

CCAT Conference 2006
Opening Plenary: The Integrated Tribunal – From Concept to Reality
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***Integrated Alignment:
Mastering the Conceptual Challenges of Governance
in Daily Tribunal Operation***

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Introduction

I am delighted to be part of this opening plenary session, particularly as it deals with a topic that is among my fiercest of academic interests – the daily functioning of the administrative state and ways to better understand the challenges involved in the machinery of administrative justice. The theme of this year's conference -- *The Integrated Tribunal* -- offers us an opportunity to discuss and appreciate the challenges that exist in the everyday administration of the various enabling statutes that surround us. It also provides us with a means to explore the ways in which members and staff of administrative bodies have come to master these challenges on a day-to-day basis. An understanding of these internal challenges and ways to address them can be particularly helpful to our individual and collective goal of realizing administrative justice through the tribunal system. Such knowledge can also be invaluable in pointing us to areas in which policy reform is needed.

From my own academic research, I am convinced that the challenges faced in the daily operational context are diverse and dependent on a myriad of interacting (and sometimes conflicting) factors such as the mandate of your decision-making body, the branch of government to which you are loosely connected and inevitably, legislative design. Not only does this diversity of challenges exist across the administrative state as a whole, it is often experienced within administrative bodies with similar mandates in different parts of the country. Unfortunately, the process of internal administration, its tensions and best practices are not given enough attention in administrative law theory and practice. Three

* Visiting Scholar, Cornell University Law School; Ph.D Candidate and SSHRC Canada Graduate Scholar, Osgoode Hall Law School. (lj37@cornell.edu ; ljacobs@osgoode.yorku.ca). Many of these ideas are expanded upon more fully in: L. Jacobs, "Reconciling Independence and Expertise in the Canadian Multifunctional Administrative Tribunal", (2007) forthcoming. I am grateful for the generous support of the Social Sciences and Humanities Research Council of Canada, Cornell Law School and Osgoode Hall Law School. I am also grateful to colleagues with whom I have had the opportunity to workshop these ideas over the past year -- in Canada, at Osgoode Hall Law School and University of Ottawa, Faculty of Law, in the US, particularly at Cornell Law School and, in the UK, with administrative law scholars from across the UK whom I met at the 2006 Socio-Legal Studies Conference held at the University of Stirling, Scotland. Finally, I must thank the administrative bodies that allowed me to spend time with them as part of my research, learning more about how they function on a daily basis.

years ago, I had the pleasure of speaking on the closing plenary session of CCAT where I suggested that empirical knowledge of the specificities of the daily operational context of tribunal could be very useful to the continued growth and development of our Canadian Administrative Justice system. I am glad to return to participate in the CCAT conference dedicated to constructive dialogue on this topic.

My paper aims to raise a few questions that surround the idea of an integrated and smooth working administrative tribunal. All of these questions centre on the relationship between the decision-making body and its various stakeholders. These stakeholders include the government to which it is responsible, the public (both the users and in terms of broader public confidence) and its own internal members and staff. I imagine that these questions may resurface over the remainder of the conference.

I will first start by defining the concept of integrated tribunal as I understand it to be used in this conference. The term is used in a way that is different than what one often hears and sees in the literature. However, this way of thinking of integration is very useful in exploring both the similarities and differences in the challenges that administrative bodies face in their common endeavour of delivering administrative justice. I use the metaphor of a machine in alignment to denote the well integrated administrative tribunal. When obligations to every stakeholder are in correct relative position, as the notion of alignment itself implies, then the tribunal should work smoothly. Yet, due to a myriad of reasons – all of which are factors that naturally have an impact on the tribunal (— for example, interaction with the branch of government to which it is loosely accountable; interaction with public users; and internal interactions between decision-makers, staff and other internal players in the tribunal —) perfect alignment or even near perfect alignment can be difficult to attain.

After defining the concept of an integrated tribunal, I move to discuss in more concrete terms some examples of challenges to integration that exist. I conclude with some questions that could be used as guideposts on ways to think about and address these challenges.

I. Defining the Integrated Tribunal

There are two common ways that the expression “integrated tribunal” is commonly used in Canadian administrative law. The first and relatively newer definition refers to one decision-making body dealing with more than one subject area.

An example of this type of integrated tribunal is the *Tribunal Administratif du Québec* (TAQ). TAQ is a superintending tribunal that decides disputes in which citizens (*les administrés*) have contested decisions affecting them, rendered by a centralized or decentralized governmental administrative authorities.¹ Instituted by the *Act respecting*

¹ I discuss more fully the structure and workings of TAQ in L. Jacobs, “The *Tribunal Administratif du Québec*: Innovations in Administrative Justice; Tribunal Independence and Constitutional Questions” (2003) Vol. VI, No. 3 *Journal of Regulatory Boards and Administrative Law and Litigation* 362. TAQ is established by s. 14, *Act respecting administrative justice* R.S.Q. c. J-3 [“ARAJ”] which reads:

*administrative justice*², TAQ aims to be a final review and appellate tribunal for several other provincial boards and agencies³ and is exclusively adjudicative in nature⁴. TAQ regroups the functions of several review and appellate bodies that had previously existed in Quebec in key areas of economic and social regulation. The tribunal is divided into four main divisions: the social affairs division, the immovable property division, the territory and environment division and a fourth, dedicated to economic affairs, that hears and determines contested decisions relating to permits, licences and other similar matters.⁵ The bodies that are brought together under TAQ are the *Commission des affaires sociales*, the *Bureau de révision en immigration*, the *Commission d'examen des troubles mentaux*, the *Bureau de révision de l'évaluation foncière*, the *Chambre d'expropriation de la Cour du Québec*, and the *Tribunal d'Appel en matière de*

The Administrative Tribunal of Québec is hereby instituted.
 The function of the Tribunal, in cases provided for by law, is to make determinations in respect of proceedings brought against an administrative authority or a decentralized authority.
 Except where otherwise provided by law, the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or adjudicative body.

² *Supra*. The Act came into effect on April 1, 1998.

³ TAQ is endowed with wide powers that incorporate both review and appellate functions in the common law sense of the terms (see s. 15, ARAJ and, generally, on the distinction between review and appeal, Sir William Wade, *Administrative Law*, 7th ed. by Sir William Wade and Christopher Forsyth (Oxford: Clarendon Press, 1994) at 38. However, although TAQ has the ability to substitute its own decisions for those quashed, the legislator has often circumvented this power by indicating that, in such cases, the matter be sent back to the original decision-making body.

TAQ's privative clause excludes judicial review except on questions of jurisdiction (s. 158, ARAJ). This clause would, of course, constitute one of the four factors taken into account in determining the appropriate standard of review, along with the nature of the question, nature of the statute and the relative expertise of TAQ compared to the court. The factor of expertise, which is considered the most important factor in establishing standards of review (see *Director of Investigation and Research v. Southam Inc. et al* (1997), 144 D.L.R. (4th) 1 at para 50), has taken on a new dimension with TAQ. The fact that it is often statutorily precluded from substituting its decisions for those of the agency it is reviewing takes a primary place in determining its level of expertise under a given statute (see for example, *Société financière Speedo (1993) ltée. c. Québec (Commission des transports)*, [2000] J.Q. no. 4520 (Q.L.)). Agencies such as TAQ present a much different type of tribunal than the model on which the doctrine of expertise outlined in *Pushpanathan v. Canada (Min. of Citizenship)* [1998] 1 S.C.R. 982 is based. In *Pushpanathan*, expertise was said to depend on the specialized knowledge of the decision-makers, any special procedure of the agency or its non-judicial means of implementing the statute under its mandate. On the concept of tribunal expertise, see generally, Laverne Jacobs & Thomas Kuttner, "The Expert Tribunal" discussion paper prepared for the Canadian Institute for the Administration of Justice Roundtable on the Expert Tribunal, held in Ottawa, May 30, 2003, <http://www.ciaj-icaj.ca/english/publications/papersarticles/theexperttribunalpaper.pdf>.

⁴ See the discussions by both the Superior Court and the Court of Appeal in *Barreau de Montréal c. Québec (Procureure générale)* [2001] J.Q. no. 3882 (Q.C.A.) [*Barreau de Montréal*]. See, for example, the lower court decision at para. 103 and the decision of the Court of Appeal at para. 120. A general overview of TAQ's structure, jurisdiction, mode of functioning and powers is given in the Court of Appeal decision at paras. 21-46.

⁵ See ARAJ, Title II, Chapter II, ss. 18-37 and its accompanying Schedules I-IV. The powers entrusted to the economic affairs division were previously exercised by the Quebec provincial court and the Quebec Court of Appeal.

protection du territoire agricole.⁶ In total, over 150 different pieces of legislation confer a right of recourse on TAQ.

In everyday discussion, many in the administrative tribunal community refer to TAQ because of the unique permanency of its decision-makers. Instead of having decision-makers that are appointed for a fixed term, members appointed to TAQ hold their office during good behaviour or permanently except for removal for cause.⁷ This is a recent change made to the legislation in 2005.⁸ An significant decision-making advantage of an integrated tribunal like TAQ, however, is that many different experts possessing knowledge in different areas of social and legal knowledge are theoretically available to contribute to a particular case. (TAQ's enabling statute indicates that members are assigned to one particular division but that in case of need to expedite business, they may be assigned temporarily to another division.⁹)

The concept "integrated tribunal" has a second and older meaning in administrative law theory. Put concisely, it is the idea that a tribunal may perform many functions coincidentally – for example, being involved in investigation, adjudication and policy-making. Normally, these types of tribunals have been highlighted in the jurisprudence for allegations that their functions improperly conflict. For example, while having a multiplicity of functions was not in itself denounced in the 1996 Supreme Court case of *Régie*¹⁰, the fact that the same individuals could perform prosecutorial and adjudicative work done was held by the Supreme Court of Canada not to guarantee a sufficient appearance of impartiality under the Quebec Charter.¹¹

The concept of integration used in this conference is one of internal integration. It deals with the gap between what is written in the legislation and how the administrative agency uses its discretion to put the legislation into practice: For example, in the allocation of work to decision-makers, in the written and unwritten norms created in relation to the decision-making process and in the written and unwritten norms and guidelines established to regulate the relationships between the Chair and members, between members themselves and between members and staff. The process of integration involves locating your work as tribunal members on several levels: as members of an institution where such questions figure among members of the tribunal, including relationship with Chair and between members and staff; within the judicial doctrines that

⁶ The Quebec Court of Appeal discusses the evolution of TAQ's functions in *Barreau de Montréal supra* note 4 at para. 23. An excellent overview of the structure, functions and history of TAQ is also provided by Gilles Pépin in "La loi québécoise sur la justice administrative" (1997) 57 R. du B. 633.

⁷ See s. 38 ARAJ. Previously, the Act provided for term appointments of five years with provisions allowing for these terms to be shortened. These sections of the Act, ss. 46-50, have now been repealed.

⁸ See *An Act to amend the Act respecting administrative justice and other legislative provisions*, 2005 S.Q., c. 17.

⁹ See ss. 39 and 77 ARAJ.

¹⁰ 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919.

¹¹ See also the *Report of the Fairness Committee to David A. Brown, Q.C., Chair of the Ontario Securities Commission*. (2004) which examined the question of whether the Ontario Securities Commission's structure created a reasonable perception of bias for engaging in the multiple functions of policy-setting, rulemaking, investigation, prosecution and adjudication under one corporate, statutorily established, umbrella.

have come to surround if not dominate the work of administrative tribunals – concepts such as impartiality, independence and fairness that often take on more of lawyers values than administrative values¹². It involves further placing yourself within the many roles that you play within your statutory mandates – for even if you are said to be pure adjudicative tribunal, I have not come across a tribunal that does not have to turn its mind at some point to some policy-making – even if it is a thought of how its collective decisions are affecting consistency and the community it is managing. Overall, it means placing yourself in relation to the many stakeholders that have expectations from your administrative body and balancing your many relationships and obligations including those with: i) the branch of government with which your administrative body is loosely connected ii) the public that uses it (where fairness, impartiality and efficiency issues arise). Successful integration involves an appropriate alignment of all of these relationships.

This conference is therefore a place to discuss the very important question of how to obtain smooth mechanical integration with the various players in everyday tribunal existence. It leads also and quite naturally to a larger question which is the degree to which policy changes to the structure of our overall tribunal system needs to be made.

II. Challenges to Integrated Alignment

What are some of the challenges to integrated alignment? Several exist; I will mention only three by way of example.

a) Policy-making, expertise and independence

The first two examples concern policy-making, expertise and independence. The first focuses on the use of expertise in the development of policy-making¹³. While one often thinks of expertise as a qualification that a tribunal member must have in order to be appointed, another potential use of expertise is often overlooked. This is the expertise that tribunal members and staff gain through the daily administration of their statutes. It comprises knowledge of how things are going in the broader industry, market or sector that they are helping to regulate. Undoubtedly, this front-line information can be useful in improving the sector, the question is the appropriate way to use it to do so.

It is here that many thorny issues arise. One option is for the administrative body to be involved in thinking about the bigger issues that can help to improve the sector and many

¹² And at this juncture, one cannot help but recall the ideas of some of the original thinkers in Canadian administrative law such as John Willis. See for example, the 2005 University of Toronto Law Journal issue, emanating from a symposium dedicated to Willis, *Administrative Law Today: Culture, Ideas, Institutions, Processes, Values – Essays in Honour of John Willis* (2005) 55(3) U.T.L.J.

¹³ Of late, we have been fortunate to have more attention paid to how policy-making is actually being done within different tribunals. See for example, F. Houle and L. Sossin, “Tribunals and Policy-Making” discussion paper prepared for the Canadian Institute for the Administration of Justice Roundtable on Tribunals and Policy-Making, held in Ottawa, June 18, 2004, <http://www.ciaj-icaj.ca/english/administrativetribunals/paper-houleandsossin.june12004.PDF>

tribunals are involved in this type of work to some degree.¹⁴ However, my observation is that a certain nervousness exists within these administrative agencies. There is a concern that the administrative body will be seen to be doing something improper; that it will be perceived as incapable of passing an open mind test if it is both aware of the ways that the sector needs to be improved and making decisions at the same time. As a result, this unease leads to a tendency to separate functions within the tribunal. Policy-related functions – those that have an eye on how the legislation is actually faring in the sector – are kept separate at all costs from those related to adjudication. Thrown in the mix, and what makes this aspect of tribunal work particularly aggravating is that enabling statutes are often not clear in delineating either the scope or the nature of the advisory role that arm's length administrative bodies can play in advising government of problems in the sector. In such situations, clearer legislative guidance would be helpful, particularly in situations where – as in the recent case of the Alberta Labour Relations Board being asked by the Executive branch for its input on proposed legislative changes – the information sought is valuable but the method of seeking it may put the tribunal in seemingly compromising position.¹⁵ Such guidance should aim to promote transparency in the policy-making processes involving tribunals as well as a means to include, through consultation, all interested parties. An open dialogical process, instituted through legislation, would certainly foster more public confidence in the administrative justice system by both allowing for useful information to be collected while alleviating suspicions as to independence and impartiality of the administrative body. At the same time, however, we need also ask whether, as academics, tribunal members, lawyers and policy-makers, our conception of the role that tribunals play has become too judicialized. Is it may be that our conception is too often drawn from the way we conceive of the judicial process to work with not enough careful consideration paid to the shared place that the administrative state occupies -- that is, as part of the policy-making executive with functions of the judiciary and legislature incidentally mixed in. This question of over-judicialization becomes even more complex when we take into account tribunals that are accountable to other branches of government such as the ombudsman-like bodies that emanate from the legislature.

Second, narrower policy questions that relate to maintaining consistency in decision-making have been a recurring theme for some time, particularly since the trilogy of Supreme Court cases that began with *Consolidated Bathurst*¹⁶. Yet, these questions continue to be live ones and are worth revisiting. This trio of cases sets out the principles

¹⁴ See for example, in the area of access and privacy, the *Commission d'accès à l'information* which, through its enabling statute is responsible for a surveillance role and an adjudicative role.

¹⁵ See *Communications, Energy and Paperworkers Union of Canada, Local 707 v. Alberta (Labour Relations Board)*, [2004] A.J. No.83 and the resulting public and legal outcries, where the tension between 'furthering the policy of the Executive' (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781) and maintaining an appearance of independence and impartiality took on a new and particularly tempestuous dynamic. See L. Jacobs, "Reconciling Independence and Expertise in the Canadian Multifunctional Administrative Tribunal", *supra* note 1, where I discuss this situation more fully.

¹⁶ See *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.* [1990] 1 S.C.R. 282 at para. 74 [*Consolidated Bathurst*]; followed by *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 [*Tremblay*] and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* [2001] 1 S.C.R. 221 [*Ellis-Don*].

to be followed by tribunals so that they can pursue consistent decision-making without compromising fairness to the parties – either by placing the decision-makers in a situation where they can be influenced by others who have not heard the evidence or arguments or by simply interfering on the adjudicative independence of the decision-makers. Internal alignment dealing with interactions between the chair and adjudicators and between adjudicators themselves to avoid inappropriate interference is at the core of this aspect of integration. It can be particularly problematic for reasons that are not often seen directly in the jurisprudence – for example, consistent decisions may be an indication that a tribunal has mastered the area of social or economic regulation for which it is responsible, thereby demonstrating a level of expertise in the domain. Such expertise is always positive and is useful for maintaining judicial and public confidence.

b) Independence and efficiency

Finally, recent 2006 cases such as *Thamotharem*¹⁷ & *Geza*¹⁸ from the Federal Court and Federal Court of Appeal respectively, remind us of another recurring issue in achieving the smooth mechanical working of tribunals: obtaining efficient outputs while respecting the adjudicative independence of decision-makers. Both cases dealt with the possible fettering of adjudicative discretion through the use of guidelines. In both cases the guidelines were introduced by authority of the Chair of the IRB to help expedite caseload. In *Thamotharem*, the guideline was in the form of a standard order of questioning to be used by members of the Board's Refugee Protection Division in conducting their hearings. This guideline ("Guideline 7"), required the claimant to be questioned first by the Immigration official at the hearing or by the Board member. In this way, there was no "examination in chief" of the claimant and the hearing took on more of an inquisitorial character. The Federal Court found that Guideline 7 had a mandatory effect on the adjudicators. While the adjudicators could deviate from applying it, they could only do so in very exceptional circumstances. In concluding that the guideline breached natural justice by fettering the adjudicators' discretion, the Court noted the Board's expectation that the adjudicators comply with the guideline and the monitoring of compliance with it. Through its holding, the Court reinforced the principle that although administrative tribunals are masters of their own processes, the procedures they design cannot favour efficiency at the expense of evaluating the merits of each individual case fully.

The case of *Geza* presents similar concerns. There, the IRB developed a lead case Hungarian citizens of Roma ethnicity to provide non-binding guidance to future panels hearing cases dealing with the matter. While the Federal Court of Appeal held that the lead case package was problematic and that it, along with the overall factual matrix in the *Geza* case could give rise to a reasonable apprehension of bias in that case, it did not go as far as to suggest that all cases that relied on the lead case package were vitiated.

¹⁷ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 8 (Fed. Ct. of Canada). On the "Guideline 7" controversy see also the companion case of *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631 (Fed. Ct. of Canada)

¹⁸ [2006] F.C.J. No. 477 (F.C.A.).

Balancing internal efficiency with respect to caseload while respecting the strictures of natural justice is constant theme of practical importance within the daily operational context. It is certainly one that will resurface again in the future.

Conclusion

As I indicated at the beginning of this paper, my aim in this presentation is to open the door to discussion by raising some of the tensions that the concept of an integrated tribunal, or more importantly that of a well aligned integrated tribunal, forces us to consider. Certainly the notion of integration requires careful attention to what has been aptly described in this conference as the three relational “pillars”. Specifically, these are the relationships between the administrative body and the branch of government with which it is loosely affiliated; relationships between management, members and staff within the institution itself; and relationships between the administrative body and the larger public including its users.

Some questions that arise in this context and which give rise to reflection are: How should communications with government be fashioned, including how should general memoranda of understanding be drafted? What are the best ways to handle calls for efficiency while avoiding the pitfalls of fettering discretion or breaching natural justice more generally? And finally, on a much broader level, to what extent, if any, should broader policy restructuring to be done to the various sectors with which tribunals deal and to the overall system as a whole?

This conference offers us a chance to explore some developmental questions about how to achieve integrated alignment within the daily internal functioning of administrative tribunals -- I am sure our dialogue will be constructive.

I look forward to our discussions of this topic both on this panel and over the coming days.