decision-making expertise; efficient use of administrative and judicial resources as well as the resources of the affected parties; and respect for legislative or consensual intentions in establishing administrative decision-making structures" (MacLauchlan, H. Wade "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001) 80 *The Canadian Bar Review* 281 at 285).

There now appears to be in British Columbia a "sliding scale" for the standard of review ranging from correctness (no deference to the previous decision maker) through reasonableness simpliciter to patent unreasonableness (highest degree of deference to previous decision maker). The presence of a full privative clause is compelling evidence that a court should show a level of deference on the high end of this scale. (*Mitchell v. British Columbia (Director of Employment Standards)* [1998] 62 B.C.L.R. (3d) 79 (Vickers, J.)

Looking at these issues in combination, it is our conclusion that any legislated standard of review should be specific to the relevant tribunal and consistent with its level of expertise. If there is to be a "one size fits all" standard of review, it should be reasonableness. Given that the legislature's intent regarding judicial intervention with a tribunal's interpretation of its statute would be clear, we submit that the presence of a privative clause is unnecessary.

A legislated standard of review will provide for greater certainty in the process. To further increase the efficiency of this process, we also submit that on those occasions when a matter does proceed to judicial review, the court have the statutory discretion to either substitute its own decision (where it has the expertise to make a decision on the original application) or return it to the tribunal (where it is the tribunal that has the necessary expertise to make this decision). By enacting the foregoing, many straightforward matters can be decided expeditiously and the time and cost of unnecessary hearings eliminated.

Evidence

The place of evidence is also relevant to fair and impartial administrative practices and procedures.

From the perspective of people who have minimal skills with which to make their way through the administrative process, clear rules for the introduction of evidence would serve to de-mystify the system and help them build their case. On the other hand, tribunals have diverse needs and therefore universal requirements for the introduction of evidence may not be practical. (Alberta Law Reform Institute, "Powers and Procedures for Administrative Tribunals in Alberta", Report No. 79, Dec. 1999 ("Alberta Report") at 138. Acknowledging that the underlying principle for evidentiary requirements is the right to be heard, we submit that legislation reflect the basic requirement for the admission of

evidence by a tribunal, being relevance, and that a model evidence code which tribunals can choose to adopt where practicable be developed.

Primary adjudication of claims

In our discussion of what administrative practices and procedures would support fair and impartial decision-making, we concluded that the first place at which important changes need to take place is with the primary adjudication of claims.

In his book *Compensation Systems for Injury and Disease: The Policy Choices* (Butterworths, 1994, pp.156-157) Terence G. Ison distinguishes between two models of primary adjudication: The clerical model and the adjudicative model. For most agencies, these models are not an "either/or" choice but represent the ends of a spectrum. In practice, "most systems fall somewhere along the spectrum" (id. p.156) Although his comments are specific to workers' compensation, we submit that they essentially apply to other administrative agencies responsible for the adjudication of claims.

This is how Professor Ison describes the adjudicative model:

Claims adjudication is recognized as a function that requires contemplation. Adjudicators are selected for an ability to think, the caseload allows them the time to think, and each is provided with an office in which to think. Applicants for the position may be required to be university graduates, or otherwise seen to be qualified for a role of making decisions, which are recognized to be of some complexity. They are expected to follow instructions, but they are also expected to show initiative, imagination, and sensitivity. To the fullest extent possible, one claims adjudicator is responsible for making all the decisions on one claim. Where referral to someone else is necessary, it will be for input of advice, not for making the decision. Claims adjudication is decentralized to facilitate personal contact with the claimant and others affected by the claim, as well as to facilitate medical examinations of claimants. Extensive use is made of telephone inquiries and of personal interviews. The adjudicator makes any fieldwork inquiries that may be needed. Hearings are not held as a normal routine, but the adjudicator conducts a hearing in any case, in which that appears to be appropriate, or in which it is specifically requested. If the evidence is incomplete, or if the claim seems doubtful for other reasons, that is cause for further inquiries. (id. pp. 156 - 157)

The author concludes that "for all claims involving any kind of complexity, dispute, suspicion, rehabilitation assistance or other need for sensitive treatment, the adjudicative model is clearly essential for efficiency and justice" (id. p. 157). We agree with these conclusions and submit that the primary adjudication of claims by administrative agencies move along the spectrum towards this model. It will cut down dramatically on the number of reviews and appeals.

Internal review

Internal review processes that seriously looked at the correctness of decisions would further reduce the need for formal review or appeals. In this regard, we submit that when an agency makes a decision with which the applicant does not agree, the first step towards resolution is automatic internal reconsideration using a uniform standard of meaningful review. This review should determine that on the papers, the decision

appears to be correct in fact and law and that opposing the appeal is a justifiable use of public funds (Leggatt Report, *supra*., at #216).

As a means of encouraging the meaningfulness of this process, we further submit that the agency must produce all relevant materials on which the reconsideration decision was based within a relatively short time frame (possibly one week) and that any further review (either to tribunal or court) be restricted to these materials.

Central management of agencies (Administrative Justice Service)
The last topic under this guiding principle which we considered was whether or not there should be central and independent planning and management of a system of agencies, including co-ordination, common services and resource sharing. The "working title" we gave to such an agency, referred to earlier in this submission, is the Administrative Justice Service.

Currently there are a large number of rights determining agencies which operate in complete isolation from one another, despite the fact they are all bound by common principles of law and procedure, and they use common techniques, skills and resources. (Leggatt Report, *supra*., at 5.8).

Every tribunal requires accommodation and support services. Central support services for all tribunals and shared facilities would mean greater administrative efficiency and decreased overall costs. (Leggatt Report, *supra*., at 5.8) In addition, bringing together the administration of all administrative law tribunals under one body would serve to create a recognition that administrative law is a "system" of justice, separate from, but equally important as, the courts and bringing with it the collective power to fulfil the needs of users. The "Administrative Justice Service" would also serve to decrease the bias perception of users about the existing system. The bias perception arises because the very ministries, who have a vested interest in the outcome of the proceedings, currently administer and fund Tribunals. (Ellis, R., "The Administrative Justice System in the New Millennium: A Vision in Search of a Centre", (1999) 13 CJALP, 171 , note 36)

Finally, we agree with the conclusions reached by Sir Andrew Leggatt in his report and submit that this service be funded by the ministries whose decisions are being appealed. There should in addition be an incentive system for improved front line decision making such that the fewer appeals the ministry generates, the less they pay for the service. (Leggatt Report, *supra*., at 5.21)

TIMELY, EFFICIENT AND COST EFFECTIVE DECISIONS AND RESOLUTIONS

Eliminating multiple proceedings
This principle can be supported in a number of ways, beginning with the elimination of multiple proceedings as follows:

(a) Consent orders for procedural matters

By providing a tribunal with the discretion to grant a consent order on procedural issues, it could decide to run a "test case" on a matter within the tribunal's jurisdiction, thereby

staying the proceedings for one or more cases and proceeding with a single one. The order could also deal with the application of the resulting decision or order to the remaining proceedings.

Providing such discretion would further reduce the number of proceedings by allowing the tribunal to make an order with respect to the joinder of parties and the ability to hear representative cases, particularly where the outcome of these proceedings had precedential value.

(b) Declaratory decision: (decisions as to the application of the law to unproven or hypothetical facts)

A general interpretive statement of how the law applies may obviate the need for hearing a multiplicity of cases involving the same or similar facts. Providing a tribunal with the ability to make declaratory decisions would be useful for our clients because large numbers of them are often affected by the interpretation of the same law or policy. An example would be a group of tenants with essentially the same lease, all of whom want to challenge one of its terms. There should be statutory recognition that a declaratory decision of a tribunal is binding precedent.

Cost effective decisions

We also submit that decisions and resolutions can be made more cost effective by implementing the following:

(a) Refusal to accept an application, or early dismissal where the proceeding is an abuse of process.

Examples of abuse of process would include applications where the supporting reasons are frivolous or trifling or where the proceeding is an unjustified attempt to have a matter redetermined that has already been resolved in an earlier proceeding. In this regard, we support the approach codified in Section 5. (7) (c) of the *BC Benefits (Appeals) Act* with provides that "(a)fter considering the appeal, the panel must, by order…dismiss the appeal if it considers that the appeal is not on a question of law or is frivolous or vexatious".

(b) Consolidation

By joining matters or participants in a common hearing, the time and cost of duplication can be avoided. However, expediency must not be permitted to override fairness.

(c) Pre-hearing conference

At a pre-hearing conference, a person designated by the tribunal can make orders in relation to scheduling of the proceeding including identification of issues that should be heard by the full panel at the inception of the hearing (e.g. jurisdictional challenges, extensions of time limits, bias, constitutional questions). It is a mechanism for conducting proceedings in an efficient manner and saves resources by allowing a staff member or single adjudicative member, as appropriate, to make ordering and preliminary decisions.

Pre-hearing conferences may also be counter-productive, we submit, with respect to some legislation. Where it is essential that a decision be rendered quickly, this step may make matters more complicated and lengthy. A matter before a Mental Health Review Panel or BC Benefits Tribunal would in most cases not benefit from a pre-hearing conference. There are circumstances, however, where they would. We therefore submit that whether or not to hold a pre-hearing conference should be left to the discretion of the Administrative Justice Service discussed earlier.

Reducing delays

Under this same guiding principle, we also submit that the following mechanisms might reduce delays in administrative decision-making:

(a) Procedural Rules

Applications would be made to the Administrative Justice Service, which would take certain steps including:

- notification of errors or omissions in pleadings
- requests for additional necessary information
- notification of the name, title, address of a contact person
- notification of any sources of information, advice, for the applicant
- means and time for replying, consequences of failure, notification of any sources of information (including full disclosure of the information coming forward from the automatic internal reconsideration conducted by the agency), advice, for other parties
- notification of conciliation machinery

(b) Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) has been described as “an increasingly important feature of modern administrative decision-making”. (Duke, Kenneth M. “ADR and Administrative Tribunals – The Alternative to the Alternative, 1999 CLE on Administrative Law. P.7.1.01). ADR is already being used by at least four administrative tribunals in British Columbia (B.C. Assessment Appeal Board, the B.C. Securities Commission, the B.C. Labour Relations Board and the B.C. Utilities Commission) and interest in it is increasing. We reviewed this subject by looking at how ADR might be incorporated into administrative decision-making in a way that gives particularly vulnerable clients access to its benefits, while protecting them from its inherent difficulties.

For the purposes of our discussion, we defined ADR broadly as any forum or method for resolving disputes other than the traditional adjudicative hearing process. Specific examples of ADR from various jurisdictions include negotiated settlements, early arbitration, early neutral evaluation, expert determination, conciliation and mediation.

In our discussion, we concluded that ADR potentially has the following benefits:

- Reduce costs

- Reduce the number of contested cases, or at least of contested issues, thereby shortening times, reducing case backlog and delay (increased efficiency of the tribunal)

- Reduce the probability of an appeal or judicial review, thereby reducing regulatory costs for some tribunals where appeals and judicial reviews are common

- Interest groups, intervenors or persons affected by a decision can participate in the crafting of a decision, rather than have the decision imposed upon them after a formal hearing. This can be particularly helpful in cases where the parties are likely to want to maintain good relations after the conclusion of the dispute. Examples of this would be a landlord and tenant in a Residential Tenancy Arbitration or an injured worker and employer in a Workers' Compensation appeal.

- More options to deal with particular concerns than the traditional process, which is often very formal and very inflexible. For example, if a particular issue is causing considerable disagreement such that it threatens to derail agreements on other issues, the contentious issue may be set aside and dealt with by way of a "mini-hearing".

We also identified the following potential problems:

- An instituted, negotiated settlement process may not be appropriate where the bargaining strength of the parties is not equal

- Can add time, costs and complexity to the process

- May undermine the accountability of public tribunals.

After much debate, we concluded that ADR may benefit the interests of low-income people in the administrative decision-making process provided it includes a number of safeguards.

At the very least, we submit that the following factors (used by the Australian Administrative Appeals Tribunals) be taken into consideration in determining whether to direct the parties into ADR:

- whether an applicant sees the legislation as unfair, harsh or rigid

- if it is more costly for the parties to proceed to a full hearing: and

- whether the parties are entrenched in their position.

The seven considerations set out by the Alberta Law Reform Institute (ALRI) ("Powers and Procedures for Administrative Tribunals in Alberta", Final Report No.79, December 1999, p.58) are an equally effective, or possibly more effective screen. When considering whether ADR is appropriate for a given case or class of cases, the ALRI Model Code begins by directing the tribunal to consider whether "the participants are willing to take part in the process".

In ADR, there is always a less powerful party. Being poor, disabled or otherwise marginalized, our clients are almost without exception in this position, and acutely so. We submit that in spite of its potential benefits (including the possibility of empowering these same people by giving them a voice in the resolution of their dispute) an effective screening mechanism is critical to ensuring this process will benefit our clients.

We also submit that agencies be given the discretion to engage in alternative dispute resolution proceedings according to their area of jurisdiction. It is difficult to see, for example, how this process might benefit an appellant disputing a decision made under the *BC Benefits Act.* Likewise, ADR would have to be carefully considered according to the needs of individual cases.

Finally, we submit that the decision about whether or not to re-route a case to ADR is one that should again be made by the Administrative Justice Service and that it should be available at any point in the tribunal's process. The participation in ADR of those granted standing (i.e. intervenors) however, should be at the discretion of the tribunal which should also be allowed to develop its own procedural rules to suit its function and allow it to fulfill its statutory mandate.

COURTEOUS AND EFFICIENT SERVICE

Providing courteous and efficient service is very closely related to the natural justice principle that a person should know the case against him or her and be given an adequate opportunity to respond. In representing clients who are often not able to effectively present their own case, our committee has found that the way in which agency staff or tribunal members deal with a client affects how much the client will reveal to them about their situation and therefore how efficiently the case can be resolved.

We submit that it is of fundamental importance that the legislation, regulations and policy used by the administrative agencies that determine the rights of our clients be written clearly and in language that those affected by the legislation can understand. All of the relevant legislation should set out timelines for a reasonably efficient resolution of most applications and appeals. Any timelines should be provided to clients. Creating clear legislation and timelines corresponds with the government's commitment to clear and transparent government. In order to be fair, agency decisions should not be made on the basis of internal policies that clients do not know about, or which are applied inconsistently throughout the province.

We also submit that a further important step in providing courteous and efficient service is that there should be an agency that could provide information and some direction to clients who are challenging an administrative decision. In Chapter Four of his recent report, Sir Andrew Leggatt states that there should be information about how to start a case, prepare it for submission, and, if necessary, present it. This agency could also let people know about advocacy groups when appropriate. We believe these services could be provided by the Administrative Justice Service mentioned earlier in this paper.

Information materials for clients should be written clearly, available in a variety of languages and be created in formats other than regular print (eg. large print, video, and audiotapes). These materials should be produced by professionals, in consultation with those working in the area, and should be field-tested in a variety of communities.

When dealing with clients who find it difficult to understand or speak English, we submit courteous and efficient service will often require that the client be allowed to bring a translator, advocate, or other representative with them when meeting with agency staff. Such an arrangement would prevent misunderstandings that could often make the resolution of a case longer and more complicated.

A fundamental step in providing efficient service to those appealing a decision is that the agency provide clear reasons to the client about why their application has been refused and clear direction about what the client must do next if he or she does not agree with the agency decision. We submit that all clients who are denied a benefit should be given clear written reasons for the decision, along with all of the forms and information necessary to launch an appeal. In some instances, clients should be given information about advocacy services that could help them with an appeal.

All staff of government agencies and members of the administrative tribunals should understand that providing courteous and efficient service is part of their job description and an indicator of their job performance. The elements of courteous service (eg. no shouting or name-calling; privacy for private conversations; confidentiality; clear communication; co-operation with the client whenever possible) should be clearly set out for staff and clients. We submit these values should be included in the mission statement of agencies that provide services to the public and should be part of staff training and orientation. Job evaluations of agency staff should take into consideration any client feedback or complaints about that person. Finally, we note that it will be impossible for agencies to provide courteous and efficient service unless they are adequately staffed.

It is the experience of the advocates on our Committee that it is often the agencies which have a good working relationship with different advocacy groups in the province which are the most efficient in resolving applications and disputes that arise in their system. We propose that agencies and the advocacy and interest groups that they affect work together as much as possible to improve the system. Sir Andrew Leggatt, in his report, suggested that British administrative tribunals have an annual forum of user groups with an interest in the appeals process to provide feedback about the operation of the tribunals they deal with. He notes that it would be important for agencies to not just give out information, but to set up a forum that would allow user groups to present their own comments and recommendations. (Chapter 4, 4:30)

ACCESSIBLE PROGRAMS THAT ARE EASY TO USE AND UNDERSTAND

We submit that administrative justice requires the adjudicative process be accessible to those for whom it was intended. The initial decision-maker is therefore obligated to provide a decision in writing stating the following:

- What the appellant's statutory entitlement is

- What has been decided in the particular case

The reasons for that decision, including the section of the legislation or policy relied on by the decision maker, with the relevant section quoted or copy attached, what information the adjudicator considered and why the adjudicator considered that the person was not eligible. The use of form letter decisions should be eliminated

- Whether there is a right of appeal

- To which tribunal or court.

  Again, we agree with the conclusions reached in the Leggatt Report (*supra*) that information should be provided by decision-makers about any process of internal review, about whether they have power to review their own decision and about other ways in which the dispute might be resolved.

- By what date and on what grounds

We also submit that access requires the affected individual receive notice that a decision is to be made.

This notice must be given in adequate time and in sufficient detail to enable the individual to respond. Detail is only sufficient, we submit, if it makes the individual aware of the case to be met i.e. information held by the decision-maker must be made available to those affected prior to the decision being made.

Currently, in those cases where the Ministry of Human Resources provides a written decision with notice of appeal rights, the affected individual is not told they have a right to know the case they have to meet let alone given information on how to go about getting disclosure from the Ministry. We submit it is imperative the decision maker supply the list of information supporting the decision and information on how the person can obtain a copy of that information so they can review and possibly decide that they can now see and understand the denial. Alternatively, they may be able to see that the adjudicator relied on inaccurate or incomplete information and it is worth trying to rectify the situation.

Third, we submit that the affected individual must be given an opportunity to present evidence and make an argument to the tribunal.

It is of fundamental importance that users be given information about how to start a case, prepare it for submission to the tribunal and present it at a hearing. We support the conclusion of Sir Andrew Leggatt, (Leggatt Report, *supra*) that every tribunal should give to users, in a form designed by experts, all practical information they will need if they are to decide to have recourse to the tribunal. This information should be supplemented by a tribunal telephone help-line with e-mail back up, designated customer service points and a video of a mock hearing available to users. Decisions and materials written in plain language, designed by experts and field-tested would be particularly important to our clients.

We further submit that where an administrative agency has the power to make decisions that impact an individual's fundamental rights i.e. their ability to feed, clothe and house themselves and their families (the Employment Standards Tribunal, Human Rights Tribunal, Labour Relations Board, Manufactured Home Park Dispute Resolution Committee, Residential Tenancy Arbitrator, BC Benefits Tribunal, BC Benefits Appeal Board, Mental Health Review Panels, Workers' Compensation Review Board, Workers' Compensation Appeal Division, Workers' Compensation Medical Review Panels all make such decisions) the affected individual is entitled to an early opportunity for an oral hearing. For unsophisticated litigants, this means a face-to-face meeting with the decision-maker. Collectively, we have significant experience with telephone hearings, and submit that based on it, telephone hearings are a barrier to access. Evidence often critical to the outcome of the proceeding never comes before the decision-maker due to lack of visual contact. This is a larger problem where the credibility of the parties is at issue. Even before an impartial decision-maker, telephone hearings do not support the twin pillars of administrative justice because they deny the parties a right to produce all evidence that may affect the outcome of the proceeding.

Finally, we submit that SOAR (*supra*) was correct in concluding that confidence in the administration of justice can only be improved by making the administrative justice system inclusive. Agencies must perform their duties and provide their services free of barriers for disadvantaged consumers. Physical impediments should be minimized, with accommodation being made for persons with different abilities and persons who speak languages other than English. Hearings should be scheduled at times convenient to users and people should not have to travel unreasonable distances to access a hearing.

SOAR recognized that many disadvantaged Ontarians face serious barriers when trying to gain or in actually gaining access to the administrative justice system. Those people with greater confidence, support and resources were better served, while some potential consumers are too disenfranchised to even seek access. We submit that British Columbians are no different and that, for a large number of marginalized people, access to administrative justice requires the assistance of trained advocates.

CONCLUSION

In this submission we have made recommendations for a system that supports the twin pillars of administrative justice (the right to be heard before a fair and impartial decision-maker) that will ensure it is fair for all. We looked at the specific objectives of the Administrative Justice Project within each of the six core review principles and came up with a list of recommendations that are summarized in Appendix A attached. These recommendations, we submit, are a procedural safety net, a checklist that must be taken into consideration if the fundamental rights of marginalized people as well as the fundamental requirements of administrative law are to be respected in the process of dynamic change to the system.

APPENDIX "A"

SUMMARY OF RECOMMENDATIONS BY CORE REVIEW PRINCIPLE

***PUBLIC ACCOUNTABILITY AND TRANSPARENCY**
***PUBLIC SERVICE EXCELLENCE AND PROFESSIONALISM**

1. The process for appointment of tribunal members should be open and fair. A committee to select these members should include representatives from the client communities.

2. The tribunal chair should participate in the selection process. The chair should be required to have some formal legal training.

3. Persons chosen for the appointment must be competent to carry out the work of the tribunal and should reflect the diversity of our population, including source of income.

4. Party membership or loyalty should be irrelevant.

5. Tribunal members should be entitled to adequate training, both initially and continuing education. This should include training on issues intrinsic to the client or client group which have the potential for negative stereotyping.

6. Training of tribunal members should be organized, advertised and conducted by an Administrative Justice Service, that is independent of government, but which consults with all partipants in the tribunal process.

7. Appointments should be for a fixed term and re-appointments should be made according to merit based on a performance evaluation measured against set performance criteria.

8. The duration of appointments, and the basis for compensation, should be specified in legislation.

9. A contract at the beginning of the appointment should outline details of a member's obligations and responsibilities.

10. Certain tribunals, such as BC Benefits and the Mental Health Review Panel should be maintained as community-based, lay, tripartite tribunals. This is the most effective way of ensuring that these tribunals are accessible and accountable to the constituency that uses them.

11. There should be a legislated complaints process. At the agency level, the Office of the Ombudsman should be responsible for responding to complaints. Outside the agency (e.g. regarding the behaviour or competence

of tribunal members) complaints should be made to an independent body responsible for the central management of a collectivity of agencies ("Administrative Justice Service").

***FAIR AND IMPARTIAL ADMINISTRATIVE PRACTICES AND PROCEDURES**

12. Party v. party disputes should remain in the administrative justice system.

13. Any legislated standard of review should be specific to the relevant tribunal and consistent with its level of expertise. If there is to be a "one size fits all" standard of review, it should be reasonableness. The presence of a privative clause is unnecessary.

14. On judicial review applications, the court should have the statutory discretion to either substitute its own decision or return it to the tribunal for decision.

15. Legislation should state that the basic requirement for the admission of evidence by a tribunal is relevance to the matter in dispute. A model evidence code which tribunals can choose to adopt should be developed.

16. The primary adjudication of claims by administrative agencies should be based on the adjudicative model.

17. When an agency makes a decision with which the applicant does not agree, the first step towards resolution should be automatic internal re-consideration using a uniform standard of meaningful review. The agency should be required to produce all relevant materials on which the reconsideration decision was based within a relatively short time frame and any further review should be restricted to these materials.

18. There should be central and independent planning and management of a system of agencies (including co-ordination, common services and resource sharing) which we have called the Administrative Justice Service. This service would be funded by the ministries whose decisions are being appealed.

***TIMELY, EFFICIENT AND COST EFFECTIVE DECISIONS AND RESOLUTIONS**

19. Eliminate multiple proceedings through the use of consent orders for procedural matters and declaratory decisions. There should be statutory recognition that a declaratory decision of a tribunal is binding precedent.

20. Decisions and resolutions can be made more cost effective by refusing to accept an application, or early dismissal where the proceeding is an abuse of

process. Consolidation of matters or participant in a common hearing along with pre-hearing conferences can also improve cost effectiveness.

21. Delays can be reduced by making changes to procedural rules such that applications would be "vetted" by the Administrative Justice Service. Providing it includes an effective screening mechanism, Alternative Dispute Resolution (ADR) can also limit delays and costs. Agencies should be given the discretion to engage in ADR proceedings according to their area of jurisdiction. A decision about whether or not to re-route a case to ADR should be made by the Administrative Justice Service and should be available at any point in the tribunal's process. The participation in ADR of those granted standing (i.e. intervenors) should be at the discretion of the tribunal which should also be allowed to develop its own procedural rules to suit its function and allow it to fulfill its statutory mandate.

***COURTEOUS AND EFFICIENT SERVICE**

22. Legislation and policy should be written clearly and in language that those affected by it can understand. Timelines should be clearly set out.

23. The Administrative Justice Service should provide information and some direction to people who are challenging an agency decision. This information should be available in a variety of languages and created in formats other than regular print. Direction would include referrals to advocacy groups.

24. People who experience difficulty speaking English should be allowed to bring a translator or other representative with them when meeting with agency staff.

25. Courteous and efficient service should be included in the mission statement of agencies and should be part of staff training and orientation. Agencies must be adequately staffed in order to provide such service.

26. Agencies and the advocacy groups should work together as much as possible.

***ACCESSIBLE PROGRAMS THAT ARE EASY TO USE AND UNDERSTAND**

27. The initial decision-maker should be obligated to provide a decision in writing setting out the appellant's statutory entitlement; what has been decided; the reasons for that decision (including what information the adjudicator considered and why the adjudicator considered that the person was not eligible); whether there is a right of appeal; to which tribunal or court (including any process of internal review, whether they have power to review

their own decision and other ways in which the dispute might be resolved); and, by what date and on what grounds.

28. The affected individual should receive notice that a decision is to be made. This notice must be given in adequate time and in sufficient detail to enable the individual to respond. This would include information about obtaining disclosure from the relevant agency.

29. The affected individual must be given an opportunity to present evidence and make an argument to the tribunal. Users must be given information about how to start a case, prepare it for submission to the tribunal and present it at a hearing.

30. Where an administrative agency has the power to make decisions that impact an individual's fundamental rights i.e. their ability to feed, clothe or house themselves and their families, the affected individual is entitled to an early opportunity for an oral hearing. Telephone hearings are a barrier to access and inconsistent with the principles of natural justice.

31. Agencies must perform their duties and provide their services free of barriers for disadvantaged consumers.

32. For a large number of people in British Columbia, access to justice requires the assistance of trained advocates.