

Are Administrative Tribunals Effective in Rendering Justice?

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The administrative arm of the welfare state has an effect on individual lives that is far more influential than most citizens realize. Administrative tribunals and government regulation touch everything from the availability of chemical aphrodisiacs to the cultural content of Canadian television. Maitland recognized this trend already in 1888 when he observed :

*We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.*¹

This tendency has continued and has, in fact, accelerated. The state intrudes into citizens' affairs at a rapid and ever increasing pace as it strives to provide more services to the public. This expansion, of course, has not been confined to the central government. I read recently that there are more than 120 federal boards, tribunals or commissions. They regulate everything from employment rights under appropriate labour statutes, penile erectile dysfunction under the appropriate food and drug statutes, to income support for children of divorced parents. These boards and tribunals regulate :

- labour relations, including private contracts and labour standards, as well as trade union certification
- human rights and gender equality
 - income support programs
 - transportation
- professional and trade group regulation
 - economic regulation of banking, securities, financial markets, trade and intellectual property
 - food and drugs and public health

This list is not exhaustive, but it illustrates the extent to which we are regulated and controlled by administrative agencies.

1. *Constitutional History of England*, 1955 reprint, at 501.

As these boards and tribunals developed, principles of administrative law evolved to ensure that these bodies did not exceed their mandate. Administrative law and judicial review prevent agencies from abusing powers granted by the legislature. The expression "abuse" is used in the sense of exceeding the power granted to a board or tribunal by statute. These concerns include the ability to compel administrative bodies to exercise their jurisdiction where they may refuse to do so. One must acknowledge, however, that not all legal principles purport to limit the function of these agencies. Some aspects of judicial review (most notably curial deference) seek to protect these boards from arbitrary judicial interference. This begs the question, "What factors influence members of the judiciary, and the public at large, to trust these agencies to render judgments or implement public policy?" In other words, to what extent can citizens have confidence that administrative tribunals are effective in rendering justice in an impartial and fair manner?

To answer this question, we must define what we mean by the terms "effective" and "justice." What is meant by "justice" — speed, cost effectiveness, timeliness, access, accountability, remedy? Justice is a concept whose content is usually assumed but rarely defined. The primary difficulty encountered in debates (contrived or genuine) on this topic is that the most common focal point is the specific resolution of a particular dispute. There are diverse opinions on whether the decision is palatable; those who relish the result congratulate the chef, and those who subsequently develop indigestion (for various political or ideological reasons) maintain that the meal, the decision, is unpalatable, that is, "unjust." The terms of the present debate suggest a similar focus (i.e., justice is a product to be rendered), but it is more appropriate to speak of "justice" as a process that lends legitimacy to a decision that would otherwise appear arbitrary. One could cite many examples but one will suffice : the effect on workers severely disabled in an industrial accident of a decision of the Workers' Compensation Board denying them the right to sue the Government of Saskatchewan in its role as regulator of occupational health and safety rather than in its role as employer under *The Workers Compensation Act*.² The Board effectively expanded its jurisdiction under the guise of a policy decision that prohibits all actions against employers for damages incurred in the course of employment. While the general policy can easily be defended, the result for these seriously disabled workers who will not receive adequate compensation under *The Workers Compensation Act* is anything but just. The decision is rendered doubly unjust when the worker sees the Government and the Board joining forces to prevent workers to claim directly against the Government. That is one of the fundamental problems in debating whether administrative tribunals are effective — can they protect the rights of individual claimants as well as protecting the rights of groups or classes of persons?

In Canada, as in other western democracies, the structure of the judicial system has been specifically and consciously designed and modified to preserve a process of decision making that will satisfy litigants, both plaintiffs and defendants, that their claim has been heard, considered and decided in a rational, objective and fair manner. Administrative law was able to develop and keep pace with the acceleration of the expanding powers of the state until the end of the 19th century. In the early 20th century, the courts began to fall behind the control of the expanding power of the state.

2. *The Workers Compensation Act*, S.S. 1979, c. W.17.1.

Administrative law fell into a state of impotence. The state as exemplified by the executive assumed massive new powers after the second world war and the courts abdicated their traditional controlling or supervising role just at a time when they should have been exercising it. It was not until the 1960's that the courts began to reassert their traditional supervisory role.

It was perceived that the courts were ill-equipped to deal with the policy initiatives of government. The common law had not developed to the point where it could deal with or react to a different set of administrative principles. The litigation process was too cumbersome to adapt to the changing role of government in modern society. Many of the programs initiated by government were the result of complex policy decisions which could not be reduced to a simple question of law. Judicial interpretation was openly hostile to government involvement in the market place and hostile to the perceived limitations on individual rights. There was distrust on both sides : the courts feared government excess at the expense of individual rights and supporters of the welfare state (the functionalists) feared judicial interference in issues of policy. Notwithstanding this natural antipathy the administrative state developed and grew and continues to grow as government continues to insert itself into all aspects of the lives of its citizens.

The legislatures created administrative tribunals or agencies as instruments of public policy. These tribunals flourished as the perceived difficulties in the justice system lead to the creation of administrative tribunals such as the National Energy Board, The National Transportation Board and The Human Rights Commission with ever expanding powers. These agencies were created to avoid the rigidity of the judicial system, described as :

- too formal and procedurally dominated,
- too costly because it requires the parties to retain legal counsel,
- unable to adapt the current adversarial model to render expeditious dispositions,
- unable to handle a high volume of cases,
- lacking expertise in relations to public policy in matters such as labour relations.

Interestingly, many of those criticisms can now be levelled at administrative tribunals such as labour relations boards and the human rights commissions.

I propose to isolate and discuss a number of important signposts of "justice" that have been revealed upon close scrutiny of the operation of administrative tribunals during judicial review, to illustrate how administrative tribunals are not effective in delivering justice or of delivering the appearance of justice.

I. INDEPENDENCE

The relationship between the executive branch of government and various tribunals provides the foundation for many suspicions in administrative law. Tribunals are caught somewhere between the court and the legislature along a spectrum that includes adjudicative responsibilities at one end and policy implementation at the other. This reality undermines a basic postulate of natural justice : the adjudicator should be perceived as free from influence. Mr. Justice Le Dain articulated this concern in the judicial context in the following terms :

It is generally agreed that judicial independence involves both individual and institutional relationships : the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

[...]

Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for the purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation.³

The structures and processes that underlie administrative tribunals are often inconsistent with certain indicia of independence. These inconsistencies impair many tribunals' capacity to do "justice" as perceived by members of the public and the legal community. One need look no farther than the Saskatchewan Labour Relations Board where the public legal perception was (I hasten to add this was before the time my colleague Mr. Justice Sherstobitoff was chairman of the Board) that labour won or at the very least had a clear and perceptible advantage when the NDP were in power, because the government appointed the chair and the members of the Board, and the reverse was true when the Liberals or the Conservatives were in power. The perception was obviously stronger than the reality, otherwise Saskatchewan would have the most progressive labour legislation in Canada.

If the independence of administrative tribunals is weakened and challenged, the courts will be less inclined to extend curial deference to them and the whole carefully constructed theory of judicial review based on expertise will be endangered. In my opinion, the courts play an effective supervisory role in ensuring that the administrative

3. *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 687 and 689.

tribunals render, if not effective justice, at least a remedy that is arrived at in conformity with the rules of natural justice.

A. The Appointment Process

Accusations of political patronage in the appointment process remain an important concern. Existing tribunal members may have little or no input into the hiring process which not only damages claims of institutional expertise, but encourages the perception that potential candidates will continue to pursue a political agenda at the behest of their political masters. The fact that the executive can determine the composition of the board turns what should be an adjudicative function into a poorly disguised political one. Brian Mulroney, then a member of the opposition, responded, somewhat prophetically, to one Trudeau appointment by saying :

[...] [L]et's face it, there's no whore like an old whore. If I'd been in Bryce's position, I'd have been right in there with my nose in the public trough like the rest of them.⁴

This form of patronage is equally apparent when members come up for reappointment, but are not reappointed in order to make room for supporters of a new administration.⁵ This public perception certainly affects the tribunal's capacity to do "justice." While there have been recommendations to base hiring practices on merit,⁶ I think it is safe to say that these prescriptions have been given little effect. The temptation is too great and the clamour from constituents too difficult to ignore.

B. Tenure

Security of tenure is another aspect of administrative independence that is not adequately addressed when new members are added to an administrative tribunal. Often the conditions of appointment are vague for a relatively short term of office. Besides the obvious impact on the psychological independence of the individual member of the tribunal, the institutional integrity suffers because of a lack of long term continuity. The tribunal cannot establish a consistent approach to fact finding or decision making, with the result that the decisions of the tribunal lack consistency and an appearance of fairness and appear arbitrary. This, in turn, impairs the perception of fairness and equity among members of the legal community and the public.

4. C. Hoy, *Friends in High Places : Politics and Patronage in the Mulroney Government* (Toronto : Key Porter Books, 1987).

5. S.R. Ellis, "Appointments Policies in the Administrative Justice System : Lessons from Ontario : Four Speeches" (1997-98) 11 C.J.A.L.P. 205.

6. See, generally, M.D. Priest, "Structure and Accountability of Administrative Agencies" in *Administrative Law : Principles Practice and Pluralism* (Toronto : Carswell, 1992) II.

C. Financial Independence

The irregular appointment process also extends to the financial terms and conditions of appointments reinforcing a negative perception of independence.

The members of the agencies that are considered to be the keystone of the system of administrative justice are subject to an ad hoc arrangement of salaries, benefits, per diems, and general terms and conditions of employment. The reality of the arrangements is more consistent with the perceptions of members as political patronage appointments with no particular qualifications than of a perception of members as part of an important government function affecting large numbers of citizens.⁷

Without standard terms of appointment the perception of justice suffers because it is possible for members of the executive to influence members of the tribunal. When the remunerative concerns are coupled with a short term of appointment, the inevitable question becomes "Who are we attracting to these positions?" :

The salaries paid to the members of tribunals are generally low, and inconsistent as between tribunals which do similar work. The appointments are generally of short duration, typically three years, leading to a dead end and the need for a person who is often forty or more years of age to start a new career, or try to resume one's former career thereafter. Everything humanly possible is done to ensure that the job — whether full-time or part-time — will be as unattractive as possible to anyone who is not either extremely dedicated to the notion of public service or virtually unemployable at that job and salary level anywhere else.⁸

A separate, but related, concern is institutional financial independence. Many tribunals submit budgets for approval to civil servants in the appropriate government departments they regulate. The budget approval process raises questions whether the ministry exerts control over the tribunal's policy. This aspect of independence was also referred to in *Valente* :

Judicial control over the matters referred to by Howland C.J.O. — assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence.

[...]

7. *Ibid.* at 53.

8. A.J. Roman, "Structure and Accountability of Administrative Agencies" in *Administrative Law : Principles, Practice and Pluralism* (Toronto : Carswell, 1992) 63 at 64.

As the reasons of Howland C.J.O. indicate, however, the claim for greater administrative autonomy or independence for the courts goes considerably beyond these matters. The insistence is chiefly on a stronger or more independent role in the financial aspects of court administration — budgetary preparation and presentation and allocation of expenditure — and in the personnel aspects of administration — the recruitment, classification, promotion, remuneration, and supervision of the necessary support staff.⁹

The tribunal may simply lack the resources to function **effectively**. Backlogs, delayed judgments, etc. may be a reflection of budgetary dependence or uncertainty, a factor that the chair may not be able to address, but may be held accountable for. The recent comments of the Auditor General are interesting in this respect.¹⁰

The problems associated with the issue of independence cannot be easily resolved, especially when one considers the unique role played by administrative agencies in this country.

Given the unique role tribunals play in today's society, many have argued, both before and after *C.U.P.E. v. N.B. Liquor Corp.*,¹¹ that these tribunals deserve to be protected from seemingly arbitrary judicial interference. These arguments spawned the principle of curial deference and the statutory privative clause but, in reality, there is much greater potential for **political** interference from the executive that is often suspected but rarely addressed :

Even as the law has erected a high wall of insulating curial deference around administrative tribunals to reduce their accountability to the parties that appear before them, the political masters of the tribunal have been working to reduce their political independence, frustrating their efforts to acquire expertise, and making appointments which can only undermine public confidence.

[...]

Is it not ironic that the more our administrative law mythologizes the expertise of appointees to administrative tribunals, and the less judicial scrutiny they are subject to, the more readily the politicians feel they can replace the old party's unqualified friends with the new party's unqualified friends? Is there perhaps a relationship between the two? If the academic commentators and judges understood what was going on inside the administrative tribunals, saw how closely they resemble the tribunal from hell, and thought about the implications for the quality of adjudication received by the parties, they would become as concerned about the problems of the present and immediate future as they have been about judicial activism in the past.

9. *Supra* note 3 at 709-710.

10. *1998 Report of the Auditor General of Canada*, September 1998 (http://www.oag-bvg.gc.ca/domino/reports.nsf/html/98menu_e.html).

11. *C.U.P.E. v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227.

More empirical academic criticism and less reflexive curial deference would help put some pressure on the politicians to clean up their act by introducing a merit system of appointments, improving remuneration and job security and, generally, professionalising administrative tribunals.¹²

Could this be one of the reasons why the principles of judicial review have become so malleable? From "patent unreasonableness" to "reasonableness simpliciter" the concept of curial deference has become diluted, and for good reason.

II. ADMINISTRATIVE PROCESSES

Having discussed the issue of independence (in the pejorative sense), one must discuss issues of procedure (or lack of it). When one considers that findings of fact are relatively immune from review according to principles of judicial review, procedural issues provide fertile ground for debate and commentary. The traditional view has been that, given the unusual function of such tribunals, strict rules of evidence (for example) should be relaxed in order to facilitate timely/effective decision-making. It would be prudent, however, to discuss the subject openly without hasty recourse to the rebuttal that any attempt to provide additional structure would inexorably lead to over-judicialisation of administrative tribunals. As I have already pointed out, curial deference can sometimes gloss over some important concerns relevant to the administration, or perception, of justice.

A. Lack of Uniform Procedure

While it has been commonly accepted that tribunals should adopt procedures that mesh with some of the objectives of their mandate, one must ask whether this "hands off" approach provides too much leeway. There are some universal concerns for admissibility of evidence, for instance, that could be modified, in keeping with the objectives of the administrative tribunals generally and codified by jurisdiction. The common objection is that any attempt to govern the fact finding process would unduly inhibit the tribunals effectiveness. If we are to accept the proposition that findings of fact are not subject to judicial review, we must have confidence that the process is not suspect. Members of the public would be justified in their cautious regard for fact finding that appears arbitrary and subject to abuse.

B. Lack of Training

The problems associated with procedural conduct are increased when one considers that most tribunal budgets simply do not allow for training new members of boards. There are at least two dimensions to this issue :

12. *Supra* note 8.

1. Issues of Natural Justice

Recent appointments to tribunals may not have had any exposure to widely held principles of procedural fairness, yet they are immediately thrown into the fire. Even judicial appointments (rookies and wily veterans) attend continuing legal education seminars and conferences to keep them abreast of developments of which they might otherwise remain ignorant. In order to instill public confidence, should we not consider similar training for tribunal members?

2. Substantive Expertise

Recent appointments may not have had significant exposure to those issues broadly encompassed by the term "institutional expertise." One of the traditional bases for curial deference is the assertion that tribunal members have peculiar knowledge of complex issues of public policy. This assumption is weakened when recent appointments from the general public are immediately empowered to make decisions insulated by supposed "institutional expertise."

Given the relatively high attrition rate for administrative tribunals,¹³ new members are appointed to tribunals with great frequency and, given my comments on the issue of independence generally, there is a danger that public confidence in the tribunal's competence might be undermined if these concerns remain unaddressed.

C. No Code of Conduct

There are undoubtedly numerous issues that deal with accountability, but perhaps none so pressing as the need for a code of conduct. The Chair of the tribunal should have the power to sanction its members. Although the chair is usually held publicly accountable for the tribunal's decisions, he does not have the means to sanction certain forms of conduct. It would be preferable to have a disinterested third party available to investigate claims of impropriety levelled at the chair by members of the tribunal. A code of administrative conduct and an impartial investigatory body would greatly enhance public perceptions of accountability as they relate to the manner in which tribunal members conduct themselves in the fact finding and decision making processes.

D. Efficiency

The usual reply to many of the forgoing concerns is that reform would compromise one of the chief advantages of administrative tribunals : the timely and efficient resolution of disputes. Nevertheless, in light of the Canadian Human Rights Tribunal's recent pay equity decision and the companion report of the auditor general, there is reason to believe that this position is not as persuasive as it once was. The fifteen year, multi-million dollars investigation and suit conducted by the Human Rights

13. See "Tenure" at p. 45 of this document.

Commission certainly rivals the expense and length of any civil suit. The current practices of the Human Rights Tribunal were characterized by the Auditor General in the following terms :

Conclusion and Recommendation

10.120 — In 1977, Parliament established the Canadian Human Rights Commission and the Human Rights Tribunal Panel to resolve complaints about human rights quickly, impartially and expertly. This model was chosen as the alternative to the formal legal processes of the Federal Court. However, the approach that has evolved is cumbersome, time-consuming and expensive.

10.121 — The Commission and the Tribunal are operating in an increasingly litigious and complex environment that poses major risks. In general, while stakeholders appreciate that the Commission and the Tribunal are dealing with difficult matters, they have major concerns about the efficacy of the process.

10.122 — The Minister of Justice has stated that a broad review of the Canadian Human Rights Act will be undertaken. The Commission has stated that this should be done sooner rather than later. The December 1997 Third Report of the Senate Standing Committee on Legal and Constitutional Affairs also called for a comprehensive assessment. We agree that a fundamental review by Parliament is needed. The various issues we have identified are for the most part interrelated and cannot be easily addressed individually.

10.123 — The government should identify and present to Parliament an integrated set of specific measures to improve the effectiveness of addressing human rights complaints. Such measures could :

- provide for periodic reviews by Parliament of the relevance and impact of the grounds of discrimination;

—

- broaden the choice of ways that complainants and respondents could use to resolve human rights complaints, possibly permitting complainants to take cases directly to the Tribunal or the Federal Court;

- clearly separate the Commission's roles as promoter of human rights, investigator and conciliator of complaints, representative of the public interest and advocate for an expanded interpretation of the Canadian Human Rights Act;

- ensure that the Commission and the Tribunal are independent and accountable;

- provide for greater transparency in appointments to the Commission and Tribunal;

- establish statutory deadlines for the receipt and disclosure of information to and by the Commission;

- ensure that specific standards are established and followed that safeguard the reliability, impartiality and transparency of the investigation, conciliation and decision-making processes;
- require clear, complete and timely disclosure of reasons for decisions;
- require parties to consider voluntary mediation by a neutral independent mediator, early in the complaint management process;
- ensure that there is legislative authority for the mediation policies and procedures that may be used by the Commission and Tribunal;
 - require greater disclosure of information on performance against defined service standards; and
- ensure that there are legislative authority and resources to undertake international projects.¹⁴

Many of these recommendations overlap points already raised, but what is especially interesting in this case is that the Auditor General has suggested that the court system may, in fact, offer a more efficient alternative than the current statutory regime. This example warns us not to accept the "efficiency" argument without regard to the existing backlogs and inefficiencies that could be improved upon if functionalists were not preoccupied with judicial intervention.

CONCLUSION

The points canvassed are not exhaustive, but serve to illustrate how the administrative framework may be improved. In the past, legal scholarship became too preoccupied with judicial interference and lost sight of other, equally important concerns such as independence and procedural efficacy. This limited critique does not suggest that tribunals should be disbanded/abandoned, but rather that the current model should be modified to improve the administration of justice.

There have been recent developments that may serve to address some of the issues I have raised today. For example, the new *Loi sur la justice administrative*¹⁵ that has been adopted by the National Assembly in Quebec appears to have taken many of the common concerns seriously :

The legislation aims for coherence in the status and procedures of Quebec administrative tribunals, including the integration of most existing tribunals into a single institution : the Administrative Tribunal of Quebec. This new body will consist

14. *Supra* note 10.

15. *Loi sur la justice administrative*, L.Q. 1996, c. 54.

*of four divisions : social affairs, immovable property, territory and environment, and economic affairs. [...] The legislation deals definitively with the term of office (five years, renewable for a further five years), recruitment, removal and remuneration of Tribunal members. It creates a Council on Administrative Justice, to advise on procedure before the Administrative Tribunal, including the harmonisation of rules of procedure before the four divisions of the Tribunal. The Council will also develop an ethical code for members of the Tribunal.*¹⁶

This initiative is the most dramatic development in administrative law for some time and should be closely monitored by both the executive (federal and provincial) and the legal community. Old arguments that rely upon the "efficiency" of administrative tribunals have outlived their usefulness. I submit that, at present, administrative tribunals are not effective in rendering justice and it is time to seriously examine how we can improve/overhaul the existing paradigm.

16. H.W. MacLauchlan Book Review of *Les tribunaux administratifs au Canada : Procédure et preuve*, by Y. Ouellette (1997-98) 11 C.J.A.L.P. 303 at 308.