Administrative Law Course
SESSION 1
Administrative Tribunals and Jurisdiction

John Donihee & Charles Birchall
Willms & Shier Environmental Lawyers LLP

NWT Board Forum
Yellowknife, NWT
February 16-17, 2016
Introduction

• Administrative Tribunals are an important part of the way in which government decisions are made in Canada

• Tribunals form part of the Executive Branch of government
  • 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 eliminate a Tribunal if it no longer serves a public purpose
Introduction

• Land claims-based Tribunals benefit from additional protections because of their origin

• 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; 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.”

Newfoundland Telephone v. Newfoundland (Public Utilities Board) [1992] 1 SCR 623 at 634
Purpose

• This Session will explore:
  • 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
Tribunals and Jurisdiction

• Legislative branch of government has 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

• 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
Powers of a Tribunal

• 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
  • 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
Tribunal’s Jurisdiction

• Concept of jurisdiction is a key principle in the legal framework for Tribunals
  • it both allows Tribunals to act and controls their actions
Administrative Law Concepts

• Basic framework for how a tribunal conducts its business:
  • rules of procedural fairness or natural justice – tribunal must respect certain principles
  • enabling legislation

• Two principles are most important:
  • duty to act fairly
  • must exercise discretion appropriately
Tribunals – From Administrative to Quasi-Judicial Functions

- 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
Tribunals – From Administrative to Quasi-Judicial Functions

• Administrative functions involve handling and managing matters necessary to carry out the requirements of legislation
  • 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 – From Administrative to Quasi-Judicial Functions

• Tribunals exercise an adjudicative or a “quasi-judicial” function to 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
Tribunals – From Administrative to Quasi-Judicial Functions

• 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

• 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:

- Tribunal’s authority to delegate its powers
- type of procedure which the Tribunal should use to make a decision
- remedies which may be available if the Tribunal’s actions are challenged in Court
Tribunals – From Administrative to Quasi-Judicial Functions

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

• Type of power a Tribunal exercises also affects the procedural safeguards that ensure that parties are treated fairly
Tribunals – From Administrative to Quasi-Judicial Functions

• Generally, even administrative powers must be exercised fairly (*Nicholson* case)
  • administrative functions require greater procedural safeguards and may include the need for a hearing

• Result is a **sliding scale** of procedural requirements
  • Tribunal members and staff must be aware that the requirements can change during a proceeding
  • Tribunal must be ready to adapt the Tribunal process to meet these legal requirements
Tribunals – From Administrative to Quasi-Judicial Functions

• Supreme Court of Canada re-addressed this issue in a case called *Baker v Canada*

• Court found:

  • “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:
Tribunals – From Administrative to Quasi-Judicial Functions

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.”
Jurisdictional Review of Administrative Actions

• As part of the Executive branch of government, administrative tribunals are subject to supervision by the Courts, called judicial review.

• MVRMA boards and some other NWT Tribunals are subject to judicial review in the Supreme Court of the NWT (s 32 MVRMA)
  • a review may be initiated in the Federal Court as well

• Other federal tribunals are subject to review in the Federal Court.
Tribunals – From Administrative to Quasi-Judicial Functions

• 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
Tribunals – From Administrative to Quasi-Judicial Functions

• Important to have some general knowledge of the reasons for which Tribunal decisions may be challenged

• Court may decide to intervene based on claims that a Tribunal committed errors of law or jurisdiction, including fairness
Courts’ role in judicial review is supervisory

- not in the business of re-deciding and substituting their views for those of a Tribunal
- consequently, Courts generally do not substitute their views of the facts found during the course of a Tribunal decision
Tribunals – From Administrative to Quasi-Judicial Functions

• 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

• Court may send the matter back to the Tribunal and may order it to re-hear the matter or to reconsider an issue
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?
Standard of Review

• Courts generally review questions of law or jurisdiction, decided by a Tribunal, on the correctness standard

• Presence of a privative clause in a Tribunal’s enabling legislation will also affect how the Court reviews matters within the Tribunal’s discretion

  • **strong** privative clause will likely contribute to the Courts’ deference to a Tribunal’s decision

  • **weak** privative clause provides little protection
Grounds for Judicial Review

• Broadly described, the grounds of an 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 rules of fairness or natural justice, and
  
  • errors of law
Grounds for Judicial Review

• 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.
Grounds for Judicial Review

• Judicial review process is part of the checks and balances in Canada

• Allows the Courts to ensure that statutory delegates, like Tribunals, act within their jurisdiction and that the administrative processes established by government work fairly
Grounds for Judicial Review

• 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

- Tribunals established in response to land claim settlements generally require specific membership
- Requirements balance members appointed or nominated by government with members appointed or nominated by First Nations
Co-Management Tribunals

• 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
Co-Management Tribunals

• 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.
Co-Management Tribunals

- 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.
- 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.
Co-Management Tribunals

• 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.
Co-Management Tribunals

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

• 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
  • not acting in a representative capacity
Tribunals and Government: A Question of Independence

• As indicated, administrative tribunals are creations of and part of the executive branch of government
  • 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
Tribunals and Government: A Question of Independence

• Government 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
Tribunals and Government: A Question of Independence

• 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?

• Courts have been clear about their view of Tribunal independence
Supreme Court of Canada said the following 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.”
The principle reflects the 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...
Tribunals and Government: A Question of Independence

• “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 quasijudicial 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...”
Tribunals and Government: A Question of Independence

• “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.”
Much academic and other commentary, including by the Courts, on the question of Tribunal independence

- some issues relate to security of tenure for members, funding for the tribunals operations and for members and staff salaries etc.
Tribunals and Government: A Question of Independence

• 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
Tribunals and Government: A Question of Independence

• That said, it would be completely improper for government to interfere directly in the specific deliberations of a Tribunal

• Thus, while Tribunals are not independent of government, they do exercise independence in the decision-making process
Conclusion

• 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
Conclusion

• 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.
Conclusion

• Courts supervise and control actions of Tribunals through judicial review

• Tribunals are creations of government
  • they are not independent except in the course of making their decisions
Contact Information

John Donihee
(613) 217-8521
jdonihee@willmsshier.com

Charles Birchall
(613) 761-2424
cbirchall@willmsshier.com

Willms & Shier Environmental Lawyers LLP
www.willmsshier.com