

The Status of Members of Administrative Tribunals:
"The Situation in Canada"

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THE STATUS OF MEMBERS OF ADMINISTRATIVE TRIBUNALS:
"THE SITUATION IN CANADA"

According to a brochure published last year by the Privy Council Office, federal administrative tribunal members fall within a "community" of 3,600 appointees of the Governor General in Council who serve 270 federal government organizations. The bulk of these persons and their organizations are not "administrative tribunals" in the sense that concerns this gathering. Many are crown corporation officers and directors; others are members of advisory councils and commissions.

Nevertheless, as to certain matters of "status", the brochure makes clear that the government views the whole community as one lump.

I confess that for a variety of reasons I have made no attempt to attach numbers either to the members or to the agencies which presumably would fall strictly within our area of scrutiny here. The same situation applies in respect of the provinces which are included in my over-view mandate. My excuse for this total absence of basic statistical precision is that nobody seems to be able to agree anyway on just what exactly constitutes an administrative tribunal.

It is enough for our purposes today, I think, if I simply assert that in Canada (outside Quebec, which is the territory of Mr. Gosselin for this session) there are many hundreds of members labouring assiduously in many scores of administrative tribunals, whose objectives and mandates, powers and authorities, vary widely, but whose basic structures have much - or ought to have much - in common.

You will be glad to know, I am sure, that in keeping with the lax statistical approach which I have already cited, I have made no attempt to prepare a catalogue or comparison of members' statuses, agency by agency. This presentation will be largely impressionistic, narrowly focussed and somewhat opinionated. Of necessity, its concentration will tend to flow from my experience with labour relations boards, especially in the province of Ontario and at the federal level, and from the inside of labour departments or ministries in the same locations.

As a public policy concern, the subject matter of this session is really important only in terms of the way in which the "status" established for a member of an administrative tribunal contributes to, or detracts from, the ideal doing of the job given to that tribunal by its governing and empowering statute or statutes. Or to put it another way, members are probably given the "status" that

the government at the time considers is commensurate with the job they want the body to do or not to do. In the final analysis, there is almost invariably a set of tensions between what the tribunal eventually thinks it ought to do and what the powers who have ultimate authority over it really want it to do.

For example: I first became involved in human rights matters almost 30 years ago, and observed and participated in the setting up of the forerunner to the Ontario Human Rights Commission. This was a body known as the Ontario Anti-Discrimination Commission; its role was to plan and carry out "education" programs designed to eliminate discrimination and to advise the Minister of Labour in connection with the administration and enforcement of the existing separate fair employment, fair accommodation and fair remuneration statutes. It was not in any way, of course, an adjudicative body. The Minister of the day certainly, and the government to a lesser extent, were not particularly enthusiastic about encouraging an "ideal" carrying out of the limited mandate given to the Commission by its founding statute. They thus made sure that the "status" of the Commission was carefully circumscribed: its first members were middle-rank civil servants already carrying as a minor sideline the administration of the three fair practice laws; the members' hearts were certainly in the right places but they had this new burden placed on their shoulders without the time to carry it, had no additional monetary reward to encourage them, no staff resources and a budget of \$8,000 which they were unable to spend in the first fiscal year. And yet such was the political and social climate of the day that the government not only got away with this grotesque under-implementation of the Commission's governing statute for two or three years, but actually won kudos from opposition and media people for this flimsy facade. Fortunately, such humble beginnings were not allowed to continue.

I doubt that anything comparable applies to administrative tribunals today. Problems arising under the general heading of status, if problems there be, are undoubtedly located mainly around the fringes and not squarely in the middle.

If there is one thing common to administrative tribunals, it is the sketchiness of the provisions setting them up, governing appointments to them and generally providing for their basic constitutions.

Part V of the Canada Labour Code sets up the Canada Labour Relations Board. It provides that there will be a chairman, up to five vice-chairmen and eight full-time members. Terms of office are a maximum of 10 years for the Chairman and vice-chairmen and 5 years for the full-time members and they may be re-appointed. The Chairman, vice-chairmen and members hold office during good behaviour and are removable by the Governor in Council for cause. A procedure for identifying "cause" and initiating the removal of a tribunal member has been created in the Judges Act.

Appointees to the Board are not permitted to hold any other remunerated employment or office while sitting on the Board. When a person resigns from the Board, or his or her term runs out, he may continue to deal with and dispose of any uncompleted matter with which he was seized while still holding office. During this period of winding-up, following the end of his tenure on the Board, a person is not paid the regular salary of a Board member, but is remunerated usually on a per diem basis under the authority of an order of the Governor General in Council.

A quorum of the Board is three persons, one of whom must be the Chairman or a vice-chairmen. The Board has fairly broad powers to make regulations governing its processes and procedures. As to the specific powers of the Chairman, the act simply says that he is the chief executive officer of the board.

Other federal level administrative tribunals with quasi-judicial or adjudicative powers, such as the National Energy Board, the Canadian Radio-Television and Telecommunications Commission and the Public Service Staff Relations Board are in much the same boat. They differ from the CLRB only in incidental ways: for example, the terms of office of full-time members of the three boards (including chairmen and vice-chairmen in certain, but not all cases) are seven years. Members of the National Energy Board may be removed only by the Governor in Council upon the joint address of the Houses of Parliament; the Chairman of that board is chief executive officer and has "supervision over and direction of the work" and the staff. Some of the bodies have, in addition to comparable adjudicative responsibilities, original policy-making mandates, unlike the CLRB whose policies either flow directly from or are, in essence, interpretations of the provisions of the governing statute. In most instances, procedural regulations made by these bodies are subject to the approval of the Governor in Council.

Labour Relations Boards or comparable agencies in the provinces other than Quebec, appear to be in a somewhat more dependent position than the federal board. The Ontario Board consists of persons appointed at pleasure. No maximum period of appointment is specified in the statute. I understand that its presiding officers are now generally given a specific term of 3 to 5 years by the Lieutenant Governor in Council, but this does not have the direct effect of making tenure more secure; presumably it simply creates or adds to the complications arising from any removal from office, which would have the indirect effect of strengthening security of tenure and discouraging any removal effort. On the other hand, members of the board are required to be "representative" of employers and employees and the roster of members from each group is to be equal.

I don't imagine the practice respecting recruitment of members of the Ontario board has changed much in the past couple of decades. In my day, when a vacancy occurred, the provincial federation of labour, as the most representative union body in the jurisdiction (to use the International Labour Organization way of doing things) or the "ad hoc employers' committee", as the case may be, was asked to nominate a replacement. The understanding was that three names would be placed before the Minister and he and the government would select the new member from the list. In practice, usually only one name was submitted. I recall no case of there being difficulty in translating the nomination into an actual appointment by the Lieutenant Governor. The members, representative of unions and employers, were and still are, occasionally appointed to the Board on a full-time salaried basis; more often, they act as required and as they are available, and hold down full-time jobs either in the union movement or in business, being paid on a per diem basis for their board work.

The constitution of other provincial labour relations boards is somewhat similar. Newfoundland legislation specifies very short, at-pleasure appointments. The Manitoba statute, in addition to requiring that the board be tri-partite, also establishes fixed terms for the Chairman and vice-chairmen of five to seven years and provides that they are removable only by resolution of the Legislature. In British Columbia, the commissioner of the Industrial Relations Council, a sort of super-chairman or czar of labour relations established under their recently passed legislation, is appointed for five years and is removable only by an act or resolution of the Legislature. (If it is expedient to get rid of him via a lingering and painful process, presumably an act is introduced; if sudden death is

called for, a resolution is the way to go). Bearing in mind the high fickleness factor in B.C. public policy on industrial relations matters, one could hardly view this as much of a guarantee of tenure. The chairmen of the various divisions of the Industrial Relations Council must be happy to have straightforward at-pleasure tenure. The members of the new council continue to be representative of unions and employers.

With the rare exception of those administrative tribunals whose membership must be drawn from a specific constituency - as is the case with the labour relations boards to which I have referred - the whole process of how people come to be selected for these bodies seems to be about as mysterious as how one joins the Masonic Order. According to the Privy Council brochure I mentioned earlier, "Recommendations for appointments originate from many sources including the political, commercial and academic communities, business consultants, senior public servants and special interest groups. However, all appointments require the Prime Minister's approval." In other words, no "system" exists which might provide a basis for greater public confidence in what transpires.

To a degree, the selection of members of administrative tribunals is really not my business as a member of an administrative tribunal. On the other hand, I am entitled to a concern on two counts: the first arises from my expectation, if not my right, as a citizen, to be governed with at least minimal competence; the second has to do with the fact that the status of the administrative tribunal of which I am a member, its credibility, its capacity to discharge its responsibilities, and my own situation and that of my colleagues in those respects, depends upon our being given associates who know what they are doing.

I hasten to say that the apparent total absence of any system for selection of qualified people has not so far created any problems of which I am aware, certainly not to any great extent at the CLRB. But I need not dwell on the fact that there is a potential.

In its Report No. 26 on Independent Administrative Agencies, the Law Reform Commission of Canada suggested that the Minister of Justice should be placed at the centre of a system for initiating appointments to such bodies. A visible and understood system - yes; but whether one minister should be in charge, raises some problems. After all, the Minister of Labour, and his advisers are by definition more knowledgeable and not necessarily less

impartial than the Minister of Justice and his advisers about the industrial relations community. Therefore, the former could surely be better placed to secure the right people for a labour relations board than the latter.

Pay ranges, actual salaries, benefits, and so forth, are standardized as far as the appointees to federal administrative tribunals are concerned. The pay and rations system does not appear to be capable of being misused for the improper handing out of rewards and punishments. I am not really familiar with the situation in the provinces.

For federal officeholders, there are strict requirements designed to prevent real or apparent conflicts of interest. Related guidelines have been established so that persons will not be able to benefit improperly from their former official positions once they have left these posts and have taken up new employment elsewhere. (I shall say more about this later in connection with the subject of the duration of appointments.)

Hedged about with conflict of interest rules, not to mention governed in many cases by the specific commands of the statutes under which they operate, the members of federal administrative tribunals are unable to earn other income outside their tribunal posts and must not manage their own investment or business affairs. The situation for provincial appointees is far less restricted. It is quite common, for example, for chairmen and vice-chairmen of provincial labour relations boards to earn considerable amounts of extra money directly from unions and employers for undertaking the arbitration of grievances under collective agreements. Twenty years ago, Chief Justice McRuer looked upon the earning of extra money in such a way by judges as potentially compromising and it was subsequently specifically prohibited through amendments to the Judges Act.

The fact that a tribunal like the Canada Labour Relations Board is intended to be, and is, independent of outside influences and powers in the exercise of its functions and the making of its determinations can be inferred from the founding statute, from other legislation and, most of all, from jurisprudence. But to a layman, it is a puzzle why the legislator didn't say so in some kind of declaratory provision or preamble in the legislation. It would surely have been a simple matter for Parliament to have found words to express the idea of independence.

The clear inference that the Board is independent may have been affected by a strange provision which crept into Part V of the Canada Labour Code in 1984. This is an amendment to section 197. Previously the section had read:

"The Minister, where he deems it expedient, may do such things as to him seem likely to maintain or secure industrial peace and to promote conditions favourable to the settlement of industrial disputes or differences."

In 1984, these words were added:

"... and to these ends he may refer any question to the Board or direct the Board to do such things as he deems necessary."

Goodness knows what these final words mean. They have so far not been utilized. One cannot help noting that the Minister may direct but nothing says the Board shall respond to his directive. No doubt if he did issue a directive and the Board did accede to it in some way, a party whose rights were affected would be quick to go to the Federal Court of Appeal and the latter would set matters right in short order. I suspect that what Parliament really intended was to give the Minister power to make an application to have some matter, connected with a collective bargaining impasse, reviewed by the Board in the public interest despite the absence of any initiative to do so from either a union or an employer or even from the Board proprio motu.

As a layman, I have expressed puzzlement over the lack of any clear statement in our statute - and in those governing most other administrative tribunals - that we are independent. Such a thing would be useful in deterring unnecessary and quite frankly, somewhat questionable importunings of the Board on behalf of applicants or complainants and respondents by outside persons who are not parties to the matters in issue. These are infrequent. Occasionally, however, they come from Members of Parliament. They usually take the form of a letter which asks the Board to look with favour and compassion upon the miseries of a complainant or applicant and to let the MP know later on what disposition has been made of the matter. I doubt if an MP would make that sort of approach to a judge on behalf of

any party. I suppose it reflects a lack of appreciation for the real position of the Board as an independent tribunal.

There is no question that such representations are designed to urge the Board to make a particular disposition of the case. That is what challenges the Board's independence when it comes from a member of Parliament. In this connection, I am not in any way suggesting that an MP should not comment on anything or everything the Board does via the House of Commons and its committees or should not play, as he or she sees fit, the ombudsman role on behalf of the public. But to make direct representations on behalf of one party in a case that has not been decided by the Board is a bit much.

Some decisions of many administrative tribunals, both in the federal and the provincial spheres, are subject to confirmation by, or appeal to, the cabinet. The Law Reform Commission has dwelt at length and in detail with the implications of this kind of political supervision. Labour relations boards are as a rule not subject to this type of oversight. They are, however, liable to be judicially reviewed.

As a layman, I am neither as knowledgeable, nor as eloquent, nor as emotional, about the general subject of judicial review as some who have addressed previous gatherings of the Canadian Institute for the Administration of Justice. I certainly have no sympathy for the Law Reform Commission's proposition that privative clauses should be done away with. It is absolutely clear that if there were no holds barred to the parties in seeking judicial review - and in evoking a response from the court - there would be chaos in industrial relations in Canada.

Until 1978, the Canada Labour Code contained a privative clause which afforded a party the opportunity to seek judicial review on all of the grounds set out in section 28 of the Federal Court Act. The record shows that, in too many situations, a party, having become the subject of a CLRB decision which it did not like (and there is invariably one party in virtually every CLRB case that does not particularly like the decision) could ask for judicial review. This tended to act as a de facto stay of proceedings until the matter was disposed of or simply died. Very often, the result was that the party whose "victory" before the Board was being challenged before the court would find that the mere passage of time awaiting the actual date with the court would wipe put that victory without any

determination by the court. Then the application would be quietly withdrawn.

The thing is that industrial relations is a peculiar and fickle business where timing is important to all parties but not always in the same way. What it is all about is the acquisition, maintenance and exercise by employees, acting in concert through a union, of countervailing power to that possessed by an employer. When it applies for certification, a group of employees, through a union, is actually asking for a licence from the Board to have and to exercise countervailing power in certain ways in order to gain certain ends. Because of the social climate that exists and the economic pressures that may prevail at the time, the employees usually feel that they are taking a very considerable gamble, of great risk to themselves, when they ask for a certification order. If that "licence" from the Board is not quickly forthcoming and is not quickly put into play, the passage of time may destroy the effort.

Before 1978, some employers found that they could file for judicial review of a Board certification order and, by so doing, delay its actual implementation to the point where employees became disenchanted with the idea of collective bargaining and the union fell apart - all this without any actual review of the Board decision taking place.

Parliament came to recognize, among other things, that the reality of the effect of a wide-open opportunity for judicial review created public policy problems which clearly outweighed theoretical considerations favouring such an approach. In 1978, the privative clause was amended to confine the grounds for review of CLRB decision to excess of, or failure to exercise, jurisdiction and to denial of natural justice. Thus was the CLRB's privative clause brought into line with the clauses and the jurisprudence governing judicial review vis-à-vis the leading provincial labour relations boards. To some degree, at least, no longer could procedure be utilized to deny substance.

A review of the record since 1978 would demonstrate clearly that justice has not suffered, and has undoubtedly gained, from the restriction of access to judicial review of CLRB decisions enacted by Parliament in that year.

Reference was made earlier to the absence of any recognized systems facilitating the recruitment of qualified people to serve on administrative tribunals. (Of course, fortunately, qualified people are in the main appointed despite the lack of systems). It seems that there is

equally a lack of system in respect of the identification of vacancies and the process of filling those vacancies on administrative tribunals. Moreover, there are a number of factors having to do with the term of office which create pressures that may well be undesirable.

Since I am an old-timer, whose term on the CLRB (providing my behaviour is good) will run pretty well until I can be pensioned off, I do not think I am open to a charge of being overly self-serving in what I am about to suggest. And that is that the five-year (or shorter) term of office is too short and poses a risk to the independence of a tribunal member. While I make that as a general proposition, I propose to illustrate it via reference to the CLRB experience.

For reasons to which I am not privy, vacancies and potential vacancies have been allowed to develop in the CLRB membership to the extent that the Board's capacity to dispatch its business expeditiously could be impaired. This holds the possibility of reflecting seriously upon the credibility of the surviving members. Whether this is common as far as most boards and most jurisdictions are concerned, I cannot tell.

There is something curious and unenviable, to say the least, about the ways in which persons are treated, and the positions in which they are placed, when their terms of office are coming to an end. Having to uproot themselves from some other location in Canada, sell a house, move to Ottawa, obtain new accommodation, sever all ties with a former job, obey conflict of interest rules and post-employment guidelines, potential recruits quite understandably seek some assurances about security of tenure. There is little attraction in pulling up stakes and submitting to the fairly stringent regime of a member of a tribunal without some assurance that it will probably be for more than five years. It is not surprising, therefore, that persons take up their new appointments with the impression, gained from their discussions with the appointing authorities that while no guarantee can be given, it is quite likely that the appointment will be renewed for another period if performance is satisfactory.

What actually seems to happen is that a few months before the end of the term, the member, having made known that he or she is willing to accept re-appointment, is greeted with total silence. No yea; no nay. Total silence. What is to be done? Does one start job-hunting? There is probably no going back to the former employer, since all

ties have likely been cut. During the period while one is a member of the tribunal, the conflict of interest rules apply. Hence any job hunting must be very carefully directed in order not to run afoul of them. Similarly, the post-employment guidelines restrict the possibilities quite sharply. There is no severance pay to tide one over during job hunting after the end of a term. And, while the government is generous in paying moving and other relocation expenses from elsewhere in Canada to Ottawa at the time of appointment, there is no provision for assistance in the return direction.

As was mentioned earlier, persons may continue after their terms expire to deal with, and dispose of, any uncompleted matter with which they were seized before the end of their terms. Cases before the Board are frequently complex and require many hours of hearing, deliberation and writing. The work load is heavy. Even with the best will in the world, and careful planning, it is usually not possible to ensure that a member's term and the matters with which he has been dealing wind up simultaneously. Thus, invariably, there is work to be done by a person, for which he requires compensation, for some time after a term of office expires. It seems that even in this connection, the "system" is unable to provide the authority for payment until many weeks have elapsed after the end of the term. What happens is that the person, being conscientious, continues to do his job, trusting that the Governor General in Council will eventually see his way clear to authorize payment.

There is no evidence that any of this has been consciously scripted to undermine the status and independence of tribunal members but that does not erase one's sense that there must be a more civilized and sensitive way to deal with people.

I did not intend that this sour note should serve as my conclusion on this subject. It has been located at this point in these notes only because I have been trying to follow some kind of chronological order in my presentation.

One could make a successful academic career out of identifying systemic imperfections that might conceivably impinge improperly on the "status" of members of administrative tribunals. Nobody denies the existence of a potential for problems. The wonder of it is that in this tough world, not only do we evolve solutions to these problems, as we must over time, but that in the meantime,

there is not much taking advantage by the powers that be of these imperfections.