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There are several ways to approach the issue of independence. One is to see it as the uniform of the justice system, to be wrapped around the structures as a shield from careless attack. If we look independent by wearing the trappings, we signal others that we will only tolerate those changes to our uniforms that protect the essential style and cut we have fashioned for ourselves.

Or we can assess independence to be the body of the justice system, the sum total of the collective acts we perform to preserve our institutional character. If we act independently, we signal others that certain behaviour will be deemed to be an assault on the independent body. But I think the most ^{important} ~~appropriate~~ way to examine independence is to see it as the soul of the justice system. How it looks and acts are of course critical incidents to being independent, but most important is how it feels. From a secure feeling of independence comes the confidence to look and act independently, and, most significantly, comes the capacity to educate interested actors and observers to distinguish between behaviour that is tolerable and behaviour that threatens the heart of the system. In this way, independence becomes the conductor of the whole justice symphony, coordinating the players, refining the sounds, and controlling the ultimate product.

What is the essence of independence, this concept that demands hegemony over the justice system? It is the right to be free from external control or influence, and the right to be seen that way. In Canada, this right has long since been granted and attributed to the courts, although, as Justice Deschênes points out, breaches can and do occur, from the subtle to the severe. But for administrative tribunals, the right, though claimed, remains largely beyond our reach. There are several reasons for this, some definitional, some institutional. But as Dr. Singhvi points out, tribunals are an important part of the justice system, and the failure, however benign, to accord them the full honours of an independent institutional character, resonates throughout the rest of the system, impairing its ability to claim that justice is an impartial and independent commodity. Having decided that we desire independence for tribunals, we are left to search for the sources impeding the development of the objective.

In my view, there are three - the government, the courts, and the tribunals themselves.

What this analysis calls for first is an examination of what tribunals really are. We know clearly what we are not.

We are not courts, and we are not government departments. But these are the bookends to our literature. As bodies falling somewhere near but outside the judicial and bureaucratic spectrum, we are deemed, as institutions, to have characteristics of both. From time to time, we are called upon to act judicially when we act in our adjudicative capacity. Notions of due process, impartiality, and natural justice are invoked and imposed as the judicial symbols of our requirement to grant a fair hearing. On the other hand, when we are regulatory bodies executing policy functions we either promulgate or bear responsibility for implementing, we are often seen as no more than an appendage of government breathing life into departmental directives.

Because we are like courts in our requirements for due process, the courts continue to impose strict judicial standards of decision-making, some of which bear no relationship to the reality of tribunals. At the same time, as a decision like the Ombudsman case shows, they may make no distinction between our administrative and adjudicative functions.

On the other hand, because we are like government agencies in the expected finality of our decision-making and in our policy role, governments frequently attempt to hold us too tightly and to impose inappropriate standards in measuring our performance. Both sides want it both ways, depending on the issue.

Part of this schizophrenia grows out of the unstructured way in which tribunals were created. We grew, by and large, like Topsy, as a response by government to overburdened courts and government departments, and as machineries either to replace or complement them. And herein lies the heart of the paradox. As tribunals proliferated, taking on a life and power of their own, it was rarely clear which one of those functions we were supposed to assume - replacing or complementing. And even when we knew whether we were replacements or complements, it was not by any means clear that our enabling governments or our institutional siblings - the courts and departments - understood our role. What had become clear, however, by the time the federal Law Reform Commission issued its Working Paper #26 in 1985 on Administrative Tribunals, was that we were such a heterogeneous group that we almost defied explication.

Whereas everyone has always understood and continues to understand the role of the courts or departments, the former to adjudicate independently and the latter to advise internally, no one to date has understood us very clearly as a group.

When we demand independence, we are accused by some of overreaching our grasp and being insensitive to government policy. When we appear simply to be doing the bidding of a department or lobby group, we are accused by others of undue influence and a lack of independence.

Let me deal first with our relationship with government.

Whether one accepts tribunals as being an aid to or implementer of public policy, it is crucial that we are seen as credible by the parties who rely on our decisions. And one of the ways we are seen as credible is if our appointments are made in a way which reflects respect for our independence. If the appointments to our tribunals are made without sensitivity to the objective qualifications of the appointees, or bear little or no relationship to the needs of the tribunal, both the motives of the appointing body and the decisions of the tribunal become suspect. If the appointments are for short terms and poorly remunerated with no security of tenure, this invites in the appointees either a passive commitment or creates a deterrent to courageous judgment calls.

If the collegial internal tribunal environment is one of fear of non-renewal at the displeasure of partisanship, there is every chance that true decision-making will be supplanted by anticipatory reticence.

The problem of appointments is of course not unique to tribunals. One frequently hears cynicism and protest over judicial promotions, citing suspicions over qualifications or merit. But the fundamental difference lies in the judges' security of tenure. Whatever the political or intellectual origins of appointments to the Bench, one expects that with the assumption of office, the office-holder executes his or her role independently and free from fear of idiosyncratic removal. Decisions are, and are expected to be made in accordance with impartial criteria, subject to the adjudicator's conscience and view of the law. This is probably also the way tribunal adjudicators see their role, but is it the way the public sees them performing it when the appointments lack credibility or job security?

Historically tribunals have not enjoyed the careful appointments the courts have had.

There has not been a sufficiently serious effort to avoid the appearance of political expedience in donating partisan leftovers to various tribunals as safe temporary havens between elections. Again, as with the courts, one cannot and should not argue that past partisan affiliation ought to disqualify a capable appointee. But all too often, the public senses that this affiliation is the appointee's sole qualification to become a member of the tribunal, and his or her high profile attaches sadly and lingeringly to the tribunal's reputation. A tribunal loses its capacity to engender respect, and governments lose their capacity to rely on the tribunal to execute its mandate effectively.

But the relationship between government and the tribunal requires more than an examination of the appointment process to assess tribunal independence. It involves the question of whose needs the tribunal is serving.

On one level, it is serving the government's need to have expeditious resolution of specialized issues the courts or departments lack jurisdiction, time, or resources to resolve.

That is why they were created in the first place. But on the other hand, they are not different from the courts in that having been handed a statute or issue to enforce, they are expected to do so impartially. Otherwise, they are superfluous. If the intention was to make them respond in accordance with a departmental philosophy, we could have saved the country millions of dollars by disbanding them and having parties write directly to a Minister for remedial action. The very fact of the existence of tribunals means that this option has been rejected.

Tribunals are not concurrent decision-makers to Ministers, they are alternatives, and must be treated as such. They can no more call a Minister or government officials for advice on decisions than a Minister or government officials can call on them to offer it.

I would frankly go so far as to suggest that the test be as simple as what would be appropriate for a court. If it is a matter a Minister or government official ought to consider inappropriate for discussion or perception or action with a judge or Chief Justice, then it is likely inappropriate for discussion or perception or action with a member or head of a tribunal.

This still leaves room for healthy cooperation, but it is mutual cooperation of a much more deferential degree.

And there is sound reason behind such an approach. We deal, as specialized bodies, with interest groups and subject matters which have enormous potential for controversy. And the parties who bring these issues before us expect to have their rights enforced or regulated in a sensitive but fair way, subject only to the interpretations of our legislation they are able to persuade us to accept. There cannot be, and cannot be seen to be, the spiritual presence of a Minister or government official in the hearing room, or we risk denying or being accused of denying natural justice, and the Minister or official risks being accused of interference.

This is not to say we are not accountable for our decisions. We all understand that from time to time, questions are raised in the House about our decisions, just as they may be about court decisions. But it is one thing for a Minister to feel obliged to express familiarity with a decision, and another to behave in a way which makes him or her seem responsible for it.

Analytically, other than bearing responsibility for ensuring that the Tribunal has the resources and qualified personnel to execute its mandate efficiently, effectively and with credibility, the ball is exclusively in the Tribunal's court. If the ball is in the wrong court, the courts will undoubtedly tell us we have exceeded our jurisdiction. If it is in the right one, then the game is entirely the Tribunal's.

Once qualified people are appointed with sensitivity to the needs of the tribunal, the Minister is off the hook and need say no more but that the decision having been made by the appropriate body, there is no room for interference. Both governments and tribunals have a sphere of legitimate power and influence, but the integrity of each sphere requires a complete understanding of when the influence should avoid confluence.

In this way, our interests are entirely consistent. When tribunals look credible, governments look credible. And tribunals can only look credible when they are seen to be operating independently, with the human and financial resources they need, and with the full confidence of government in their independence.

The relationship is not one of adolescent to parent, an adolescent whose recalcitrance is punished by interference with its rules, regulations and decisions. It is, as with the courts, one of full partnership in the various and distinct policy spheres in which the public expects decisions. And, as with the courts, it is a partnership which requires arms-length but healthy cooperation, mutual respect, and independence in thought and deed.

Although it may be the most obvious source of external concern, it is not simply the relationship between tribunals and government which has the potential for impairing a tribunal's credibility. One of the most serious threats to their capacity to execute their functions as independent specialized bodies making final determinations in their areas of expertise comes from the very courts upon whom we model our independent institutional characters. This threat is more qualitative than quantitative, but our relationship to the courts and their perception both of our capacities and our jurisdictions seriously affects our integrity with all our constituent groups - the legal profession, our interest groups, and the legislature.

The most important barrier in our relationship with the courts is the culture conflict between courts and tribunals. Bear in mind what the courts understand to be part of the decision-making hierarchy. At every level of judicial decision-making except the Supreme Court of Canada, there is a right of appeal, an appeal not only of any procedural rulings, but the right to have the final decision replaced with a different one. All judges understand this cultural imperative, and although no judge relishes the prospect of an overturned decision, he or she recognizes the appeal process as a legitimate safeguard against the potential for error.

When judges are confronted, therefore, with an organism like a tribunal which presumes in its area of expertise to be the final arbiter of a given problem or issue, when privative clauses appear to be worn as shields from judicial scrutiny to protect this expertise from the generalism of the courts, judges are being asked to ignore their own culture and give to tribunals a deference they are not themselves routinely accorded. This is no small challenge, and one the courts have all too rarely risen to. They seem too frequently unable to resist the temptation to replace a tribunal decision they do not agree with, with one they would rather impose.

And they do it partly because they make too narrow a distinction between judicial review and appeals, and partly because they do not sufficiently respect the tribunal's expertise.

It is a perfectly normal response, this desire on the part of the judiciary to substitute its opinion for that of a lower tribunal. Descartes might have said "I judge therefore I review". And it is also understandable given that the kind of decision which is most likely to find its way into the court system is the bizarre one that defies common sense. Judges can be forgiven therefore, I think for assuming that these cases reflect the quality of decision-making at the Tribunal level. But to judge Tribunals on the basis of the extreme pathology that finds its way under the judicial microscope is like basing your opinion on modern family life on what you see in the family court. It is but a slice of real life and in no way represents the whole pie.

The temptation for courts may be to offer a superior quality of decision, but the test is supposed to be a principled one based on ~~sound administrative law~~ ^{the law of judicial review}, not of one-upmanship.

I am not unaware that the test for judicial review is not as simple as it sounds - a 1983 article Dean Rod MacDonald of McGill found 28 examples of what constituted jurisdictional error. But if you look closely, what you will find is the wolf dressed up as the sheep of jurisdictional error to disguise his wish simply to replace a tribunal's decision with one he is more personally comfortable with.

Aside from violating the objective that specialized tribunals render expeditious hearing and final decisions in their area of expertise, protected not only by their philosophical mandate but by what has turned out to be the paper tiger in privative clauses, there is another sinister side-effect to the courts ignoring the purpose of tribunals and ~~administrative law~~ ^{judicial review}. And that is in the effect on the lawyers and parties who appear before these tribunals. Leaving aside for a moment what is obvious, namely, that the tribunal itself through the way it conducts its hearings and gives its decisions is the most important progenitor of the respect its community will give it, that community cannot help but notice the extent to which the courts overturn, as opposed to review, decisions the tribunal, based on its expertise, is supposed to be making with finality.

That community expects the courts to defer to the tribunal's specialized and independent judgment calls and when the courts violate that expectation, whatever the sophistication of the language they use to find a way around the existence of the privative clause, the community's respect for both the tribunal's expertise and its independence is necessarily reduced, and as a result, so is the tribunal's credibility and effectiveness to do the job it was set up to do.

To reduce this discussion to its tackist level, you cannot appear to be strong and independent to your spouse or children if there is a mother-in-law nattering away at you in front of your family about how silly your opinions are. It's true that we are all as independent as we feel, but we are also as independent as we look to those with whom we are trying to act independent.

What is the problem with this approach? It is not in the right to judicial review, a right we ought assiduously to respect in its original goal of protecting parties from serious procedural violations and from patently, and I stress patently, unreasonable decisions. But one judge's patent unreasonableness may be another tribunal's expert and specialized opinion, an opinion, moreover, that was meant to be final and binding both in law and in theory.

Judicial supervision is not, and was not meant to be, judicial substitution. The problem lies in the courts' unwillingness to appreciate that tribunals have been established to deal with specialized issues, many of which do not lend themselves to the usual cerebral exercises judges invoke in assessing contract breaches, negligence claims, or criminal liability. Many of the decisions tribunals are called upon to make appear counter-intuitive to a generalist unfamiliar with the specialized terrain of labour relations, immigration, or atomic energy.

It is not that tribunals make decisions violative of common sense, it is that the specialized terrain may have its own unique common sense, with road-maps appropriate only for its particular navigation. If, as a policy matter, governments had felt these matters appropriately belonged in a more generalized judicial forum, that is where they would have been consigned. But they have not been, specifically because governments understood that some issues are best left to a different and final process more apposite to the special issue to be decided. And having given tribunals the sole responsibility for decision-making over that area precisely because they can better identify, administer, and adjudicate a particular policy issue, it violates both the territoriality and credibility of the tribunal if the courts feel little reluctance to impose their own sensibilities and conclusions on the tribunal.

Until the intervention is replaced by respect for, and understanding of the unique perch tribunals occupy in the legal system, tribunals are rendered anaemic in their capacity to be the final arbiters in their own areas, areas that require both speed and integrity in decision-making.

This is not a plea for judicial rigormortis. It is a plea for judicial deference. And it is a plea that may not be heeded unless it is earned. We are, after all, called inferior tribunals, but we needn't reinforce the adjective. And this leads me to the last threat to tribunals - the threat from within.

It is not surprising that we are often confused by the expectations, but tribunals themselves must be the front line in their own search for independence.

We are not courts and we are not departments, but just because people are unsure of where we fit, does not mean that we do not fit. And we do not necessarily fit on the simple continuum between these two branches. We fit on our own terms and not by reference to what we are not. Confusion may induce innocently inappropriate behaviour in others, but it need not do so in the tribunals themselves.

If we are more certain of our right to a unique institutional character, we are better able to inspire in others the same security. We must reverse the Rodney Dangerfield syndrome - "I don't get no respect" - and do everything we can to engender it.

This is a variation on the maxim borrowed from the ideology of human rights: you may not be able to change attitudes, but you can change behaviour. And when you change behaviour, the altered attitudinal approaches follow in due course. It is harder to be unique without the benefit of historical or traditional antecedents, but it is not impossible.

Each tribunal is different, each may call for a different procedural makeup. But temperamentally, we are not different from each other. We are specialized, we are expeditious, we are quasi-judicial, and we are all in one way or another, decision-makers. We are unique, but we belong as unique structures.

Governments and courts are not our natural adversaries. They seek no less than we do to identify appropriate standards and relationships.

What is done by governments and courts is often done in the innocence that flows from uncertainty over expectations and assumptions. If we do not clearly understand what and who we are, how can anyone else be expected to?

We must learn to define to whom we are or are not strictly accountable, and we must in turn educate those who feel differently to respect those boundaries. In the larger sense, we are accountable to the public for the fairness of our decision-making, and accountable through the legislatures and courts for the same fairness. But we are not strictly accountable to either the legislatures or courts for the correctness of our decisions, specifically because as decision-makers, we understand that there is no such thing as a correct decision. There are more, or less, understandable decisions, creative decisions, principled decisions, politically acceptable decisions, philosophically cohesive decisions, or internally consistent ones. But there are no right or wrong ones. Correctness in tribunals as in the courts is in the eyes of the parties affected by the decision, and in almost every case, someone will see the decision as incorrect. But if they cannot dispute its procedural fairness, its impartiality, its basis in expertise, or its integrity, then the tribunal has maintained its credibility and has nothing to apologize for, either politically or judicially.

These comments are not meant as entirely provocative. They are a quest for understanding. They accept totally the principles outlined in Dr. Singhvi's and Justice Deschênes papers and argue, rather strenuously, for their equal application to tribunals. If you view, as I do, the issue of independence as the impressario for justice, as a condition precedent to notions of impartiality, integrity and credibility for the justice system, then these comments show how though the body and uniform for tribunals have been designed and implemented, the soul is still restless. Until it is at peace, independence remains illusory and we are all at risk.

In the movie Platoon, one of the main characters in explaining the seemingly inexplicable war in Vietnam said "There's the way the world is and there's the way the world ought to be". As members of the justice community, we constantly feel the tension that comes from trying to narrow the gap between the possible and the desirable, but it's a mark of the leadership the public expects from us that we keep trying. For the cause of administrative tribunals, the effort is crucial; for the cause of independence, the effort of our partners in the justice system is indispensable.