INDEPENDENCE AND ACCOUNTABILITY

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

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FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

Perhaps no issue provokes more discussion and debate within the administrative justice community than the interrelationship between the concepts of tribunal "independence" and "accountability". Parties in proceedings before tribunals have challenged government's authority to structure tribunals in certain ways and, while the courts have confirmed that governments are fully competent to create tribunals under provincial legislation, details about the appropriate institutional relationship between tribunals and the government have not been finally settled from a policy perspective.

This report addresses questions about what constitutes inappropriate government interference in tribunals' independent decision making responsibilities – and about what limitations, if any, government might face in implementing appropriate mechanisms for the full public accountability of administrative tribunals. On the one hand, there must be an appropriate balance between independence and accountability. On the other hand, initiatives that foster independent decision making may also enhance the public accountability of administrative tribunals.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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INTRODUCTION

The independence and accountability of administrative tribunals are central issues in the administrative justice system. Both are important but there can be points of conflict or tension between them. What is the appropriate balance between independence and accountability? Does this balance vary depending on the type of administrative tribunal? To what extent can both independence and accountability be fostered? These are the questions addressed in this report.

Administrative tribunals exercise a court-like function when they make adjudicative decisions. Yet most tribunals also perform non-adjudicative tasks, and all tribunals are in one sense part of the executive arm of government. They are not courts. In structuring its institutional relationship with tribunals, government needs to foster an appropriate level of tribunal independence in deciding individual cases and to achieve an appropriate level of tribunal accountability in the performance of their statutory mandates. This report makes recommendations to government on achieving these important goals.

Tribunals are created and usually funded by government to carry out specific functions assigned to them by the legislature. A common reason for creating a tribunal is so that a particular task can be carried out at arm's length from government. Another frequent reason is to provide a quicker and less formal alternative to the courts in adjudicating certain matters. This last reason applies particularly to those administrative tribunals which have an adjudicatory function – the focus of the Administrative Justice Project. A degree of independence from government is necessary for these tribunals to carry out their functions effectively.

Why is independence important? When deciding cases, administrative tribunals are part of the overall system of justice, and public confidence in the integrity of the justice system is essential in a fair and democratic society. Ensuring such confidence requires a public perception that decisions are based on the merits of cases, and are made in a fair way – free from outside interference by the government (or indeed by non-government groups that may wield influence).

On the other hand there must also be a degree of accountability. An important question is to whom should administrative tribunals be accountable. Another question is for what should tribunals be held to account. On this second point, there is an important distinction between accountability for specific adjudicative decisions and accountability for the efficient and appropriate operation of the tribunal as a whole. For example, financial management of a tribunal and the overall timeliness of decision making are different issues, compared to whether a particular decision was made correctly.

This report addresses the legal and policy factors relevant to structuring an appropriate institutional relationship between government and administrative tribunals. As will be seen, the existing case law gives the legislature considerable freedom in determining the degree of independence it gives an administrative tribunal. The result is that careful policy consideration must be given to finding the correct balance between independence and accountability.

POINTS OF CONTACT: FUNCTIONAL RELATIONSHIP BETWEEN TRIBUNALS AND GOVERNMENT

Before turning to the legal and policy issues, it is helpful to understand the practical context within which questions of independence and accountability arise.

Obligatory Points of Contact

At least three points of contact are inescapable in the relationship between government and tribunals. Most tribunals are funded by government. This means that budget requests must be provided to government and government must make decisions about the amount of money devoted to a particular tribunal. A second critical point of contact is in the appointment of members to tribunals – a subject addressed in a separate White Paper report, Making Sound Appointments. For present purposes, one need note only that, since government appoints most tribunal members, there is an inescapable role for government in deciding who it will appoint and on what terms and conditions. This is true irrespective of statutory or other policy decisions the province might make about the appointment or tenure of tribunal members.

A third point of contact is less concrete than the previous two but nonetheless important. Under our system of government, the executive is responsible and accountable to the legislature (consisting of the elected representatives of the people) and ultimately to the electorate. This ultimate accountability of government to the electorate includes accountability for both individual tribunals and broader issues affecting the administrative justice system as a whole.

The accountability of the executive to the legislature requires that tribunals be, in at least some respects, accountable to government. This statement does not prejudge either the precise degree of that accountability or the matters for which tribunals should be held accountable. But it is a point of contact between government and tribunals which must be considered when assessing the appropriate balance between independence and accountability.

Other Points of Contact

There are other instances in which government and tribunals may interact. In one sense, these points of contact can be viewed as optional since they are not necessarily inherent to the government and tribunal relationship.

Generally, these “optional” issues encompass a range of support and infrastructure matters where a tribunal may interact directly with an arm of government. These matters include office space, information systems support and human resources assistance in hiring tribunal staff. Training for tribunal members (especially new members) is a task where interaction could occur between government and tribunals or the tribunal community as a group (perhaps via the British Columbia Council of Administrative Tribunals). Especially where a number of tribunals have sufficient features in common, government could facilitate some form of centralized registry for

those tribunals. There are also a number of instances where Cabinet has the ability to prescribe rules of procedure which will govern hearings before a particular tribunal.[1] Another form of possible interaction between government and tribunals is where Cabinet (or a minister) has the statutory power to issue a formal direction to a particular tribunal.[2]

One obvious way in which government may interact with certain tribunals is where the province is a party to a proceeding before the tribunal. For example, the province is a party to an appeal to the Medical and Health Care Services Appeal Board when there is a question whether a particular individual qualifies as a beneficiary for coverage under the Medical Services Plan.[3]

In summary, there is a broad range of ways in which government and administrative tribunals must interact. This is the factual context within which decisions must be made about the appropriate degree of government control over tribunals. This question is most acute in the case of tribunals which exercise adjudicative powers — the primary focus of the Administrative Justice Project.

LEGAL CONSIDERATIONS: INDEPENDENCE AND ADMINISTRATIVE TRIBUNALS

In order to understand what the courts have said about the independence of administrative tribunals, it is helpful first to address the following matters:

- sources of law;
- constitutional framework;
- judicial independence;
- natural justice.

These form the backdrop against which any discussion of tribunal independence must occur.

1 See, for example, *Forest Act*, R.S.B.C. 1996, c. 157, s. 151(2)(q) and *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, s. 220.

2 For example, cabinet has the power to issue directions to the Utilities Commission: *Utilities Commission Act*, R.S.B.C. 1996, c. 473, s. 3. At the federal level, cabinet has the power to issue certain directions to the Canadian Radio-television and Telecommunications Commission, under sections 26 and 27 of the *Broadcasting Act*, Stats.Can. 1991, c.11.

3 *Medicare Protection Act*, R.S.B.C. 1996, c. 286, ss. 41-42.

Sources of Law

There are three sources of law.[4] First is the constitution. With some exceptions, constitutional powers and restrictions are contained in the *Constitution Act*, including the *Canadian Charter of Rights and Freedoms.* The second source is statute law, which is enacted by a legislature (or the federal Parliament).[5] The third and final source is the common law. This describes the non-statutory case law developed by the courts through case-by-case decisions. The common law is the primary source of law in areas such as contract and negligence. It is also the source of law on natural justice, an important area of law for administrative tribunals.

There is a hierarchy to the three sources of law. The constitution is the supreme law of the land. As long as a legislature acts within its constitutional powers, it has freedom to enact what statutes it wishes. This concept is known as the sovereignty of Parliament. One important consequence is that a legislature can modify the common law – including the law on natural justice.[6]

Constitutional Framework

Under the constitutional framework which Canada inherited from Great Britain, we have three separate levels of government: the legislature, the executive and the judiciary. The legislature creates law by enacting statutes. The executive is Cabinet (assisted by the public service). It administers or carries out the operations of government. The judiciary is the courts. The courts decide cases between individuals as well as litigation between government and individuals, or between levels of government.

This constitutional structure must inform any discussion about the appropriate levels of independence and accountability for administrative tribunals.

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4 An complete discussion of sources of law would include the royal prerogative; however, it has no relevance to the present discussion and can be left to one side.

5 Much law is contained in regulations, which are made pursuant to a statute. Regulations are not, however, an independent source of law; their legal force relies on provisions in the statute under which they are made.

6 For two Supreme Court of Canada cases on this issue, see *Ocean Port Hotel Ltd. v. British Columbia (Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, (2001) 204 D.L.R. (4th) 33; and *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301.

Judicial Independence

The independence of administrative tribunals is frequently measured against the touchstone of judicial independence. What is judicial independence? Why is it important?

For answers to these questions, we can look to the Supreme Court of Canada, which has stressed the importance of judicial independence in various decisions in the past 20 years or so. A number of cases referenced below illustrate how the principles of judicial independence protect judges from outside influence. An extreme example of such influence would be a telephone call from a Cabinet minister to a judge in the hope of affecting how a particular case was decided. A more complex issue is the process used by government when deciding the amount of judicial salaries.

Independence is linked to, but separate from, impartiality. Simply put, impartiality refers to a state of mind whereas independence refers to:[7]

> …a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

Although the question of judicial independence arises in several contexts, a number of the leading cases have arisen under section 11(d) of the *Charter of Rights and Freedoms* which guarantees a person charged with an offence:

> …to be presumed innocent until proven guilty according to law in a fair and public hearing by an <u>independent and impartial</u> tribunal. [emphasis added]

This constitutional guarantee of a hearing before an independent and impartial tribunal applies to accused persons and appears to have no application to administrative tribunals created by the province.

Meanwhile, the following passage from a recent Supreme Court of Canada decision explains the importance of both actual judicial independence and the perception of independence:[8]

> *The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status…. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice…. In order for the independence in the*

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7 *Valente v. Her Majesty the Queen*, [1985] 2 S.C.R. 673 at para. 15.

8 *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at para. 38.

> *constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.*

The courts have viewed this issue from two perspectives. First, they have identified the following characteristics of judicial independence:[9]

- **Financial security** has been at the core of most cases on the independence of judges. For example, a 1997 decision of the Supreme Court of Canada addressed the constitutional requirements for the process of determining salaries for provincial court judges.[10]

- **Security of tenure** refers to the protection of judges from being dismissed from office except in the most unusual circumstances. For example, a judge of the British Columbia Supreme Court can be removed from office only by the Governor General, following a request from both the Senate and the House of Commons.[11]

- **Administrative independence** has been defined as:[12]

  …control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (p. 712 [Valente]). These were defined at (p. 709 [Valente]) in narrow terms as

  > *assignment of judges, sittings of the court, and court lists, -- as well as the related matter of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions….*

  As noted above, the content of administrative independence is confined narrowly to matters that affect the adjudicative function directly.

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9 See, for example, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 and *Re Independence of the Provincial Court of British Columbia, Justices of the Peace*, 2000 BCSC 1470.

10 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra*. Provincial court judges are those judges appointed to the Provincial Courts. These are inferior courts created by the province and whose judges are appointed by the province. In contrast, judges of the provincial superior courts are appointed by the Governor General in Council. In British Columbia, the two superior courts are the British Columbia Supreme Court and the Court of Appeal.

11 *Constitution Act, 1867*, s. 99(1).

12 *Reference Re Remuneration, supra*, at para. 117.

In addition to identifying the characteristics listed above, the courts have ruled from a second perspective – that independence should be viewed from both the individual and the institutional dimensions.[13] The individual dimension focuses on the particular judge deciding the case in question. Is he or she impartial? The institutional dimension is larger and reflects the collective independence of the court (consisting of all its judges) as a whole.

Generally, judicial independence exists because of the role played by the courts. Apart from deciding cases between individual litigants, courts are the final arbiters in disputes between individuals and government. This last group of disputes includes issues arising under legislation as well as cases involving the protection of constitutionally guaranteed rights alleged to have been breached by government. In a federal state such as Canada, courts are also the final arbiters in disputes between provinces and the federal government about which level of government has constitutional jurisdiction over a particular subject matter. The Supreme Court of Canada has explained the constitutional role of the courts as follows:[14]

> *…the institutional independence of the judiciary was said [in Beauregard] to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important"…. Institutional independence enables the courts to fulfill that second and distinctly constitutional role.*

For these and other reasons, the courts have stressed and upheld the importance of judicial independence.

Natural Justice

Natural justice is an important issue when discussing the independence of administrative tribunals, especially for tribunals which exercise an adjudicative function. Natural justice has two broad components. Both relate to procedural matters leading to certain types of decisions and are not directly concerned with the substance of those decisions. A considerable body of law exists on what types of decisions attract the requirements of natural justice (or procedural fairness). Very simply, most types of adjudicatory decisions trigger the requirements of natural justice. These include, for example, decisions whether a liquor licence should be cancelled, an

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13 *Mackin, supra*, para. 39; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *supra*.

14 *Reference Re Remuneration, supra,* at para. 123.

injured worker should receive workers' compensation or a lawyer should be disciplined by the Law Society.

The first component of natural justice is that a decision maker must listen to the person affected by the decision: *audi alteram partem*, literally "listen to the other side". In practice, this usually includes, as a bare minimum, the right to know the case against you and an opportunity to be heard. The second component is the rule against bias: *nemo judex in sua causa* or "no one should be a judge in his own case". This is the rule of most relevance to the issue of tribunal independence.

These two broad rules or components of natural justice do not provide rigid answers about what should happen in a particular situation. The specific application of the rules of natural justice depends on the circumstances of the individual case. For example, natural justice may require a right of cross-examination in some cases but not in other situations. The specific application of natural justice depends in part on provisions in the statute under which the decision is being made.

Natural justice is judge-made case law. It is used by the courts when deciding whether a statutory power has been exercised in a procedurally acceptable way. Although there are different views about the formal role of natural justice, it can be viewed as a set of guidelines or rules used by the courts in deciding whether a statutory power has been exercised in the way intended by the legislature. As noted earlier, the rules of natural justice are subject to a contrary legislative intention.

There is one way in which the rules of natural justice may indirectly gain a legal ability to override even an express statutory provision. Section 7 of the *Charter of Rights and Freedoms* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

There is considerable overlap between natural justice and the procedural component of the "principles of fundamental justice".[15] The result is that at least some of the rules of natural justice may effectively have constitutional force if a particular case triggers section 7 of the *Charter*. Most decisions made by administrative tribunals do not, however, trigger the protection of life, liberty and security referred to in section 7 of the *Charter*.

[15] There is also a substantive content to the principles of fundamental justice.

Role of Administrative Tribunals: Quasi-Courts or Something Else?

The Supreme Court of Canada recently provided an unequivocal statement about the role of administrative tribunals and the legal principles that govern the degree of independence given to a tribunal by the legislature. The issue before the Supreme Court in *Ocean Port Hotel Ltd.*[16] was whether the British Columbia Liquor Appeal Board had sufficient independence. The case involved the security of tenure of board members, who were appointed "at pleasure". The Court of Appeal had concluded that board members had insufficient independence because of Cabinet's ability to terminate their appointments.[17] It set aside the Liquor Appeal Board's decision. The Supreme Court of Canada reversed the decision of the Court of Appeal.

The Supreme Court of Canada ruled that, subject to constitutional constraints, the rules of natural justice concerning impartiality and independence could be overridden by statute:

> [para. 20] *This conclusion, in my view, is inescapable. It is well-established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.*
>
> [para. 21] *Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: Minister of National Revenue v. Cooper and Lybrand, [1979] 1. S.C.R. 495, at p. 503; Law Society of Upper Canada v. French, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: Matsqui, supra (per Lamer C. J. and Sopinka J.); Régie, supra, at para. 39; Katz v. Vancouver Stock Exchange, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": Régie, supra, at para. 39.*
>
> [para. 22] *However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication…. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory*

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16 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52.

17 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control)*, 1999 BCCA 317 at paras. 33 and 37-38.

> *direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.*

The court then discussed a fundamental distinction between administrative tribunals and the courts:

> [para. 23] *Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective, guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts….*
>
> [para. 24] *Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making functions, it is properly the role and responsibility of the Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.*

After referring to the "traditional division between the executive, the legislature and the judiciary" and the resulting constitutional need for judicial independence, the court continued:

> [para. 32] *…The classical division between court and state does not … compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*
>
> [para. 33] *…I can find no basis upon which to extend the constitutional guarantee of judicial independence that animated the Provincial Court Judges Reference to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licenses are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.*

Two results flow from this decision:

1. Absent constitutional constraints, the legislature is free to adopt what institutional relationships it wishes for provincial tribunals.
2. In the absence of contrary legislation, the courts may impose a natural justice requirement that an adjudicative tribunal be independent and impartial in its decision making.

Independence of Administrative Tribunals

The concept of judicial independence does not, strictly speaking, apply to administrative tribunals. However, a number of the values and some of the content of the law on judicial independence do have application to administrative tribunals when they make adjudicative decisions. The reason is that a basic concept behind judicial independence also forms part of the rule of natural justice against bias: a decision maker should not only be impartial but also be perceived by a reasonable person as being impartial. There is a direct link between the amount of independence enjoyed by a tribunal and its members and whether the institutional arrangements create "a perception of reasonable apprehension bias".[18]

This is currently a fertile area for litigation. At the time of writing, at least two appeals are pending in the Supreme Court of Canada on this issue.[19] A frequently cited passage is the dicta of Chief Justice Lamer in *Canadian Pacific Ltd. v. Matsqui Indian Band:*[20]

> *I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in Valente are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted.*

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18 *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405.

19 *Bell Canada v. Canada (Human Rights Commission)*, 2001 FCA 161; Supreme Court of Canada Docket No. 28743. *C.U.P.E. v. Ontario (Minister of Labour)* (2000), 194 D.L.R. (4th) 265 (Ont.C.A.); Supreme Court of Canada Docket No. 28396. In addition to these two common law cases, there has been litigation in Quebec arising under section 23 of the Québec *Charter of Rights and Freedoms*: *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; and *Procureure Générale du Québec v. Barreau de Montréal*, September 5, 2001, Quebec C.A., J.Q. No. 5472.; leave application to S.C.C. pending at the time of writing (Docket No. 28910).

20 [1995] 1 S.C.R. 3 at para. 80. The formal basis for the decision in *Matsqu*i did not involve the questions of institutional independence and institutional impartiality.

Questions about the application of judicial independence to administrative tribunals arise most frequently in the context of security of tenure. There is a dearth of cases addressing how the administrative independence component of judicial independence applies in practice to administrative tribunals.

Summary

This section of the report has described the legal principles governing the independence of administrative tribunals when exercising an adjudicatory function.

First, in the absence of contrary statutory language, courts apply the requirement of natural justice for an impartial decision maker. In doing this, the courts address not only the personal impartiality of the adjudicator but also the degree of institutional independence of the tribunal. The three key factors for independence are security of tenure, financial security and administrative independence.

The second general principle is that the legislature has the power to displace the rules of natural justice – except in the rare situation when there is a constitutional constraint on this legislative freedom.

ACCOUNTABILITY

Independence is only one side of the story. Since government is ultimately responsible to the electorate for the proper operation of the administrative justice system, tribunal accountability must also be considered.

Tribunals are accountable for carrying out the functions assigned to them by their enabling statutes. This general statement does not, however, explain precisely for what things tribunals are accountable – nor does it reveal how this accountability can or should operate. Accountability is not an all-or-nothing proposition. As with tribunal independence, it is important to clarify the types of accountability under discussion.

The following is a list of matters that might come to mind when considering tribunal accountability:

- quality of individual decisions;
- timeliness of decisions;
- courteousness of members during hearings;

- ethically appropriate behaviour and compliance with a Code of Ethics;
- effective case management;
- effective management of non-adjudicative tribunal staff (if any);
- financial management.

The list is not exhaustive but illustrates the range of matters for which some degree of accountability might at first be considered. Some of the matters relate directly to the adjudicative function in individual cases (quality of decisions, timeliness of decisions and courteousness). Others relate to individual cases but also have broader application (ethically appropriate behaviour and effective case management). Others relate primarily to management of the tribunal as an organization (management of non-adjudicative staff and finances).

Accountability can be exercised in several ways. For example, there could be public accountability for the quality of individual decisions; for example a decision maker could be required to defend the merits of a particular decision. This mode of accountability would be extremely problematic since it would strike at the core of independent decision making. The essence of quasi-judicial decision making is that competent decision makers are both entitled and required to make decisions as they see best – subject to any rights of appeal or judicial review which may be available to a party unhappy with a particular decision. On the other hand, accountability for rendering timely decisions, courteousness and ethically appropriate behaviour are matters for which individual tribunal members can appropriately be held accountable through performance management carried out by the chair of a tribunal.

At the tribunal or organizational level, there are a number of matters for which a level of accountability to government can be appropriate. These matters include:

- use of an effective case management system;[21]
- management of non-adjudicative tribunal staff (if any);
- financial management.

One method of structuring accountability for these matters is for legislation to clarify that the chair is head of the tribunal, not merely the first among equals.

[21] It is probably appropriate that there be accountability for ensuring that an appropriate case management system is in place; however, the design of the system should be in the hands of the tribunal since it has a direct bearing on the tribunal's decision making process.

POLICY CONSIDERATIONS

The law on tribunal independence gives considerable latitude to the legislature in achieving a balance between independence and accountability. It is therefore critical to address the following question: What principles should be followed when the province decides on the appropriate degree of independence and accountability for administrative tribunals?

The answer to this question depends in part on how one characterizes the role of administrative tribunals – a process which takes into account two realities.

First, tribunals are not homogenous. For some, their only role is adjudication of individual cases. For others, their primary task is regulatory, although they may also have a significant adjudicative component to their mandate. For yet others, an important part of their role is policy related and at least one tribunal is explicitly stated to be an agent of the Crown.[22] This variation has implications when deciding on an appropriate institutional relationship between government and the administrative tribunals it creates.

The second reality that must be considered is the nature of tribunals' adjudicatory function. Views about this vary. At one end of the spectrum are those who see tribunals in their adjudicatory function as being court-like in many respects. For example, the landmark 1957 *Franks Report* stated:[23]

> *Tribunals are not ordinary courts, but neither are they appendages of Government Departments....We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration....the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.*

This approach is also reflected in the recent English report on the administrative tribunal system in that country.[24]

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22 *Securities Act*, R.S.B.C., c. 418, s. 5(1). In addition, section 3(11) of the *Medicare Protection Act*, R.S.B.C., c. 286 contains the following provision concerning the Medical Services Commission:

> The commission may sue or be sued in its own name or in the name of the government in any civil action respecting the commission or a special committee, but any proceeding by or against the commission is binding on the government, and the *Crown Proceeding Act* applies accordingly.

23 *Report of the Committee on Administrative Tribunals and Enquiries*, (1957) HMSO, Cmnd 218, at para. 128.

24 Sir Andrew Leggatt, *Tribunals for Users One System, One Service: A Report of the Review of Tribunals by Sir Andrew Leggatt* (2001); available online: http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm.

At the other end of the spectrum are comments by the Attorney General of Australia about a ministerial power to issue directives to a tribunal reviewing government decisions:[25]

> *Well the criticism of that I think fails to recognise that these are merits reviews of decisions made by the executive. The executive operates under government policy. Ministers and Cabinet made government policy, there is no reason why on a merits review, policy shouldn't be relevant to the review process as it is to the original decision making. Ministerial directions to the tribunals will be able to reflect the relevant policy involved in the area of decision making.*

Chief Justice Lamer made a somewhat similar comment several years ago when he described administrative tribunals as:[26]

> *"Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government...*

Somewhere between these two extremes is the Supreme Court of Canada's recent description of the primary function of administrative tribunals as policy-making, even if policy implementation sometimes occurs through making quasi-judicial decisions.[27] Interestingly, this comment was made in the context of an appeal board whose statutory mandate was limited to deciding questions of law or natural justice.

Policy Principles

The crux of the issue is the need to maintain independence of decision making for adjudicative or quasi-judicial functions, while providing accountability to government for overall tribunal operations. Although decision makers should not be held accountable to government for individual decisions, even a purely adjudicative tribunal must, at one level, be accountable for sound management of the public financial resources devoted to it. Government is ultimately accountable for management and operation of the administrative tribunals which it has created.

The following principles are among those which should inform government policy in this area:

- Independence of adjudicative decision making and public accountability for tribunal management are both important. Government should take steps to foster both.

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[25] This comment was made concerning legislation for a proposed new review tribunal. See the online transcript of "The Law Report" on Radio National: http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s195024.htm.

[26] *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.R. 854 at para. 13.

[27] *Ocean Port*, *supra*.

- In discussing independence, it is important to distinguish between independence with respect to decision making in individual cases and overall institutional independence.
- The appropriate balance between institutional independence and accountability may vary somewhat among tribunals. This variation may be affected by factors such as the following:
  - relative importance of the tribunal's adjudicatory function within its overall mandate;
  - size of the tribunal;
  - whether the tribunal is a part time or a full time operation with a number of staff;
  - whether the tribunal hears cases in which government is a party or whether it hears cases only between private individuals;
  - links (if any) between the tribunal's policy making function and the policy creation function of the relevant line ministry.

The single most important policy principle is probably design of the appointment process. An open and merit based appointment process helps ensure public confidence in the competence and quality of decisions rendered by tribunals. Security of tenure and financial security of tribunal members are factors in achieving independence of decision making. Both matters are addressed in a separate report and should be dealt with appropriately by legislation and operational policy.

RECOMMENDATIONS

In order to provide a foundation for the development of a shared understanding about the role and purposes of the administrative justice system, it is recommended that government adopt the following guiding principles, namely that:

Government base its ongoing relationships with administrative tribunals on a commitment to the principles of:

- **independence for administrative tribunals in adjudicative decision making;**
- **public accountability for administrative tribunals through the adoption of modern and innovative management practices.**

Government reinforce the decision making independence of tribunals by:

- **continuing to respect decisions of tribunal members in individual cases;**
- **formalizing relationships with tribunals through clear legislation, policies, practices and agreements;**
- **establishing standard terms and conditions of appointment;**
- **acknowledging the role of organizations like the British Columbia Council of Administrative Tribunals and the Circle of Chairs;**
- **providing public information and education on the role and purpose of administrative tribunals.**

Government strengthen public accountability for administrative tribunals by:

- **implementing an appointment process that is open, transparent and merit-based;**
- **establishing a management framework that is proportionate to the scope of the tribunal's activities and sets out clearly the respective roles and obligations of both government and the tribunal.**

In establishing the level of independence and accountability that is appropriate to the diverse mandates and operating circumstances of individual tribunals, government should be guided by the following additional principles, namely that:

- **tribunals should be accountable for producing fair and competent decisions in a timely fashion;**
- **public confidence in the fairness, quality and impartiality of tribunal decisions should not be undermined through unnecessary or inappropriate government interference in tribunal operations;**
- **government and tribunals should have shared obligations for using in a prudent manner public funds allocated to tribunal operations.**