

# **COUNCIL OF CANADIAN ADMINISTRATIVE TRIBUNALS CONFERENCE**

**WESTIN BAYSHORE HOTEL, VANCOUVER  
6 – 8 MAY 2007**

## **ADMINISTERING OF JUSTICE WITHOUT BORDERS**

**HON JUSTICE J BRUCE ROBERTSON  
NEW ZEALAND COURT OF APPEAL  
FORMER PRESIDENT OF THE NZ LAW COMMISSION**

### **The state of administrative justice in New Zealand**

Perhaps because we are a relatively small country, we tend to be very conscious of how we stand in the international ratings in a variety of areas. A report<sup>1</sup> earlier this year which confirmed that New Zealand was failing rather lamentably with regard to the nurturing and protecting of children was viewed as a national catastrophe<sup>2</sup> - as it should have been. Larger countries can much more easily shrug their shoulders and carry on as they have been, whereas we littlies tend to become defensive, apologetic and likely to seek remedy and rectification.<sup>3</sup>

Alongside that reaction is a proud tradition of New Zealand being a pioneer and innovator in areas as diverse as giving women the vote<sup>4</sup> and creating meaningful mechanisms for dealing with injustices from our colonial past.<sup>5</sup>

While New Zealand has been active in creating groundbreaking specialist tribunals in areas as varied as the return of land to indigenous peoples<sup>6</sup> to settling small claims,<sup>7</sup> New Zealand

---

<sup>1</sup> UNICEF, 'Child Poverty in Perspective: An overview of child well-being in rich countries' (Innocenti Report Card 7, 2007).

<sup>2</sup> For example S Collins, 'NZ's child poverty rate one of the highest', New Zealand Herald (Auckland), 13 April 2007.

<sup>3</sup> One response to the UNICEF report was the introduction of an "anti-smacking" Bill: Crimes (Substituted Section 59) Amendment Bill 271-2.

<sup>4</sup> Women were given the vote in New Zealand in 1893: Electoral Act 1893, s 6.

<sup>5</sup> The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act 1975. The Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi.

<sup>6</sup> Waitangi Tribunal see above.

<sup>7</sup> For example, the Disputes Tribunal was established by the Disputes Tribunal Act 1988. The purpose of the Disputes Tribunal is to operate as a small claims court that provides an inexpensive forum for resolving disputes between

has been slow to address issues facing the system of administrative tribunals as a whole. The growth in number of tribunals has been pragmatic rather than principled.<sup>8</sup> Although a multitude of tribunals are alive and well in New Zealand,<sup>9</sup> they operate at a very ad hoc and fragmented level. A rationalisation and reconstruction of operational structure of them is desperately overdue<sup>10</sup> but relevant issues, priorities and demands can still be assessed from Down Under.

In the early years of this century I spent the bulk of my time leading a team which was seeking a vision for New Zealand Courts and Tribunals.<sup>11</sup> The overwhelming impression I am left with as a result of that exercise is the enormous gulf between the perception of the operation of state adjudicative bodies by those who are on the inside and those who are outside. By that I mean that the judiciary and the profession have a view and attitude which is not often shared by other professions, business and commerce and certainly not the wider general community.

A subsidiary theme was that, within the insiders, there is an unhealthy and unjustified view that what goes on in traditional courts is of greater importance and utility than what goes on in other areas of the state supported adjudicative regime.

My thesis is that the existence of the gulf cannot be ignored and desperately needs and deserves to be bridged – and urgently. The hierarchical focus within the system is unhelpful and unresponsive to the reality of the community. There must be a shift so that there is a recognition that there are different aspects of the system, but not more or less important parts.

---

<sup>8</sup> private persons, both natural and corporate, that is accessible and relatively quick. Upon the lodging of a claim, an informal hearing is held where the 'referee' assists the parties to reach a settlement: Disputes Tribunal Act, s18(3).  
<sup>9</sup> Daya-Winterbottom 'Specialist Courts and Tribunals' [2004] Waikato L Rev 12.

<sup>9</sup> The Law Commission has identified over 100 specialist tribunals: New Zealand Law Commission, 'Striking the Balance' (NZLC PP51 2002).

<sup>10</sup> In a communication of 20 April 2007 to me from the Deputy Secretary Operations, Ministry of Justice, it was recorded: Recent decades have seen a proliferation of tribunals established to address specific needs in New Zealand. The proliferation of tribunals has occurred in the absence of a clear framework to guide the establishment of tribunals. AS a consequence existing tribunals differ widely from each other. The differing jurisdictions, types, procedures and powers lead to significant administrative and management challenges and complexities for agencies which administer tribunals. It can also lead to confusion for users, potentially discontented members and may reduce the economies of scale that can be gained. These challenges ultimately impact on the quality of services received by consumers. Officials from the Ministry of Justice, in consultation with other key agencies, have commenced a project for tribunal reform. The aim of the project is to recommend a structure for tribunals, as well as a framework for establishment of any future tribunals which, amongst other things: ensures government obtains value for money from its substantial investment in tribunals; and ensures that tribunal users and the general public are able to have confidence in the resolution of disputes within tribunals. Work is well underway, but this is a large project involving complex issues of administrative justice and machinery of government issues. It is expected to take some time before any major changes are made to New Zealand's tribunal structure."

<sup>11</sup> New Zealand Law Commission, "Delivering Justice for All" (NZCL R85, 2004).

I leave out of consideration at this conference the criminal jurisdictions of our Courts. They sadly are major growth industries. In my country their activities are spawning an ever-increasing prison muster<sup>12</sup> while our streets and homes are regrettably no safer or more secure.<sup>13</sup> Someone one day needs to face the harsh reality about what actually works in penal policy and what is rational or relevant to contemporary demands.

But there is the rest of the decision making which our communities require to receive attention. To get that into perspective, it is necessary to note the startling growth of non-state sponsored and supported adjudication.<sup>14</sup>

Arbitration has been part of the fabric of our various countries for decades,<sup>15</sup> but in more recent times mediation and other forms of alternate dispute resolution have become major players.<sup>16</sup>

In my assessment it is beyond argument that this is largely a result of discontent with the operation of traditional courts. They are too slow. They are too expensive. They are bound by processes and approach which make little or no sense to those who would contemplate using them. Although we have seen the advent of case management and reforms like those instigated by Lord Woolf in the United Kingdom,<sup>17</sup> the truth is that even our modernised and updated courts are still insufficiently responsive to the needs of business and commerce, and for ordinary citizens they are financially off-limits.

Those who believe in an economics driven approach will say that is fine. If what people want can be achieved without State supported and sanctioned adjudicative systems, then the State should keep out of it.

---

<sup>12</sup> Hon Mark Burton, 'The Justice Sector and the Challenge of a Growing Prison Population' (Speech delivered at the Prison Fellowship Annual Conference, Upper Hutt, 14 May 2006).

<sup>13</sup> Overall the New Zealand crime rate has increased by eight per cent from 2005 to 2006: see New Zealand Police, 'New Zealand Crime Statistics: July to December 2005 and 2006' (Police National Headquarters, April 2007); Axist Consulting New Zealand Limited, 'Understanding Recent Movements in Crime Statistics: A report prepared for the New Zealand police' (Axist Consulting New Zealand Limited, September 2006).

<sup>14</sup> New Zealand Law Commission, "Delivering Justice for All" (NZCL R85, 2004) at 86.

<sup>15</sup> See Arbitration Act 1996 and Barker 'Arbitration, Mediation and the Courts' [2004] NZLJ 489. I note that the Arbitration Act emphasises party autonomy, increased the powers of arbitrators and clarified and redefined the limits of Court intervention.

<sup>16</sup> Canon 'Pluralism of Private Courts' (2004) 23 CJQ 309.

I note also that the New Zealand Law Commission in *Delivering Justice for All* investigated a restructuring of ADR providers. They recommended a State Mediation Service. The report acknowledge the growth in numbers of private providers but expressed concern about the way the market was developing, noting spiraling costs which threatens to make mediation out of reach for many people: Powell 'Alternative Dispute Resolution: Law Commission Report on Courts' [2004] NZLJ 219.

<sup>17</sup> Lord Woolf, 'Access to Justice: Final Report' (Final Report to the Lord Chancellor on the civil justice system in England and Wales, July 1996)

There is an alternative argument which is that Courts should hear and understand what those would have a need to use them want, and to respond to that. There is a duty on the State to provide a system to determine disputes between citizens and between citizens and the State. Implied within this duty is a requirement that the system provided is able to be used by those who need it.

### ***Growth and reform of Tribunals in New Zealand***

At the end of the 19<sup>th</sup> century, with its social and political reforms (especially the creation of the welfare state), we saw the emergence of a proliferation of administrative tribunals. At this time the creation of specialist tribunals was wide spread, one of the earliest being the establishment of specialist body to determine employment problems.<sup>18</sup>

We then saw throughout the common law world of various administrative agencies being established, many of which were sometimes in reality (and more often perceived as being) mere functionaries of Executive Government.<sup>19</sup>

This is not the time nor the place to investigate that evolution, but in all our countries today there is a proud and essential system of administrative adjudication without which our communities could not operate.

Sometimes they have been specifically created because there is not a confidence that traditional courts can or will meet a perceived demand.<sup>20</sup>

At other times they have been created to ensure a sensible alternative to the more sophisticated methods of so many Courts.<sup>21</sup>

---

<sup>18</sup> See for example the Court of Arbitration created under the Industrial Conciliation and Arbitration Act 1894 to hear labour disputes.

<sup>19</sup> Wade and Forsyth *Administrative Law* (8ed 2000) 884.

<sup>20</sup> See for example the Commerce Commission set up to make decisions on economic matters, the Office of Film and Literature Classification established to deal with censorship and the Abortion Supervisory Committee created to regulate the provision of abortions.

<sup>21</sup> For example the Disputes Tribunal (small claims court) and Tenancy Tribunal (jurisdiction over disputes between residential landlords and tenants) which were created to provide informal, cheap and timely resolution to disputes.

This prolific ad hoc development of tribunals has resulted in a wasteful and inefficient proliferation of agencies and organisations without central leadership, co-ordination and standard-setting which are fundamental in this area.

Thirteen months ago I talked with some of you in Canberra, Australia, about New Zealand's failure to create unified structures and frameworks like those which exist in the Australian Federal jurisdiction, the State of Victoria,<sup>22</sup> the State of Western Australia,<sup>23</sup> and the United Kingdom.<sup>24</sup> I regret to advise that, although I am assured planning is continuing apace, the Ministry's view of apace and mine do not coincide.<sup>25</sup>

While the recommended unification may not yet have been implemented the rationalisation theme has been put into practice in other ways. For example recent legislation has unified the mechanisms that supervise whether health professionals are competent to practice into a single disciplinary tribunal replacing eleven existing bodies.<sup>26</sup> In creating this piece of legislation it was recognised that a single body would address problems such as delays, multiple investigations into the same event, and lack of agency interaction.<sup>27</sup>

### **Administrative Tribunals – best practice**

Despite the lack of reform, no-one questions the standards which are applicable and which must be maintained with or without a unifying structure. For the remainder of this speech I will discuss the fundamental hallmarks which must be maintained and which are essential if administrative tribunals are to fulfil existing needs and requirements in our respective communities.

---

<sup>22</sup> Victorian Civil and Administrative Act 1998 (Vic).

<sup>23</sup> State Administrative Tribunal Act 2004 (WA).

<sup>24</sup> Courts and Tribunals Bill

<sup>25</sup> The issue of Tribunal restructuring has been referred again to the Law Commission and another investigative and consultative process is underway.

<sup>26</sup> Health Professionals Competence Assurance Act 2003

<sup>27</sup> Manning 'Health Care Law: Part 2 Legislative Developments' [2004] NZ Law Review 385 at 391.

## ***Independence***

Whether we talk about tribunals, administrative bodies, adjudicative services or any other phrase, I want to suggest to you that at the heart of the operation is a truly independent adjudicative function. Tribunals must be viewed as part of the judicial arm of government.<sup>28</sup>

In Australia tribunals are considered to be part of the executive whilst in the United Kingdom tribunals are viewed as being part of the judicial arm.<sup>29</sup> The Supreme Court of Canada has recognized that quasi judicial tribunals, at least, fit within the justice system.<sup>30</sup> In New Zealand tribunals are generally considered to be part of the judicial arm of government but many statutory tribunals are housed, resourced and administered by the state agencies affected by their decisions.<sup>31</sup>

Institutional independence is different to mere impartiality. Impartiality concerns the sense of lack of personal interest or bias. By contrast, institutional independence is valued for the perceived link between demonstrable independence and public confidence in the system of justice.<sup>32</sup> Institutional independence has the ability to produce both objectivity and enhance an administrative body's credence in the eyes of the public.

Matters brought before tribunals are ones in which individuals have an enormous investment. They want an answer which is totally objective and unfettered by pre-condition or presumption. Consequently they are looking for people to adjudicate who operate solely on the basis of the material before them and not to some pre-set agenda. Citizens anticipate that they will get a judgment which reflects the merits and the factual reality and is not a consequence of an executive policy, quota system or similar inhibition.

---

<sup>28</sup> I do not consider here the concept that administrative tribunals ought to reside independently in what has been termed the 'fourth arm or government': see Creyke 'Where do Tribunals fit into the Australian System of Administration and Adjudication?' in Huscroft and Taggart eds *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (1 ed 2006) and Falzon 'The Integrated Administrative Tribunal' [2006] CJALP 239.

<sup>29</sup> Richardson 'Tribunals in Transition: Resolution or Adjudication' [2007] Public Law 116

<sup>30</sup> *Paul v British Columbia (Forest Appeals Commission)* [2003] 2 SCR 585. For a contrary view see Ellis 'The Juristicizing of Quasi-Judicial Tribunals: Part 1' [2006] CJALP 303.

<sup>31</sup> For example Department of Labour houses, funds and administers the Removal Review, Residence Appeal and Refugee Status Appeals Authorities. These tribunals hear appeals against decisions of the immigration service, a division of the department, relating to deportation, the refusal to grant residence visas and the refusal of refugee status.

<sup>32</sup> Richardson 'Tribunals in Transition: Resolution or Adjudication' [2007] Public Law 116 at 121.

## ***A Right to Tell their Story***

As part of that independent objectivity, women and men are looking for the ability to tell their story and to challenge those who have a different perspective or view of the matter. You and I will speak of the principles of natural justice<sup>33</sup> and the right to be heard, but they see it as simpler than that. They have a story to tell. Sometimes it may be misconceived and those misconceptions need to be exposed for what they are. They need to know what it is they have to challenge or confront and they need to have confidence that they are being heard and understood.

The nature of the tribunal,<sup>34</sup> the function of the decision maker<sup>35</sup> and the interests at stake<sup>36</sup> will affect the means by which that is achieved, but the underlying requirement cannot be diluted or removed. There is a common law of decision making that imposes natural justice obligations upon all decision makers unless excluded by statute.<sup>37</sup>

## ***Accessibility***

Thirdly, decision making bodies must be in a system which is accessible to ordinary folk and operational by them. What is required are processes that are inexpensive, simple, relatively informal and flexible.

A significant dilemma for issues of accessibility is the role legal representatives ought to play in proceedings and how to deal with lay participants. The rules as to whether legal representation can be employed differ across tribunals. The reality is that, in the overwhelming proportion of cases, the existence of the right to legal representation will be theoretical only as the participants will most often be people who cannot afford

---

<sup>33</sup> For example that natural justice requires that decision making bodies, “act in good faith and fairly listen to both sides” before they exercise their power of decision: *Board of Education v Rice* [1911] AC, 179 at 182.

<sup>34</sup> The nature of the tribunal affects a person right to be heard in many ways such as whether a person has the right to legal representation.

<sup>35</sup> Where the decision is only preliminary natural justice concerns are of less importance. The rationale for this is that natural justice is built into the decision making process as a whole and the parties will have a right to put their case when the substantive decision is made: see for example *North Holdings v Rodney District Council* [2004] NZRMA 76. A contrary view is provided in Forbes *Justice in Tribunals* at 8.3 – 8.4.

<sup>36</sup> There is a distinction between the exercise of power at a large scale and on the individual level: *Ridge v Baldwin* [1964] AC 40. Natural justice requirements are regarded as more intensive at the individual end as the interests are more immediately felt and therefore more important: *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 141.

<sup>37</sup> *Birss v Secretary for Justice* [1984] 1 NZLR 513.

representation or do not know how to use it.<sup>38</sup> There must therefore be adjudicators who are sympathetic, sensible and facilitating of the presentation of a case. It is not a case of taking sides, but it is the need to be responsive and empowering of people doing the best for themselves.

Accessibility also requires a sense of proportionality. Processes must be developed which have consideration of the types of problems and disputes people have and the outcomes people wish to achieve.<sup>39</sup>

### ***Quality Decision Making***

Too often in our various legal systems we put the energy and resource and commitment at the top. As an appellate Judge I am hardly likely to say that the top is not important, but I do, without apology or equivocation, maintain that getting it right the first time is the paramount consideration of any adjudicative system.<sup>40</sup> Once and properly is my catchcry. That of course is wishful thinking, but in the administrative arena the opportunity to appeal will often be circumscribed and, even if it does exist, the reality of exercising it is very limited indeed.

A reinforcing of the need for the first hearing to be credible, accessible, intelligible and available is essential.

### ***Right to Reasons***

It is desirable that decision makers give reasons for their decisions, and I suspect before too long our Court will find a general common law duty to give reasons.<sup>41</sup> The provision of reasons has multiple benefits to the exercise of administrative justice.<sup>42</sup>

---

<sup>38</sup> Research has shown that public bodies and large commercial firms frequently have legal representation when appearing in front of tribunals while private individuals usually do not: Baldwin 'Increasing the small claims limit' (1998) 148 NZLJ 274. This distinction has the potential to reinforce power differentials that are undesirable.

<sup>39</sup> For a discussion of issues relating to proportionate dispute resolution see Adler 'Tribunal Reforms: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69(6) MLR 958.

<sup>40</sup> This view is shared by the White Paper (Department of Constitutional Affairs, 'Transforming Public Services: Complaints, Redress and Tribunals' Cm 6243 (Norwich, Stationary Office, 2004)) which has a policy directive of improving first instance decision making and reducing error rates.

<sup>41</sup> The Supreme Court of Canada announced in 1999, for the first time in the common law world that there was such a duty on administrative decision makers to give reasons: *Baker v Canada (Minister of Citizenship & Immigration)* (1999) 174 DLR (4<sup>th</sup>) 193. Australian Courts have not followed suit (see *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 (HCA)) but the Federal government has implemented legislature that makes the giving of reasons mandatory in a number of instances: Administrative Appeals Tribunal Act 1975. In the United Kingdom s10 of the Tribunals and Inquiries Act 1992 requires specified tribunals to furnish reasons on request. English Courts have recognized an obligation on administrative decision makers to give reasons in "exceptional circumstances", especially

- (a) having to formulate logical reasons and their factual bases improves the quality of decision making;
- (b) articulation of reasons demonstrates that attention has been paid to the arguments raised and aid in the parties (or wider public) accepting the decision;
- (c) a statement of reasons allows a party to determine whether to seek review or appeal the decision and enables the reviewing or appellate court to assess the decisions made;
- (d) the expression of reasons enhances public confidence in the decision making process by demonstrating freedom from improper influences, absence of arbitrariness and the quality of reasoning; and
- (e) reasons for particular decisions promote consistency in decision making.

The requirement that reasons be given does not mean the provision of an extensive academic discourse is necessary, but it does mean that the person providing the judgment:<sup>43</sup>

- (a) identifies with facts which have been found (and the reason for finding those facts where there has been conflict) including the matters which have been influential in reaching discretionary decisions and the clear exclusion of matters which have been advanced, but which have not been relevant;
- (b) a reference to the relevant law or legal principles; and
- (c) the application of the law as determined to the facts as found.

---

where fairness so demands: *R v Secretary of State for the Home Department; ex p Doody* [1994] 1 AC 53 (HL). What constitutes exceptional circumstances is expanding: Taggart 'Administrative Law' [2000] NZ Law Review 439 at 440. In New Zealand the New Zealand Commission of Inquiry Act 1908, which codifies aspects of tribunal procedure for many statutory tribunals, contains no requirement to give reasons. Section 23 of the Official Information Act 1982 which provides that certain government departments and organisations must give reasons for decisions affecting individuals on request does not extend to tribunals in relation to their "judicial functions": s 2(6). The New Zealand Court of Appeal has expressed a willingness to consider a common law duty to give reasons: *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 567. Michael Taggart has argued the findings in the Canadian jurisprudence and the favourable decisions in the UK make it likely that New Zealand will find a common law duty to give reasons: Taggart 'Administrative Law' [2003] NZ Law Review 99 at 119.

<sup>42</sup> These reasons were outlined in *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 at 262-263 and succinctly summarised by Fisher J: Fisher J 'Improving Tribunal Decisions and Reasons' [2003] NZ Law Review 517 at 524-525.

<sup>43</sup> *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 at 263.

## ***Timeliness***

In all of this it goes without saying that timely disposal is of the utmost importance. “Justice delayed is justice denied” is somewhat trite, but if you talk with those who need justice and who wait for it, you will be reminded of its enduring truth. All of us in the system need to be far more conscious of our need to hear matters in a timely way and provide judgment within a sensible framework.

For me, that does not lead to the conclusion that wherever adjudication is going on one simply multiplies the number of adjudicators. The requirement is more sophisticated than that. The need is to identify efficient but responsive ways of doing what we do in our respective fields in a more focussed and efficient manner. You don't cut corners on the fundamentals, but you do flush out of the system that which is time-consuming or operational for the sake of itself.

## ***Conclusion***

On my desk I have a paperweight given to me 40 years ago by a friend in Los Angeles. It blandly says "Do not confuse effort with results".

I suggest there is a constant danger that at all levels of adjudication there is an unhealthy emphasis on effort to the detriment of a fair, proper and rational result from those who are forced to turn to it. And remember always that those of us who are in the adjudication business very seldom have people who want to be before us. They have turned to us at whatever level we operate because they have no other way of getting the outcome they require, or protecting them from a consequence they want to avoid. This is even more acute in administrative tribunals which deal with the trials and tribulations of the daily round. The cases won't make the law reports, but they go to the heart of people's lives.

Because we are the last resort for so many, the responsibility upon us to do it well is even greater.