



May 7, 2014

Via email: nffn@sen.parl.gc.ca; FINA@parl.gc.ca

The Honourable Senator Joseph A. Day
Chair, National Finance Committee
Senate of Canada
Ottawa, ON K1A 0A4

Mr. James Rajotte, M.P.
Chair, Finance Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Senator Day and Mr. Rajotte,

Re: Bill C-31, *Economic Action Plan 2014 Act, No. 1, Part 6, Division 29 –Administrative Tribunals Support Service of Canada Act*

We write on behalf of the Administrative Law Section, the Commodity Tax, Customs and Trade Section, the International Law Section and the Labour and Employment Law Section of the Canadian Bar Association (CBA Sections) to comment on Part 6, Division 29 of Bill C-31 (*Economic Action Plan 2014 Act, No. 1*) dealing with the *Administrative Tribunals Support Service of Canada Act* (ATSSCA).

The CBA is a national association of 37,500 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA sections who have prepared this letter include lawyers with years of experience appearing before the various tribunals outlined in the ATSSCA and accumulated expertise of the inner workings of the tribunals.

Other CBA Sections will address other parts of Bill C-31 in separate letters.

Introduction

The ATSSCA proposes an historic restructuring of eleven federal administrative tribunals.¹ The CBA supports the development of innovative and efficient ways to improve the administration of justice and access to justice. However, the legislation has been introduced without prior notice or consultation with stakeholder organizations, as well as the many users or advocates who appear

¹ Our attached appendix A explains these changes in further detail.

before these tribunals. Further, the introduction of the ATSSCA through an omnibus budget bill hinders opportunities for public or parliamentary scrutiny.

The changes to the federal tribunals brought forth by the ATSSA may not be compatible with the requirement that tribunals exercising adjudicative functions maintain an institutional independence and autonomy from government. The ATSSCA raises other serious concerns for access to justice, independence of the tribunals, potential conflicts of interest, and expertise of the tribunals.

We believe that Part 6, Division 29 should be withdrawn from Bill C-31 for comprehensive consultations with the tribunals and the affected organizations, users and advocates. This would allow for the many compelling questions raised by this legislation to be thoroughly analyzed and considered. We recommend, at a minimum, removing the Canadian International Trade Tribunal (CITT), the Public Servants Disclosure Protection Tribunal (PSDPT), and the Canada Industrial Relations Board (CIRB) from the ATSSCA for the reasons outlined below.

Administration

Under the ATSSCA, the staff of the affected tribunals will be merged into one agency and collectively serve the needs of the various tribunals. We oppose such a significant change to the functioning of these administrative tribunals as part of an omnibus budget bill. A staff merger of this magnitude will likely affect how the tribunals function and requires consultation with interested stakeholders.

It is unclear why some tribunals are included in the ATSSCA while others are not. For example, the ATSSCA does not include the Canadian Transportation Agency (CTA), the Canadian Radio-television and Telecommunications Commission (CRTC) and the Immigration and Refugee Board (IRB). However, other tribunals with disparate mandates such as the Social Security Tribunal (SST), Canada Agricultural Review Tribunal (CART), and the CITT are included. In the absence of rationale, the potential risks of a merger outweigh the potential benefits that may be achieved.

Independence, Impartiality and Access to Justice

The ATSSCA may impair the independence of the tribunals covered by the proposed legislation, or foster perceptions of conflict of interest. The implications of the ATSSCA for the Canadian International Trade Tribunal (CITT) and the Public Servants Disclosure Protection Tribunal (PSDPT) illustrate the potential risks and negative outcomes.

A conflict of interest may arise from the proposed structure of the new agency and its relationship to the Department of Justice. The head of the ATSSCA will report to the Minister of Justice. The same Minister is responsible for the Department of Justice. In several CITT mandates, including customs appeals and federal government procurement challenges, the Department of Justice represents government departments in proceedings. ATSSC staff working with the CITT members will, like Department of Justice lawyers, be subject to the supervision of the Minister of Justice.

The ATSSCA restructuring also raises concerns for natural justice and fairness. Parties appearing before a tribunal are entitled to an impartial adjudicator. Staffing arrangements should not lead to an appearance of bias, either. However, if the tribunal staff and counsel for a party (Department of Justice lawyers) both report to the same Minister, a well-founded apprehension of institutional bias may arise. The Minister has the power to influence the work and direction of the Department and ATSSC staff through budget mechanisms, regulations and policies that direct their work.

With the CITT, conflicts of interest and lack of institutional independence may have international repercussions. The ATSSCA arrangements may lead Canada's trading partners to question the country's commitment to procedural justice (i.e., the ability of a foreign party to have a fair hearing

before the CITT) and substantive justice (i.e., whether decisions will be made on the merits by persons knowledgeable in international and trade-related matters).

For the PSDPT, the tribunal's separation from the administrative machinery of government is so crucial that it is difficult to envision how the tribunal would continue to operate under the ATSSCA. Established in 2007, the PSDPT is a quasi-judicial body that operates independently from any Canadian federal department. The Tribunal was created to enhance public confidence in the integrity of public servants and to protect from reprisals those who report wrongdoing. Cases are referred to the Tribunal by the Public Sector Integrity Commissioner. The potential for a chilling effect on whistleblowing due to concerns over independence and confidentiality is high.

Confidentiality

The ATSSCA merger poses a threat to confidentiality. Protecting sensitive information submitted by parties is a critical function of tribunal staff. The CBA Sections believe that interested parties will be reluctant to provide confidential information if there is a risk that, through merged staffing, this information could find its way into the wrong hands. This includes those who could retaliate against whistleblowers (as previously discussed) or business competitors (with tribunals who receive commercially sensitive information, such as sales data and future business plans).

Using the CITT as an example, if a merged registry is created under the ATSSC, the trust earned by the tribunal's enviable record of preserving confidential information will be threatened. Unless the new agency can show, from the outset, that it will protect confidential information, parties will refuse to present this information in proceedings. The risk of limiting evidence before CITT is not a hypothetical concern. Practitioners who appear before the CITT can attest to the fact that confidential and sensitive business information is frequently at issue before the tribunal, but counsel must persuade clients that the CITT will protect their confidential information. As things now stand, counsel can provide assurances with confidence. With a newly-created mega-agency, counsel may no longer be able to provide those assurances.

Expertise of the Tribunals and Timely Decisions

The CBA Sections fear that the specialized expertise developed in particular tribunals will be lost in a merged entity.

For instance, the CIRB determines labour relations matters under Part I of the *Canada Labour Code*. Labour relations officers play an active role in assisting parties to resolve their disputes through mediation and alternate dispute resolution approaches, eliminating the need to proceed to a hearing before the CIRB in many cases. The labour relations officers have special expertise and experience in investigating and reporting on various questions before a matter is heard by the CIRB and in assisting the parties with procedural issues. If these positions are merged with other positions of the federal tribunals under the ATSSCA, that expertise will be lost or diminished.

With the CITT, the expertise of its staff is why can handle its multiple and complex mandates in the timeframes required. As Justice Wilson noted in *National Corn Growers Assn. vs. Canada (Import Tribunal)*, [1990] 2 SCR 1324:

More precisely, it seems to me that it is for the Tribunal, staffed by experts familiar with the intricacies of international trade relations who are in the business of dealing with a large volume of trade related cases, to decide what documents may or may not be of assistance in interpreting the Act. While my colleague's discussion of the documents that a court may refer to in interpreting legislation may well be sound, we are not faced with an appeal from an ordinary court's decision. Instead, we are dealing with a statutory tribunal's interpretation of its own constitutive legislation. If the legislature wishes to place limits on the range of documents that the Tribunal may refer to, then it is for the legislature to do so.

In the meantime, courts should not get into the business of assessing what documents a statutory tribunal may consult.

Again, merging CITT staff with staff from other tribunals under the ATSSCA will diminish expertise. Whether that happens overnight or over the longer course, it will impair a feature of the CITT that has been a hallmark of the institution since its inception.

CITT research staff must amass, digest and communicate vast amounts of information and documents relating to the CITT's several mandates. These include trade data, company information, market conditions and complex legal arguments. CITT staff promptly turn around issues and documents. They play a pivotal role in ensuring that CITT members can produce coherent decisions within the statutory timeframes of 90, 120 or 135 days. In the CBA Sections' view, a common registry will not be effective in meeting timeliness concerns.

Lack of staff expertise and delay can have serious repercussions for those who appear before tribunals. Significant business interests may be at stake. For example, in a *Special Import Measures Act* enforcement action before CITT, importers of foreign goods may be subject to duties significantly in excess of the value of the imported goods. These prohibitive duties could result in bankruptcy for importers or a decision not to purchase goods from certain sources. Under the *Customs Act* and other statutes, Canada may detain goods at the border pending resolution of a dispute. The economic effect of detentions during unresolved disputes can be serious.

CITT should be excluded from the ATSSCA

If the ATSSCA is enacted, the CBA Sections urge Parliament to exclude the CITT for the reasons above: the need for specialized expertise that cannot be diluted by ATSSCA merger; statutory timeframes and the need for timely resolution; the need to preserve a high level of confidence in the system which now exists among domestic and foreign parties; confidentiality concerns; institutional independence and the risk of conflicts of interest under the structure contemplated by the legislation. The CBA Sections believe that including the CITT in the administrative structure may breach Canada's international obligations.

The CITT has a unique mandate and *raison d'être* dissimilar from the other tribunals covered by the ATSSCA, having been created to implement some international obligations under trade treaties.

The CITT is an investigating authority (or a competent authority) under many World Trade Organization (WTO) agreements to which Canada is a party, such as the *Agreement of the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Safeguards*, and the *Agreement on Government Procurement*.

The CITT is also a reviewing authority under Chapter 10 of the NAFTA and similar government procurement chapters of other free trade agreements. Article 1017.1(g) of NAFTA provides:

[E]ach Party shall establish or designate a reviewing authority **with no substantial interest in the outcome of procurements** to receive bid challenges and make findings and recommendations concerning them.

Other free trade agreements contain similar obligations.

Article 1805.1 of NAFTA² provides:

Each Party shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. **Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.**

Again, the Chief Administrator of the ATSSC and Department of Justice lawyers would report to the Minister of Justice in the role of Attorney General of Canada. Department of Justice lawyers represent the Canada Border Services Agency in appeals of customs matters and represent Public Works and Government Service Canada and other government departments in procurement disputes. Including the CITT in the ATSSCA may diminish the perception of its impartiality and independence, contrary to Article 1805.1 of NAFTA.

The CITT also acts as the designated dispute resolution tribunal in accordance with Canada's obligation to maintain an independent body under international and interprovincial treaties relating to procurement. The relationship between the CITT and the Department of Justice contemplated by the ATSSCA is not compatible with Canada's international obligations under these trade treaties.

It is unclear whether compliance with Canada's international obligations was considered when adding the CITT to the tribunals covered by the ATSSCA. Attention to Canada's international obligations is important to avoid dilution of the legal arrangements Canada bargained for in treaties, and to ensure that Canadian businesses are not at risk of disadvantage by governments in other jurisdictions merging the services of quasi-judicial tribunals into their governments' justice departments.

Conclusion

The CBA Sections recommend that the ATSSCA not be passed into law. If the ATSSCA is to become law, we recommend at a minimum excluding the CITT, the CIRB and the PSDPT from its reach. The PSDPT should be excluded due to the requirement that it operate independently from any Canadian federal department to protect the integrity of public servants and protect whistleblowers from reprisals. Because the CIRB determines labour relations matters under the *Canada Labour Code*, and labour relations officers play an integral role contributing special expertise and experience in investigations and reporting, such expertise and experience will be lost or diluted in the case the CIRB is merged with the other tribunals in the ATSSCA.

We trust that these comments will be helpful to the study of the bill. We would be please to provide any further support and appreciate having the opportunity to make these submissions.

Yours truly,

(original signed by Tamra Thomson on behalf of CBA Section Chairs)

Lorna Pawluk
Chair, Administrative Law Section

Cyndee Todgham Cherniak
Chair, Commodity Tax, Customs & Trade Section

Monique Pongracic-Speier
Chair, International Law Section

Delayne M. Sartison Q.C.
Chair, Labour & Employment Law Section

² This provision must be read in conjunction with Article 510.2 of NAFTA – Customs Procedures – Review and Appeals.

Appendix A – Effect of Bill C-31, Part 6, Division 29

1. The tribunal restructuring is in Division 29 of Part 6 of Bill C-31, at pages 262-296.
2. Section 376 of Bill C-31 enacts the new *Administrative Tribunals Support Service of Canada Act*, which effectively creates a new branch of the Department of Justice – The Administrative Tribunals Support Service of Canada (ATSSC). The ATSSC is comprised of the ATSSC’s employees and “Chief Administrator” and is established as a “portion of the federal public administration”.
3. The Chief Administrator is designated as the Chief Executive Officer of the ATSSC and is empowered to “control” the management of the ATSSC and “all matters connected with it”.
4. According to Bill’s C-31 explanatory notes, the effect of the new Act and the transitional and consequential amendments is to make the ATSSC “the sole provider of facilities and support services for 11 administrative tribunals, including the registry, administrative, research and analysis services” required by those tribunals.
5. The legislation also establishes the ATSSC’s Chief Administrator as either officially or effectively the Chief Executive Officer of each of these 11 tribunals (transferring those responsibilities from those chairs who are currently the chief executive officers of their tribunals). Anyone working in any of those tribunals in any position other than perhaps the Chair or GIC appointee will now work for the ATSSC and report to the Chief Administrator, a “Deputy Head” under the *Public Service Employment Act*.
6. The tribunals in this restructuring include the Canada Industrial Relations Board, the Canadian Human Rights Tribunal, the Canadian International Trade Tribunal, the Competition Tribunal, the Public Servants Disclosure Protection Tribunal, the Review Tribunal established under the *Canada Agriculture Products Act*, the Specific Claims Tribunal (the tribunal that hears claims of the aboriginal communities against the federal government), the new Social Security Tribunal, the Transportation Appeal Tribunal of Canada, and the Canadian Cultural Property Export Review Board.
7. In addition to transferring the general powers of chief executive officer for each tribunal to the Chief Administrator, the transfers of power include the following:
 - a. Any existing contracts that the tribunals or their Chairs may have entered into with outside contractors are now to be transferred to the Chief Administrator and future contracts will be made by the Chief Administrator.
 - b. The power to select, engage and renew engagements of persons with the special knowledge or expertise required to assist the tribunals in their work is transferred from the tribunal chairs to the Chief Administrator.
 - c. All funds required for the operation of the tribunals become the ATSSC’s funds. The development, presentation and defence of a tribunal’s budget are transferred from the chairs to the Chief Administrator as is the power to spend the budgeted funds.
 - d. Authority to deal with applications under the *Privacy Act* and the *Access to Information Act* for documents in the tribunals’ control are transferred from the tribunals to the Chief Administrator.
 - e. Where existing laws require filing any documents with any of these tribunals, those documents will now be filed with the ATSSC and not with the tribunals.

- f. Chairs who are now the “accounting officers” of their tribunals under the *Financial Administrations Act* with responsibility for reporting to Parliamentary or Senate Committees will no longer hold those positions. Those responsibilities will be transferred to the Chief Administrator.
 - g. In those tribunals with their own “registries,” the staff and responsibilities of these registries will be transferred to the ATSSC and the Chief Administrator.
8. The ATSSC’s Chief Administrator is appointed by the GIC and holds the position only “at pleasure” during renewable five-year terms.