Introduction

Administrative Tribunals have become an important part of the way that government decisions are made in Canada.

Tribunals form part of the Executive Branch of government. They do not enjoy the constitutional protections of the Courts.

Parliament or the Legislature may amend a tribunal's powers and procedures when necessary and can even get rid of a Tribunal if it no longer serves a public purpose.

Land claims based Tribunals benefit from some additional protections because of their origin and we'll consider them further later.

Every jurisdiction in Canada has established administrative tribunals.

Mr. Justice Cory of the Supreme Court of Canada commented on the widespread use of Tribunals as follows:
“Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfill are legion.”


Purpose

This Session will explore the following topics:

- The nature of administrative tribunals and the concept of jurisdiction in relation to their authorities;
- Classification of the functions of administrative tribunals and how that affects the way the law applies to them;
- Judicial review of administrative tribunals’ actions; and
- Tribunal independence.

Tribunals and Jurisdiction

- Tribunals have no inherent authority. Any power exercised by a Tribunal must be derived in one way or another from the statute which created it.
- The legislative branch of government has the authority to delegate powers. Most of the business of government takes place through the exercise of delegated authority.
- Almost all of the laws passed by Parliament or the Legislatures delegate certain powers, duties or authorities to someone: a Minister, Judge, civil servant, a board, tribunal or someone else.
Powers of a Tribunal:
- The actions of a Tribunal must therefore be directly based on the powers delegated to it.
- These powers may be express, for example, the power to issue, suspend or cancel licences or to issue subpoenas.
- The powers may also be implied, for example, the power to do the things necessary (but unwritten) to satisfy a Tribunal's statutory mandate, such as interpreting its enabling legislation when necessary to make a decision.
- A Tribunal may also be granted the authority to exercise discretion in certain circumstances.

Tribunal's Jurisdiction:
- Many of the limits placed on Tribunal actions are focussed on jurisdiction. Thus, a breach of the duty of fairness and an abuse of discretion are both characterized by the Courts as situations where the tribunal has "lost jurisdiction". There may also be substantive failures to act within jurisdiction based on errors of law made by a Tribunal.
- The concept of jurisdiction is thus a key principle in the legal framework for Tribunals. It both allows Tribunals to act and controls their actions.

Tribunals – From Administrative to Quasi-Judicial Functions
- The jurisdiction granted to Tribunals by statute varies depending on the purposes for which Parliament or the Legislature created them. Therefore, the authorities of Tribunals vary as well.
- Depending on its legislation, a Tribunal may exercise a variety of functions ranging from administrative, to legislative, to adjudicative matters. Most Tribunals exercise more than one type of function.
- Administrative functions involve handling and managing matters necessary to carry out the requirements of legislation. This could include the management of staff, keeping of records and files, etc.
• Tribunals that can make their own rules of procedure, guidelines or policies which are binding on parties to their proceedings are exercising a "legislative" function.

• Tribunals exercise an adjudicative or a "quasi-judicial" function when they make decisions:
  - after reviewing evidence,
  - after a proceeding or a public hearing where the parties set out differing, sometimes adverse positions, and
  - which can affect the rights and interests of the parties.

• Black’s *Law Dictionary* 5th ed. describes quasi-judicial functions as follows:
  "A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

• Some Tribunals exercise all of these types of functions at one time or another, some do not have the jurisdiction or authority to undertake all of them.

• The only way to tell what a Tribunal may do is by careful review of the statute which establishes the Tribunal.

• Characterizing the nature of the power exercised by a Tribunal is important because it relates to:
  - the Tribunal's authority to delegate its powers;
  - the type of procedure which the Tribunal should use to make a decision;
  - the remedies which may be available if the Tribunal's actions are challenged in Court.

• Administrative powers can be sub-delegated which means that they can be given to others. Legislative and quasi-judicial powers cannot be sub-delegated.

• The type of power a Tribunal exercises also affects the procedural safeguards that ensure that parties are treated fairly.
Generally even administrative powers must be exercised fairly (Nicholson case) and as we move up the spectrum to quasi-judicial functions, the procedural safeguards required increase and may include the need for a hearing.

The result is sliding scale of procedural requirements. Tribunal members and staff must be aware that these requirements can change over the course of a proceeding. The Tribunal must be ready to adapt the Tribunal process to meet these legal requirements.

The Supreme Court of Canada re-addressed this issue in a case called Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817. The Court’s words speak for themselves:

“The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected,……[Several] factors are relevant to determining the content of the duty of fairness:

(1) the nature of the decision being made and process followed in making it;
(2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
(3) the importance of the decision to the individual or individuals affected;
(4) the legitimate expectations of the person challenging the decision;
(5) the choices of procedure made by the agency itself.

This list is not exhaustive.”

Judicial Review of Administrative Actions

As a part of the Executive branch of government, administrative tribunals are subject to supervision by the Courts.

This process is called judicial review.

The MVRMA boards and some other N.W.T. Tribunals are subject to judicial review in the Supreme Court of the NWT (see s.32 MVRMA) although it appears that such a review may be initiated in the Federal Court as well.

Other federal tribunals are subject to review in the Federal Court.
A party to a proceeding, who is aggrieved by a Tribunal decision, may apply to the appropriate Court to review the Tribunal’s decision or to review the process through which the decision was reached.

Once litigation begins a Tribunal definitely needs the assistance of counsel. We will therefore not discuss the details of the Court process for judicial review.

It is important, however, to have some general knowledge of the reasons for which Tribunal decisions may be challenged.

The Court may decide to intervene based on claims that a Tribunal committed errors of law or jurisdiction, including fairness.

The Courts’ role in judicial review is supervisory. They are not in the business of re-deciding and substituting their views for those of a Tribunal. Consequently, the Courts generally do not substitute their views of the facts found during the course of a Tribunal decision.

The Courts will intervene where they find an error of law or jurisdiction and if they consider that a process run by a Tribunal was not fair. A Court may send the matter back to the Tribunal and may order it to re-hear the matter or to reconsider an issue.

Privative Clauses

Parliament and the Legislatures sometimes try to limit the instances where the Courts may overrule a Tribunal in order to ensure that the process set out in legislation works as intended.

Legislative clauses attempting to restrict the role of the Courts are called privative clauses.

There are a number of ways to draft privative clauses.

Depending on legislative purpose and case law, Parliament and the Legislatures tinkers with the words in these clauses from time to time in an effort to limit the reach of the Courts’ judicial review.

Following are some examples of privative clauses:

133. Except where there has been a denial of natural justice or an excess of jurisdiction, no act by or decision of the Commission, including the Governance Council and the Review Committee, or the Appeals Tribunal, may be questioned or reviewed in any court, and for greater certainty no act by, decision of or proceeding before the Commission or Appeals Tribunal may be restrained by injunction, prohibition or other process or proceedings in any court.

“Final decision” MVRMA

67. Subject to sections 32 and 81, every decision or order of a board is final and binding.

- The Courts characterize clauses like the Workers’ Compensation Commission clause as strong and the MVRMA clause as weak.

**Standard of Review**

- One of the first questions addressed by the Court in a judicial review relates to the “standard of review” to be applied to a Tribunal’s decision. Does the decision have to be correct? Should there be some deference given to the decision?

- The Courts generally review questions of law or jurisdiction, decided by a Tribunal, on the correctness standard. The presence of a privative clause in a Tribunal’s enabling legislation will also affect how the Court reviews matters within the Tribunal’s discretion.

- A strong privative clause will likely contribute to the Courts’ deference to a Tribunal’s decision. A weak privative clause provides little protection.

**Grounds for Judicial Review**

- Broadly described, the grounds application by a party for judicial review are the Tribunal’s:
  - absence of jurisdiction or failure to achieve it;
  - loss of jurisdiction through abuse of discretion such as improper intentions, bad faith, no evidence, fettering of discretion etc.
  - breach of the rules of fairness or natural justice; and
  - errors of law.

- In each case the judicial review proceeds on the basis of the record that was before the Tribunal when it made its decision and, although additional evidence may be filed, the process is largely one of legal argument, not a trial.
The judicial review process is part of the checks and balances in Canada. It allows the Courts to ensure that statutory delegates, like Tribunals, act within their jurisdiction and that the administrative processes established by government work fairly.

Administrative Tribunals exist in a complex legal environment and the judicial review cases decided by the Courts provide essential guidance on a variety of matters important to the management and operation of Tribunals.

Tribunals whose decisions are overruled by the Courts should not be concerned as long as they take advantage of the learning opportunity offered by the experience.

Co-Management Tribunals

The Tribunals established in response to land claim settlements generally require specific membership. The requirements balance members appointed or nominated by government with members appointed or nominated by first nations.

These balanced appointments result in what are called Co-management Tribunals.

Co-management Tribunals cover a spectrum of functions from wildlife management to land and water management and EIA and also address fisheries and surface rights in some instances.

In the Inuvialuit Settlement Region and Nunavut, where legislation has not been enacted, co-management tribunals derive their jurisdiction and authority directly from land claims and settlement legislation.

Amendments to land claims are possible but not common so the authorities of the Tribunals set up by the IFA have been quite stable for over 25 years.

The MVRMA implements the Gwich’in, Sahtu and Tlicho agreements. Amendments to the MVRMA must first be consistent with these claims and second directly involve the first nations.
Tribunals which deliver government functions are institutions of public government and are subject to judicial review by the Courts.

In the case of the MVRMA boards, judicial review takes place in the Supreme Court of the Northwest Territories pursuant to s.32 of the MVRMA.

For IFA based Tribunals and the NWT Water Board, judicial review would take place in the Federal Court.

The discussion of the judicial review process set out above applies to Co-management Tribunals too.

Members of Co-management Tribunals are delivering public government functions. They are not acting in a representative capacity.

Tribunals and Government: The Question of Independence

As indicated, administrative tribunals are creations of and part of the executive branch of government. They do not enjoy the constitutional protections enjoyed by the Courts.

These Tribunals nevertheless often make quasi-judicial decisions and the Courts have established a framework of procedure (natural justice/fairness) that ensures the integrity of such decisions.

Government itself often establishes a Tribunal to ensure an “arm’s length” process and decisions which are rational and publicly accepted.
These goals cannot be met if government is free to interfere with Tribunal decisions.

The issue is a difficult one. How can government protect the public interest, ensure that Tribunals make quality decisions and meet its obligations to tax payers with timely and efficient decisions?

The Courts have been clear about their view of Tribunal independence.

The Supreme Court of Canada had the following to say on this issue in 2001 in a case called

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)

“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.”

“There is a fundamental distinction between administrative tribunals and courts. 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.”

“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 function, it is properly the role and responsibility of 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.”
There has been much academic and other commentary, including by the Courts, on the question of Tribunal independence. Some of the issues relate to security of tenure for members, funding for the tribunals operations and for members and staff salaries etc.

All of these practical concerns can contribute to an environment where a Tribunal is made painfully aware of whether the government approves of its actions or not. Notwithstanding these concerns Canadian law does not at this time provide any firm protection for Tribunal independence.

With that said, it would be completely improper for government to interfere directly in the specific deliberations of a Tribunal.

We may thus say that while Tribunals are not independent of government that they do exercise independence in the decision-making process.

Conclusion

The key concept in dealing with the authorities of Administrative Tribunals is **jurisdiction**.

Jurisdiction is based on the statute or legal authority which creates a Tribunal. Tribunals may perform various functions ranging through administrative, legislative to quasi-judicial in the conduct of their business.

The Courts tend to control the actions of Tribunals by reference to the jurisdiction granted in the statute which establishes them.
- A privative clause may provide partial protection for a Tribunal undergoing judicial review.
- The courts supervise and control the actions of Tribunals through judicial review.
- Tribunals are creations of government. They are not independent except in the course of making their decisions.