F O C U S

Towards judicialisation or dejudicialisation

One major current project of the Administrative Review Council concerns specialist tribunals. The Council recently held a series of meetings with members of the Social Security Appeals Tribunal, the Veterans Review Board, the Student Assistance Review Tribunal and the Immigration Review Tribunal designed to identify areas for coordination and cooperation between tribunals and any individual or mutual problems with which the Council might assist. The meetings were most productive. Their consequences will include a longer term ARC project on the constitution and procedures of tribunals and the relationship between tribunals and government.

The following article provides a useful setting for that project and shows that many of the broad questions about the role of tribunals in Australia also exist elsewhere in the common law world. The article is an edited version of a paper presented by Ms Rosalie Abella, Chair of the Ontario Law Reform Commission, at the fourth Annual Conference of Canadian Administrative Tribunals in Ottawa, May 1988. It is reproduced here from Vol.22, No.3 of the Law Society of Upper Canada Gazette, the Journal of the Law Society of Upper Canada, September 1988, with the permission of the author. At the time the article was written, Ms Abella was Chair of the Ontario Labour Relations Board.

This is a good news/bad news topic. The good news is that it shows that tribunals have arrived. Twenty years ago, there probably could not have been a conference for administrative tribunals. They were such an amorphous collection of institutions that it would have occurred to very few that they were worthy of singular examination.

The various enabling statutes described what these tribunals were supposed to do: regulate broadcasting, enforce human rights, compensate victims of crime, control environmental intervention, monitor immigration, or promote harmonious labour relations. How they were to do it developed interstitially, from tribunal to tribunal, case to case, judicial review to judicial review. The tribunals were each designed to oversee a specialised area about which they were presumed expert, and they were more or less granted hegemony over decision-making in that area. By and large, they were understood to have authority to regulate their own conduct and procedure, a mandate left flexible to guarantee expedition.

Now the bad news. Although tribunals have become entrenched and assert competence - no one seriously questions their right to exist - they have become increasingly confused over what their role is and how they should play it.

The topic, towards judicialisation or dejudicialisation, means that tribunals are having a mid-life identity crisis. It means they don't know whether they are too formal or not formal

enough. It means they don't know whether to behave more like judges and courts, or less. It means they don't know whose feelings to be 'in touch' with. And the reason is that they spring from so many varied sets of expectations, that having emerged from the euphoria of creation and gone through the purgatory of judicial censure, they have matured into young adults who have moved into their own apartments but don't quite know how to furnish them. Although tribunals feel mature, they are not clear what the accountability lines are. Without a clear sense of direction, it is very difficult to be purposeful. Unless they understand their purpose, they cannot begin to answer the question of how they do it.

Let us start by analysing the different expectations that created them. First, governments. With the development of a liberal democratic state, certain assumptions arose not only as a reaction to the economics of the Industrial Revolution, but also as a response to the social and political manifestations of more sophisticated democratic theories. The democratic state came to be seen as responsible not only for maintenance, but for apportionment and ultimately reapportionment as well.

Distributive and redistributive justice became the new catchwords, and governments found themselves obliged to cater to newly sensitised constituencies competing for attention in a modern industrialised state. As new concerns were voiced, and their legitimacy was acknowledged, the demand inevitably grew not only for their recognition, but also for their effective implementation. Essentially they were cries for policy responses to a variety of issues - stock market manipulation with the depression, human rights violation with increased population heterogeneity after World War II, environmental abuses with increased industrialisation, labour relations tensions with the rise in unionisation, and neighbourhood and municipal decay with increased urban population density. Each of these areas called for its own 'Charter of Rights' and with it, a mechanism for its enforcement. The courts, however, were general legal experts, crowded with traditional disputes and generally understood to function encumbered by a lumbering and lengthy methodology of dispute resolution. The bureaucracy was policy-oriented, and generally understood not to decide entitlements but to develop policies and frameworks from which these entitlements would flow. What was needed was a model that incorporated policy yet executed it systematically in accordance with legal principles.

The result was tribunals - a hybrid creation modelled on nothing in particular but incorporating a legal and policy ideology. To deal with stock markets we got a Securities Commission, a Human Rights Commission for racism, an Environmental Assessment Board to prevent environmental pillaging, a Labour Relations Board to protect collective bargaining, and a Municipal Board to promote responsible urban growth. Tribunals were created to fill a vacuum. They were a policy response and a policy tool. Government set them up and held them out as specialised experts to further its policy objectives by giving them the authority to make decisions exclusively in a particular area. It funded them, chose them, and defined their policy base. Go forth and decide, it said.

So they did. And here they confronted the legal profession, lawyers and judges. This profession was raised and weaned on a

very strict diet - no policy, no informality, and no change. Creativity, like dessert, was permitted, but not to excess. Lawyers were very comfortable in their familiar institutions, the courts, and believed in their omniscience, as opposed to their infallibility. The procedures were complicated but functional, even malleable.

What to the public seemed quixotic and arcane, was treated by the profession as esoteric but erudite. The credo of the profession was that to be court-like was to be quintessentially just. The clearly delineated procedures provided a predictable framework within which to resolve and decide disputes. It took a long time and often cost a lot, but the product was a refined one, and few lawyers left the hearing feeling bereft of the opportunity to use the system to its full advantage. The system was a tightly regulated one but in the end provided a full arsenal of machinery from which to choose the best strategy.

And the system was hierarchical. While to the public a court is a court is a court, to lawyers there were degrees of justice and prestige attached to each level. This is a difficult concept to explain to someone whose freedom or family life is being disposed of in what has been characterised as a 'lower' court, and possibly the only one to which he or she has access, but it is an unshakeable truism in the profession.

It is no accident that the field of law known as 'Administrative Law' tends to be what the courts decide about tribunals through judicial review, rather than about the tribunals themselves.

Needless to say, the profession's veneration of the courts, its commitment to this process, and its homage to the hierarchy of respectability leaves tribunals practically off the map. Lawyers are confronted in tribunals with a quasi-court whose policy origins they are not trained to understand. They are on a never-ending crusade to twist the tribunal into something they know and understand better - the court. They seek more structure, more process, and greater formality. And in this, they are ably assisted by the judiciary.

Through the judiciary we have accrued a body of jurisprudence which at its heart offers commendable guidance -namely, parties are entitled to know the case they must meet and have the opportunity to meet it. This principle enunciated through judicial review is in essence a call for natural justice.

Like other legal terms of art, natural justice is masterful in its capture of the spirit of the general principle while allowing for case by case explication. And it is a principle with which no one can or should quarrel. Tribunals are, after all, in the business of making decisions that affect people's rights and responsibilities. They are called upon to make findings of fact and to weave them with law and policy. They ought not to be permitted to do so without affording all affected parties an opportunity to have their say in a fair and impartial way. And so, in response to judicial supervision which expects decision-making bodies to behave according to judicial principles of fair process, tribunals have increasingly tightened their procedures by making them conform more closely to the judicial model.

This has left the tribunal's public, the consumers, somewhat bewildered. They understood tribunals to be an alternate form of dispute resolution to the courts, less formal, less cumbersome, more expeditious.

Instead, they find themselves carried along on a wave of procedural wrangling which, their lawyers explain, must necessarily take weeks rather than the days they had expected. Instead of learning quickly what the outcome was after these weeks of complex evidence and argument, they find themselves waiting months to get a voluminous decision any law review would be proud to print. Yet the public is only interested in the last page where they can see if they won. Where, this public asks, is the expeditious forum they expected, and why do they awake to find themselves in a court reincarnation they came to the tribunal to avoid.

This tapestry of conflicting expectations leaves tribunals in an impossible position. They lack as yet the generations of tradition the courts enjoy and are therefore subject to a microscopic scrutiny no longer visited upon that forum. When a controversial decision issues from a court, the opprobrium is hurled at a particular judge, not the court. Yet when a questionable decision emerges from a tribunal, it is the entire tribunal which is called into question. They are therefore made to feel an institutional fragility and develop a 'Caesar's wife' reaction. But no decision-making body can be beyond reproach. In every single case, there is a disappointed loser.

Every judge understands this. But this does not necessarily mean the decision was wrong - very few decisions survive the measure of absolute right or wrong. The facts, the impressions, the principles, the policies and the laws come out looking better for one side or the other. A tribunal is paid to make these judgment calls, whatever their sensitivity, and cannot allow itself to recoil from making them freely out of fear that an individual party, lawyer, judge, minister, or bureaucrat will question its correctness. What is needed, however, is a clearer sense of when to be nervous about what kind of criticism, and why.

First, the parties. One party will always criticise the decision. Someone always loses. There is a discretion inherent in any decision-making but so long as it is exercised fairly, there is no need for the tribunal to worry. If the process was fair, if everyone had a reasonable opportunity to make and meet the case, the concern of an unpersuasive litigant should not generate excessive anxiety.

As for the lawyers, tribunals must accept that they perceive a natural affinity between decision-making and a more court-like forum. What they can and should expect in common is politeness, impartiality, and a reasonable opportunity to be heard on relevant issues, and I stress 'relevant' because a fair hearing is entirely consistent with one controlled for relevancy. What they see as reasonable, however, may not be consistent with the less formal model of tribunal adjudication. Not every rule of evidence need be followed, and not every case calls for a 75 page legal analysis. Lawyers and their clients have every right to know the reasons behind a decision, especially if they lost, but they can just as easily learn them summarily in length and time - as they can awaiting

a definitive legal exposition of a routine judgment call. Oral decisions and bottom lines with reasons to follow are just as effective in most cases, and often preferable, in allowing the parties to get on with their lives. Tribunal processes may not be identical to the courts, but their objectives may not be either. Both are legal creatures, but tribunals are siblings, not twins, of the courts. They have a separate and unique character in pursuit of a common cause - just decision-making.

Perhaps it calls for a changed perspective towards tribunals from the profession rather than a change in the tribunals to try to fit an inconsistent perspective.

From the judiciary, we have been reminded of the need for impartiality, fairness and jurisdictional accuracy. Their greatest error in the current context, however, stems from their challenge to the correctness of tribunal decisions. They may be the masters of a more refined process, but they are not masters of the areas that tribunals administer. The courts are generalists. Tribunals are specialists. They presume no exclusivity of knowledge but they are, most of them, presumed by statute to be exclusively and finally responsible for decisions within their mandated speciality. The concept of judicial review works best when it foregoes supervision of correctness and restricts its examination to natural justice and jurisdictional questions. Natural justice does not mean replacing a decision with which a judge disagrees with one more compatible with his or her own proclivities. It means monitoring for violations of the basic tenets of procedural justice, bearing in mind that tribunals administer both law and policy and do so with an experience borne out of expertise and constancy.

But because the principle of judicial deference is only selectively applied by courts across the country and from judge to judge - some defer, some defer sometimes - tribunals, even those shielded with the armour of privative clauses, fret nervously over the implementation of processes that might best suit their own needs but might not survive the rigours of judicial inspection. The absence of judicial consistency in approaching tribunals has the potential to impair creativity, inspire counsel to gamble on a different result through the courts thereby causing delay tribunals were meant to avoid, and jeopardise the tribunal's reputation and credibility as the final arbiter it was intended to be.

Minister and bureaucrats find themselves in the most awkward position. Tribunals, because they are quasi-judicial, expect independence as the courts know it. Because they are policy instruments, governments too often expect them to be accountable for their decisions as either reflective or destructive of the policy objectives.

It must be clearly understood that while governments have the right, through law and regulation, to design the framework policy, tribunals have the exclusive responsibility for interpreting the application of that policy in each case in accordance with their statutes. Ministers and bureaucrats are responsible for ensuring the necessary resources and supports to permit the tribunal to execute its mandate effectively. They have no responsibility and cannot be seen to have responsibility, for the outcome in any given case. Criticism

from this quarter therefore may produce anxiety in a tribunal, but it cannot be permitted to inspire a contraceptive decision-making mentality.

The bureaucracy thus sees tribunals, in their policy role, closer to government; the lawyers, in their legal decision-making role, see them closer to the courts. Though they are close to both, in character they are closer to and should be treated more like the courts. The policy role gives them flexibility and wider discretion, but it does not make them into government departments. They were meant to replace bureaucratic decision-making, not to provide a parallel route.

And the legal role, while it gives tribunals a duty to behave with procedural fairness and within their jurisdiction, does not oblige them to be mimics of the courts. To the extent then that the topic of this paper asks whether they should be as formal as the courts or less, the answer is that they are bound to provide a fair hearing, but that the integrity of the process and institutions cannot be measured against the barometer of the courts' rules. Their integrity rests on a unique concept of process, one that is expeditious and can best serve the integrated needs of law, policy and the delineation of rights. It is for each tribunal to assess. What works for the Labour Board, for example, may not be appropriate for the Freedom of Information Commission. It is not a question of moving towards or retreating from judicialisation. It is a question of remaining true to the organisation's own character, without ignoring the basic values of the court's process, but without ignoring our own either.

Having placed tribunals squarely on their own perch, and not necessarily on the continuum between government and courts, I want to conclude with some observations about why certain attributes of the courts have led to their respected place in the justice system and why they should be added to the identity of tribunals. Having argued that tribunals and courts have a different personality, I want now to argue that they have basically the same character. In this sense, we should be making strenuous efforts towards those features of judicialisation whose absence in tribunals threaten not only their integrity, but their credibility and capacity to meet their objectives.

Tribunals are, after all, the final 'courts' in their respective areas. The public expects from them the impartial application of their expertise as policy and legal analysts, without undue interference from the political process. Just as they would find unconscionable intervention by a government official or Minister in a court case, so it would offend them fundamentally to perceive a collusive role for government in tribunal decision-making.

The test for government thus becomes a simple one - if the request or practice or response would be inappropriate in dealing with a judge or chief justice, then it would be equally violative of a tribunal's integrity in dealing with an adjudicator or tribunal head. If they would not impose Freedom of Information, the Ombudsman, or performance appraisals on the courts, then it is equally unsuited to the tribunals because of the character they share as impartial independent adjudicators. To treat them as part of the bureaucracy defeats

the core of their essence - they are public servants not civil servants, and ought to be treated as such both as individuals and as institutions.

This need for independence in theory and in reality calls for examination of other aspects of the tribunal make-up. One of the cornerstones of the judicial model is tenure. Once appointed, a judge need never fear that an unpopular decision will affect his or her livelihood. At the heart of judicial independence is the capacity to make courageous judgment calls without fear of political consequences.

It takes herculean feistiness for tribunal adjudicators to develop decisions of a potentially controversial kind - and in sensitive areas these are often the only kind they can make - when they know that at the end of the political telescope through which they are observed, is a person with the power to renew or not renew a three or five year appointment. And even if they individually or collectively overcome this awesome obstacle, will the public perceive them as capable of deciding without fear of political repercussions? Perhaps the answer is not life-time appointments, but it cannot be in a tribunal's long-term interests to have adjudicators who have built up experience and expertise disappear routinely through the revolving door of brief appointments. A sense of institutional commitment and history is a critical component of long-term public respect, regardless of whether the public agrees with the latest decision.

Whatever longer term of office this may call for, it requires far greater sensitivity and care in the appointment process than many tribunals have traditionally endured. Tribunals are as effective as their adjudicators, and cannot easily withstand the onslaught of intermittently qualified, however well-meaning, appointments with no background or potential skill in the specialised areas. They needn't be disqualified for political or partisan affiliation, but neither should this be the determinative qualification. The public will only have confidence in tribunals if they are not seen as the dumping grounds for post-electoral rewards. In this need for careful appointments tribunals share a concern with the courts. But the court appointments are tenured and tribunals are not. When partisan rewards and the prospects of renewal combine, the public may feel a lingering suspicion in tribunals about independent decision-making not generally attributed to the courts.

It is not just the image, tenure, and independence problems that fetter tribunals' integrity, it is remuneration as well. Given all these other concerns, it is additionally difficult to attract the high calibre appointee tribunals require if the remuneration is inadequate. That is why judges are well paid. Salaries send signals of worthiness, whether we like it or not. We tend to value ourselves and find ourselves valued in direct proportion to the salary level our position attracts. If tribunals are a central feature of the adjudication system, and they are, then the remuneration should reflect respect for this role. There are of course hundreds of civic minded people currently content to accept the office and we should be grateful for their willingness to serve. But they should not be required to do so without commensurate financial recognition for the importance of the task.

It is humiliating and humbling both to be paid inadequately and to lack an effective, respectable mechanism for challenging the inadequacy. If we want quality decision-makers, we must provide quality remuneration and working conditions.

And so the circle closes. Tribunals struggle to maintain credibility through processes and decisions that suit their personality and character. But they are only as credible as the public perceives them to be and the indicia for public approval like independence, tenure, qualified appointments, and equitable remuneration are not yet sufficiently in place to generate the continued recruitment of the quality of person integrity and image require. Towards judicialisation in process: only to the extent our institutions need it to provide fair, expeditious, expert decision-making. But towards judicialisation in character, by all means. Not to do so puts tribunals at great peril.

This paper is about the ecumenism of the courts and the secularism of tribunals, and argues for separation of church and state. The orthodoxy of the courts' principles and the reformism of tribunals each work for their respective followers, but neither is the only paradigm. Tribunals undoubtedly have to try harder, but their quest for legitimacy was won a long time ago. Now they must refine the instrument, keep what is apposite from the orthodox inheritance, but remain true to their reform purpose.

Administrative Review Council

LETTERS OF ADVICE

Since the January 1990 issue of Admin Review the Council has provided letters of advice on the following issues:

- Customs duty - payment under protest
- The Migration Legislation Amendment Act (No.2) 1989

PAPERS

The Council has also provided a submission on the Costs of Justice to the Senate Standing Committee on Legal and Constitutional Affairs.

CURRENT WORK PROGRAM - DEVELOPMENTS

Broadcasting. Further work is being undertaken by the Communications Law Centre on a discussion paper on inquiry procedures of the Australian Broadcasting Tribunal and review of its procedural decisions.

Community Services and Health. The Council has engaged a consultant to assist in preparing a discussion paper on decisions under Federal/State funding programs. The discussion paper will cover the Supported Accommodation Assistance Program, the Home and Community Care Program, the Disability Services Program, hospital funding under Medicare, and the