OPENING PLENARY
Administrative Governance Reform versus Administrative Justice Reform

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Michael Gottheil

As Executive Chair of the Environmental and Land Tribunals of Ontario, Mr. Gottheil was able to describe the opportunity and challenge to explore administrative justice reform from the perspective of a structural and governance reform initiative. While structural reform is new to Ontario, it is not so in other jurisdictions. Both British Columbia and Quebec have undertaken structural reform to their administrative justice systems over the years. In British Columbia, reform has taken place in the form of the establishment of the Administrative Justice Office and in Quebec, the amalgamation of administrative tribunals. Structural reform also appears to be a global phenomenon, with the United Kingdom, Australia and New Zealand having produced comprehensive reports on clustering or amalgamation of administrative tribunals.

When looking at the work that has been done, such as studies of policies or the initiatives of structural reforms around the world, it is fair to say that governments have generally approached the question of administrative justice reform from a perspective of governance and accountability. Governments see tribunals as institutions of governance. They see tribunals as providing an important public service. They see agencies as delivering justice in dispute resolution services to broad cross sections of the public. The administrative justice sector in most jurisdictions is a highly visible face in the public service, and often comprises a significant budgetary component of the public service. Governments are expected to be responsible for how the administrative justice sector operates. They are responsible for ensuring that public service is delivered in an effective and efficient way.

But to those who are interested in administrative justice, there is more. There are other objectives such as access to justice, fairness, independence, and “subject matter effectiveness”, i.e., whether the outcomes are accurate and reflective of the policy and statutory objectives of the legislation under which the tribunals are established and which they mandated to fulfil. These administrative justice objectives are not necessarily inconsistent with administrative governance reform. In some ways, governance and structural reform can assist in fundamental, higher principles of administrative justice. Governance reform is not different from and is probably a subset of the broader concept of administrative reform. In other words, governance reform is necessary but not sufficient in terms of how we think about reform in administrative justice.

Heather McNaughton

Ms. McNaughton spoke about administrative justice from a British Columbia perspective, in the context of what she called a “promise unfulfilled.” Administrative justice reform in British Columbia was a product of a number of factors which Ms. McNaughton referred to as the “perfect storm for reform”: an Attorney General who had an interest in law reform and was very influential at the Cabinet table, a government with a strong public mandate facing an economic crisis which led to the need to access the relevancy of all government program funding, a

mandate to cut red tape, and an administrative tribunal committee composed of members that had been encouraging reform for some time.

In July 2001, BC's then Attorney General announced what he thought of as a "thoughtful and comprehensive review" of the administrative justice system from a broad policy and legal perspective. The stated objective of the Administrative Justice Project was to ensure that administrative agencies met the public's needs, that they had open and transparent processes, that the agencies had modern and relevant mandates, and that the government provided a legislative and policy framework for administrative agencies to carry out their work. The Administrative Justice Project led to the commission of a number of papers and submissions which eventually led to the establishment of the Administrative Justice Secretariat, made up of representatives of government, tribunals and the public to coordinate and advise government on administrative justice issues.

Unfortunately, the lesson learned in the process is that the success of a project is very much tied to the personality of the Attorney General. When the Attorney General changed, in the absence of a statutory basis or requirements for the Administrative Justice Office, its role was gradually watered down. Eventually the office was wound up in spring 2008.

This is very troubling in BC, as exemplified by a number of issues that have arisen in the jurisdiction. Efforts to consider whether the standard of review as found in the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 should be amended in light of the Supreme Court of Canada decision *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 have been stalled. There is no examination of the impact of the Supreme Court of Canada decision *R. v. Conway*, [2010] 1 S.C.R. 765 on the *Administrative Tribunals Act* in relation to a tribunal's ability to grant constitutional remedies. The government has not taken steps to address s. 14.9(3) of the *Public Sector Employers Act*, R.S.B.C. 1996 c. 384, which allows the removal of a tribunal member regardless of the length of his or her term on payment of less than one month's salary. Not only is security of tenure not protected in BC, the administrative justice sector in BC continues to face problems such as the lack of merit-based reappointment and difficulty in attracting and retaining qualified candidates.

Philip Bryden

Mr. Bryden talked about comparisons in terms of tribunal reform not just in Alberta and BC, but also in New Brunswick where he was the Dean of the Faculty of Law of University of New Brunswick for five years. His discussions centred around two questions.

1) What is the relevant sector for tribunal reform?

There are three different models:

i. In New Brunswick, there is a very weak concept of the administrative justice sector being a sector. Tribunal reform, to the extent that it takes place at all, takes place on a tribunal-by-tribunal basis. The identification of tribunal members is more with their sector in subject matter terms than across the concept of administrative justice. For example, the Workers' Compensation Board focuses on education and activities in the workers' compensation sector. This is fairly typical in smaller jurisdictions.

ii. There is a sense that administrative tribunals are special and have justice characteristics to them that make looking at how they should be structured and how they should operate distinct from other forms of government agencies.

iii. In Alberta, the *Public Agency Governance Act*, S.A. 2009, c. A-31.5--legislation that has been enacted but not yet proclaimed--brings about governance reform that does not specifically target administrative tribunals. There is recognition within the reform that there is something special about adjudicative tribunals, with certain provisions in terms of accountability modified because of the independence principle, but adjudicative tribunals are sinply lumped in with other agencies such as Crown Corporations or the Board of Governors in the University of Alberta. There is a sense that they are part of an overall sector rather than something distinct.

2) What are the commonalities and differences in the British Columbia and Alberta Reform Schemes?

There are certain commonalities to the Alberta and British Columbia reforms in the sense that the issue of personnel is seen to be significant. Merit-based appointment systems are seen to be a central aspect of administrative governance reform or administrative justice reform. Certainly, as exemplified by the British Columbia regime, security of tenure is a shortcoming, but the idea of who personnel are and attracting the right types of people for the positions is also a common theme in administrative justice and governance reform. There is also a desire to make the accountability framework more transparent in both the Alberta and British Columbia regime.

The subtle difference between the Alberta and British Columbia reform lies with the efforts to explicitly protect independence. This is not a central theme in Alberta, but there is a consciousness in British Columbia that it is important to think about what type of regime is appropriate for administrative tribunals.

Building on observations in BC, what are the factors that would drive change or enable it to continue?

Heather McNaughton

In most cases, Canadian reform has not come about because of a public outcry for reform. The only time the press seems to be interested in administrative tribunals is when there is a hint of scandal. Reform usually happens when an interested minister is willing to take charge and to expend his or her political capital on an issue that is unlikely to gain him many votes on election day. He has to hold the view that things are badly broken and need to be fixed. Government reform is usually a response to anecdotal discussions as opposed to qualitative evidence as to whether the system is functioning well; sometimes it is a response to specific cases. As a result, reform usually happens on a tribunal-by-tribunal basis and wholesale reform is unusual.

The challenge for reform is to get it on the government agenda and keep it on there. It is better to table it early in a political mandate as opposed to later. Also, the focus of reform is often on cost-savings and efficiency. This is how a minister is able to sell the reform. But sustainability comes from a legislative framework calling for continuing review and having responsibility for that sustainability vested in a person who has the political support to keep administrative justice reform alive. Without that, the risk is that any gains will be rolled back.

Phillip Bryden

Having organizations does make a difference, because it provides opportunities for discussions with ministers on an on-going basis. An interesting point to note is the extent to which administrative justice reform can be seen to be an Attorney General's agenda. Because tribunals historically crossed all sorts of ministerial boundaries, once it is out of the Attorney General's ministry, the justice dimension drops in consciousness significantly. Having an Attorney General champion makes a difference in keeping the justice dimension on the agenda.

In 2007, during the launch of the Administrative Justice and Tribunal Council in the UK, Lord Justice Carnwath was struck by the degree of consensus as to both the need for reform and objectives of that reform. Has reform across Canada been a reinvention of theories of administrative justice reform, or have we done a fundamental re-analysis of the core administrative justice principles? Have we reached an agreement on a broad set of principles that are universally applicable?

Phillip Bryden

Geographically, reform has not reached smaller provinces such as New Brunswick, Prince Edward Island, and to some extent, even Saskatchewan. Reform is something that you find in jurisdictions where there is a critical mass of full time adjudicators so that the administrative justice system is seen as a significant part of the operation of government.

In terms of the shape of reform, there is only partial agreement. There is still fundamental disagreement on whether tribunal reform is justice reform or governance reform. There is also fundamental disagreement on the level of independence that ought to be afforded to tribunal members.

We have not as a society developed a principled account of where the lines ought to be drawn. There is movement in one direction or another, but notwithstanding some valiant efforts to try to identify the principles, but they are not generally shared by the community.

Michael Gottheil

There is some consistency in administrative justice reform. Some of the unifying features of reform are: identifying the justice dimension and placing it front and centre, recognizing that smaller tribunals do not have enough resources, ensuring tribunals have sufficient means to sustain themselves and recognizing the important of merit-based appointments.

However, as we move toward reform, some of the conceptual, theoretical realities of tribunals start to emerge as we start to organize reform around the principle of administrative justice. The legal reality of tribunals is that they are a branch of the executive as opposed to the judiciary. Tribunals only have power delegated to them by the legislature. Those legal realities start to butt up against the broader principles that we are trying to achieve.

For example, tribunals may be trying to implement competitive merit-based appointments, but tribunals have to develop mechanisms such as interviewing applications, screening applications, and performance assessment tools in order to make that a reality. Developing these mechanisms takes time and resources. You may start to realize that the old way of doing things (e.g. referrals) is much easier and less time consuming. To meet the principle of justice, these are some realities with which tribunals must grapple.

We are in a period of change and harsh economic reality. Are we vulnerable to losing a sense of justice and just focusing on the bottom line?

There was a consensus among the panel members that tribunals now have a focus on efficiency that places too much emphasis on quantitative measures rather than qualitative measures. Mr. Gottheil commented that there is too much of a singular focus on efficiency, how fast a case can get to hearing and how fast a decision is written, but there is little evaluation of whether the outcomes at a substantive level are accurate and are meeting legislative objectives. Mr. Bryden thought this was because we tend to be driven by our sense that doing a good job is easier to measure as opposed to things that are important. The number of days to get a decision out is easy to measure. The quality of decisions is hard to measure. Ms. McNaughton concurred with both panelists and expressed her concerns about quantitative measures being the only measures that will generate money for the system.

What is the minimum degree of independence for tribunals? What would be desirable in light of the legislation and the Ontario Bar Association Report (in response to the *Administrative Tribunals Accountability, Governance and Appointments Act*?

Michael Gottheil

Rather than outlining the minimal requirements, there are three thoughts for us to consider when we think about independence in the administrative justice system:

1) There is a distinction between adjudicative independence and institutional independence. Adjudicative independence refers to adjudicators being free to make decisions from influence and making decision based on facts and law. Institutional independence refers to whether the government is interfering with the independence of a tribunal as an institution, which would undermine the confidence that the public would have in the administrative of justice as provided by that tribunal.

2) Adjudicative independence is not a "right" for the adjudicator, but a right that belongs to the parties. It is a right that exists that along with fundamental procedural fairness principles such as equality before the law and the obligation to provide clear and intelligible reasons. Seen in that light, adjudicators and tribunals as institutions have a responsibility to ensure that those principles are protected and exemplified in the work of the tribunal.

3) Tribunals are in a different position than members of the judiciary. Members of the judiciary are not responsible for the operations of the courts. Tribunals are not only responsible for adjudicative decisions, but also their operations. But because of principles such as access to justice and timely dispute resolution, tribunals may in fact create service standards or mechanisms that seem to infringe on adjudicative independence.

When we talk about a minimum standard, we have to ensure that adjudicators are protected and insulated so they can make decisions based on facts and law. But from an institutional perspective, it is legitimate for tribunals to enhance access to justice by putting in place standards and procedures. There is a legitimate responsibility for tribunals and government to ensure accessible high quality justice.

What are some legitimate means for the government to influence the administrative justice sector that would be acknowledged as proper policy tools?

Heather McNaughton

Ministry approval is now a requirement in various policy initiatives. What is apparent from the OBA report is that many of these approval levels are exactly situations that tribunals were facing for a number of years. For example, Ms. McNaughton instituted a complaint process at the BC Human Rights Tribunal with respect to members of the public who were unhappy about how they were treated at the tribunal. She set up standards with respect to what the public can expect. She consulted with the community about amendments to the rules for things that they could be doing better. She did not require ministerial approval for these initiatives at the time, but similar initiatives would require ministerial approval now.

By making it transparent in legislation, the public is now asking whether this is what we want as the government's or the ministry's relationship with tribunals. Members of the public now know about the direct involvement of the minister. This results in challenges to institutional independence of administrative tribunals. Transparency allows counsel to make arguments that they were not able to make before when things were not transparent.

Phillip Bryden

There is an irony in that by making things visible, it makes it easier for tribunals to be scrutinized and exposed when many of these things have been part of the on-going operational relationship between ministries and tribunals.

Michael Gottheil

Governments should change legislative policy by amending legislation. However, governments have tried to control tribunals through other means such as the removal of tribunal members. This type of control stems from the old concept that tribunals are within the line of a particular ministry and that they are one of the aspects to delivery of the government program. To prevent this type of control, we have to position ourselves as part of the justice system.