Can and Should Tribunals Speak Out?

Justice Selwyn Romilly, of the Supreme Court of British Columbia

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Accountable Adjudication: From Awareness To Action

Context for this Presentation:

The context of the question I was asked to consider in my address the following:

> Over time Tribunal members develop both a deep familiarity with the working tribunal theme and appreciation of where problems and challenges lie. This appreciation may take one or more of the following forms, in observing:
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> - Front-line application of policy visibly inconsistent with legislative intent;
> - Unintended consequences;
> - Unfair impacts following precise application of the statutory scheme;
> - Visibly inefficient application of resources (in Auditor-General terms, "poor value for money);
> - Injuries to individuals or groups going unrecognized in ongoing policy development; and
> - As many other scenarios as one can postulate.

The Question

Broad (Long) Question

What does the tribunal do with this knowledge?

A tribunal may be afflicted with concerns about the fairness of the system or constraints on its review or appellate functions. The broad question leads to ask how such a tribunal is to use its knowledge of those concern or even whether the question can be asked?

The Question Recast

After that long introduction to the topic of discussion; it can be shortened considerably to merely query:

"Can and should tribunals speak out?"

I would say that the simple answer is, "Yes".

With that simple answer I could easily now sit down and replay the learned presentations and sage wisdom of my co-presenters but I will resist that temptation today.

Nature of Tribunals

Spectrum of Tribunals

Some tribunals perform advisory functions in which they are expected to report their concerns to government with detailed evidence and recommendations. "Speaking out" is not a question with which they have to wrestle. However, many more – particularly 'benefits' tribunals- simply perform an "examine for compliance function" in which their sole task is to determine whether government administrators have complied with the black letter of the law. Many more tribunals fall jurisdictionally somewhere in the middle of this spectrum.

Advantages as Court Alternatives

In an article entitled "The independence of Administrative tribunals: Checking out the Elephant", J.Paul Lordon (then the Chair of the New Brunswick Labour and Employment Board) wrote in 1996:

> Administrative tribunals continue to present an attractive alternative to the courts because of considerations of speed, flexibility and cost. Governments continue to create them …. Tribunals can allow new and flexible approaches, new remedies and new perspectives on old problems. In a world of increasing specialization, they promote enhanced expertise and focus … [1]

More Persons Have Rights Determined by Tribunals than by Courts

In *Cooper v. Canada (Human rights Commission),* [1996] 3 SCR 854 at pages 899-900 Chief Justice McLachlin J. (as she then was) in dissent, pointed out that "Many more citizens have their rights determined by these tribunals than by the courts."

Not All Tribunals the Same

Lebel J. of the Supreme Court of Canada observed in *Blencoe v British Columbia (Human Rights Commission),* 200 SCC 44, at paragraph 158:

> [158]…not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. ….

Costs Courts vs Tribunals

Because of the popularity of tribunals quite a few have been fragmented into smaller tribunals resulting in unintended costs to some of the litigants.

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[1] Paul Lordon, 'The Independence of Administrative Tribunals: Checking Out the Elephant' (1996) 45 *UNB LJ* 123 at 129. [https://journals.lib.unb.ca/index.php/unblj/article/view/29583/1882524766]

In a paper entitled "Administrative Justice in an Interconnected World" the then Professor Lorne Sossin wrote:

> … As the costs associated with traditional court-centred legal processes have grown, so has the popularity and variety of administrative tribunals in the view of both policy makers and various user communities. Individuals are looking to these tribunals as simpler and more economical avenues to review administrative decision making and to resolve their disputes, free from the many formal trappings of the law courts – a trend which is likely to continue as the cost of access grows as a concern, not only for socially and economically disadvantaged individuals but also for the politically significant middle class. Similarly, as social and economic disputes become more complex, specialty courts staffed with expert adjudicators often will be more effective than generalist judges.
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> Unfortunately, even while individual administrative tribunals are promoted as simpler, more efficient and more expert in particular subject matters than courts, fragmentation within tribunal systems continues to thwart these basic dimensions of access for users in several ways. Consider the low-income individual in Ontario who faces a challenge in obtaining social benefits and is in a dispute with her landlord. That individual needs to navigate both the Social Benefits Tribunal and the Landlord Tenant Board's procedures and rules. These two tribunals may operate in separate buildings and use different forms. They may employ different styles of adjudication and they may have divergent or even clashing organizational. cultures. As a result, the user is forced to navigate a set of institutional silos which impose high financial and informational costs and are likely to impede the overall quality of justice services that the tribunals can offer.
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> …
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> One obvious outcome of this fragmented landscape is that the sheer number of administrative tribunals – each with their own physical and logistical infrastructure – represents a considerable duplication of resources and prevents smaller tribunals from achieving economies of scale. …. [I]ndividual tribunals are each responsible for designing and implementing their own practices and procedures, making it difficult for users of more than one tribunal to access knowledge and to operate between them. This can be particularly frustrating for users when a single dispute concerns more than one tribunal – for example, where land use, planning and environmental regulatory issues coincide.[2]

Fragmentation and Unintended Consequences

If, as a tribunal member you become aware of these unintended consequences of fragmentation can you, or should you, write a judgment to that effect? Do you have any assurance that this judgment would come to the attention of future litigants and/or the legislative body that created the tribunal? If the judgment that you

[2] Sossin, Lorne, "Administrative Justice in an Interconnected World" (2013). Comparative Research in Law & Political Economy. Research Paper No. 46/2013 at pages 8 -9. http://digitalcommons.osgoode.yorku.ca/clpe/288

write does come to the attention of the legislative body that created the tribunal, is there a legitimate and appropriate role for a tribunal to provide non-partisan guidance of how to best modernize legislation?

In order to deal with some of these issues I propose to begin with basics, like the independence of tribunals. After all, it is only under this heading that we can answer the question, "Can and should tribunals speak out?" Now, as a tribunal member you act as a judge and you must have heard of judicial independence. You must have wondered why the judicial independence of the tribunal is not the same as judicial independence of the judges in the courts. Although you do not enjoy the same independence as judges of the courts do you still enjoy independence. I will explain the law in this area.

JUDICIAL INDEPENDENCE

Principle of Independence of the Courts

In *The Queen v. Beauregard*, 1986 CanLII 24 (SCC), [1986] 2 SCR 56 at para 21 Chief Justice Dickson, for the Court, defined judicial independence of the courts as follows:

> [21] Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them: no outsider - be it government, pressure group individual or even another judge – should interfere in fact, or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. …

Factors to Satisfy Independence of the Court

In *Canadian Pacific Ltd. v. Matsqui Indian Band,* 1995 CanLII 145 (SCC), [1995] 1 SCR 3 at para. 75, Lamer J., speaking for himself and Cory J. observed:

> I begin my analysis of the institutional independence issue by observing that the ruling of this court in *Valente, supra*, provides guidance in assessing the independence of an administrative tribunal. There, LeDain J. considered whether provincial court judges were independent. He pointed to three factors which must be satisfied in order for independence to be established: security of tenure, security of remuneration and administrative control.

There are therefore three essential conditions of judicial independence: security of tenure, financial security, and administrative independence.

It is clear that you as members of a tribunal do not have the core principles of judicial independence nor do you have the three essential conditions of judicial independence. This is so, in part, because, although you are judges, you are creatures of statute and as such your tribunal could be abolished at any time by the legislative body that created you in the first place. But if you had the powers listed above, it would be simple for you to answer the question, "Can and should tribunals speak out", with a resounding "YES".

Now let's look at the law with respect to independence of tribunals to see if the answer to the question that has been posed should be the same.

Independence of Tribunals

Charter Protections

Section 7 of the *Charter* requires that life, liberty and security of the person shall only be abridged in accordance with the standards of fundamental justice and the provisions of s. 11(d) of the *Charter* which guarantees the right to a fair and public hearing by an independent tribunal.[3]

Perception of Independence

In *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 SCR 114 it was recognized that the concept of institutional impartiality must be included in the constitutional guarantee of an independent and impartial tribunal. The Chief Justice stated the following, at pp. 140-41:

> Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect (*Valente*, *supra*, at p. 687), so too must the requirement of judicial impartiality. I cannot interpret the Canadian *Charter* as guaranteeing one on an institutional level and the other only on a case-by-case basis. ….
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> The objective status of the tribunal can be as relevant for the "impartiality" requirement as it is for "independence". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. As this Court stated in *Valente*, *supra*, the appearance of impartiality is important for public confidence in the system (at p. 689):
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> > Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial ....
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> > [Emphasis in original.]

[3] *Canadian Charter of Rights and Freedoms,* s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Section 7 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."

Reasonable Apprehension

In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394 Gonthier J., for the majority, wrote

> …… the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. ….

Independence and Natural Justice

In *Matsqui, supra,* the SCC expressed that the principles of natural justice apply, even in the case of companies, and is a guarantee of tribunal independence.

Sufficient Independence

In Lordon's article, *supra* ("The independence of Administrative tribunals: Checking out the Elephant") he wrote at page 124-125:

> … it should be remembered that the independence of the tribunal decision maker, unlike that of the courts, does not serve a fundamental constitutional purpose. The administrative decision maker as a general rule, need only be sufficiently independent to serve its statutory functions and purposes. A tribunal must act fully in accord with the statutory purpose for which it was established. This can mean different standards for different tribunals. Court-like independence based upon constitutional considerations is something different from the requirement that decisions be taken 'at arms length". The function of the tribunal will be critical, and it is that the integrity of adjudicative functions, in particular, will require particular attention, but the notion of independence should reflect a tribunal's real functions and activities and should not become by a facile analogy with the independence of the courts.

In *Matsqui, supra,* Lamer J. stated at paras. 80 and 83-85:

> [80] 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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> [83] Therefore, while administrative tribunals are subject to the *Valente* principles, the test for institutional independence must be applied in light of the functions

being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

[84] In some cases, a high level of independence will be required. For example, where the decisions of a tribunal affect the security of the person of a party (such as the Immigration Adjudicators in *Mohammad*, supra), a more strict application of the *Valente* principles may be warranted. In this case, we are dealing with an administrative tribunal adjudicating disputes relating to the assessment of property taxes. In my view, this is a case where a more flexible approach is clearly warranted.

[85] I would therefore apply this approach to the question of whether the members of the appellants' appeal tribunals are sufficiently independent. The *Valente* principles must be considered in light of the nature of the appeal tribunals themselves, the interests at stake, and other indices of independence, in order to determine whether a reasonable and right-minded person, viewing the whole procedure as set out in the assessment by-laws, would have a reasonable apprehension of bias on the basis that the members of the appeal tribunals are not independent.

Independence from the legislature

Since Tribunals are usually creatures of statute, it may be prudent for us to examine the nature of independence from the legislature.

In *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 at pages 899-900 Chief Justice McLachlin J. (as she then was) in dissent, at para 79, pointed out that:

> While all tribunals must apply the law of the land, the powers they can exercise in doing so may be limited by Parliament or the Legislature. Save for the superior courts, which enjoy inherent jurisdiction, a tribunal can do only that which its constituent statute empowers it to do. Some tribunals are limited to questions of fact only. Other tribunals are empowered to consider questions of law as well as fact.

In Lordon's article, *supra* ("The independence of Administrative tribunals: Checking out the Elephant") he wrote at page 128:

> It may be useful at this point to consider the question of the extent to which an administrative tribunal should be independent from the legislature. Tribunals and agencies are generally thought of as the creatures and creations of the legislature and may be altered by and required to report to them, subject to reasonable manner and form requirements, generally designed to keep legislators at arms length.16 Perhaps the only point to make here is that there is an extensive body of writing on the issue much of which deplores any non arm's length relationship and that a

> range of legislative and administrative mechanisms aimed at preserving the independence or autonomy of the relationship between the legislature and tribunals have been suggested.

Legislative Intent and Tribunal Independence

The doctrine of administrative tribunal independence is largely based on the concept of judicial independence. However, as Laverne Jacobs wrote in *Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel — A Call for Empirical Analysis*, "Given the multitude of functions that exist among tribunals and that may exist within one single tribunal, a model of independence designed for the judiciary may not always be appropriate."[4] But as Lordon stated in his article, *supra* at pages 124-125 ("The independence of Administrative Tribunals: Checking out the Elephant"):

> … The intent of the legislature, in consideration of the specific situation being considered, and taking account of broader legal standards, is the most appropriate indicator of the measure of independence thought to be accorded a tribunal as well as of the degree to which a tribunal should be accorded deference.
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> …
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> … it should be remembered that the independence of the tribunal decision maker, unlike that of the courts, does not serve a fundamental constitutional purpose. The administrative decision maker, as a general rule, need only be sufficiently independent to serve its statutory functions and purposes. A tribunal must act fully in accord with the statutory purpose for which it was established. This can mean different standards for different tribunals. Court-like independence based upon constitutional considerations is something different from the requirement that decisions be taken "at arm's length". The function of the tribunal will be critical, and it is clear that the integrity of adjudicative functions, in particular, will require particular attention, but the notion of independence should reflect a tribunal's real functions and activities and should not become overburdened by a facile analogy with the independence of the courts.

On Speaking Out

Permissible

In my respectful view, the above review of the independence that tribunals enjoy makes it certainly obvious that tribunals can speak out. On the issue of whether they should speak out, the answer is the same. In fact, one only has to see the profound result that Ms Karen Snowshoe's dissenting judgment had on effecting change.

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[4] Jacobs, Laverne, "Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel — A Call for Empirical Analysis" (June 1, 2008). *Dialogue Between Courts and Tribunals – Essays In Administrative Law And Justice* (2001-2007), p. 44, Laverne A. Jacobs & Justice Anne L. Mactavish., eds., Les Éditions Thémis, 2008, Available at SSRN: https://ssrn.com/abstract=1973725

Approach

I close by making the following observations: Where you have decided that 'you can and should' speak out in a judgment there are two matters that you should consider:

- How do you get it to the attention of those to whom you want to get it?
- What assistance. if any, could you give to legislature they decide to adopt your suggestion to make the improvements that you outlined in your judgment?

DECISIONS OF TRIBUNALS – Accessibility and Precedent

In an article entitled "Access to Administrative Justice and Other Worries" the then Professor Lorne Sossin wrote at pages 12-13:[5]

> One of the most controversial aspects of access is how parties may learn about previous decisions of the tribunal. While privacy concerns make it difficult for some administrative bodies to publish their decisions,* in most cases making available the tribunal's past decisions is seen as a key aspect of its public interest function. In this sense, it is analogous to the rule that, absent circumstances justifying confidentiality, all tribunal proceedings should be open to the public, and documents used in those proceedings should be available to the public.* The practice with respect to publishing decisions is uneven. Some tribunals publish all of their decisions in an easily searchable form.* Still others publish anonymized versions of only those previous decisions determined to be of general significance.* There are at least some tribunals who charge a fee to access earlier decisions, which appears to impose a financial burden to the process of learning the standards applied by a tribunal.
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> Unlike a court, tribunals are not bound by their earlier decisions. Many tribunals in practice, however, aim for consistency and will treat previous decisions as strongly influential over similar disputes. For this reason, making available prior decisions could plausibly be seen as an element of fairness and as part of the requirement that parties before the tribunal should know the "case to meet." …
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> [* Footnote removed]

Appropriateness and Transparency

If your judgment does indeed get to the attention of the legislative body that created your tribunal, is there a legitimate and appropriate role for your tribunal to provide non-partisan guidance on how to best modernize the legislation?

This issue was dealt with in the article by Sossin, Lorne and Charles W. Smith entitled "The Politics of Transparency and Independence before Administrative Boards". [6] In that article a dispute was examined that arose between the Government of Alberta, the Alberta Labour Relations Board (ALRB), and the Alberta

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[5] Sossin, Lorne, and Colleen M. Flood. *Administrative Law in Context*. 2nd edition. Toronto: Emond Montgomery Publications, 2013, at pages 12-13.

[6] Sossin, Lorne, and Charles W. Smith. "The Politics of Transparency and Independence before Administrative Boards." *Saskatchewan Law Review* 75.1 (2012): 13-54.

federation of Labour (AFL) concerning the drafting of a Bill (between 2003 and 2006). At the heart of the debate was the fact that the Minister of Human Resources and Employment (HRE) had consulted with the ALRB during its drafting. The resulting Bill 27 dealt with collective bargaining regulation. In dealing with the issue the authors Sossin and Smith wrote at page 20:

> … Given the problems highlighted in this dispute, is there a legitimate and appropriate role for a tribunal to provide non-partisan guidance on how to best modernize the legislation? Is there any legitimate role for the Board in providing this guidance in a secret or confidential fashion? Some have suggested that it is better to be included in the process in a non-transparent fashion than to be excluded and having the resulting legislation be less effective as a result. However, in our view, the better approach is that guidance from the Board should be open for parties and stakeholders to see and to challenge that role if they feel it crosses the line from neutral to a more partisan or substantive role inappropriate to an independent body which will ultimately have to impartially adjudicate disputes involving the government of the day.

Conclusion

As we have seen, scholarly commentators have broached the issues discussed while recognizing that they are early steps in defining the legal and policy landscape of the vast array of tribunals operate.

In my respectful view the quotes from the cases and articles identify key considerations and provide good advice. The discussions are worth pursuing. When a tribunal is faced with a hard case but chooses, however regretfully, to remain silent it could, instead, contribute intelligently to public policy debate while respecting the limits of their jurisdiction and the rule of law.

These contributions must be artful but may include “courtesy observations”, detailed analysis of problematic aspects of legislative drafting, and discussion of why a decision is reached with considerable regret (a dissent, without dissenting, one may say). They might also extend to offering possible solutions that might achieve legislative intent while avoiding the negative consequences in the case at issue.

I thank you