

Notes for Remarks

by

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Executive: A Government Perspective”**

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Thank you for inviting me to participate in this session. My colleagues on this panel, both of whom have considerable experience as members of administrative tribunals, have offered principles and some very practical suggestions to guide the development of Memoranda of Understanding between administrative tribunals and the departments with which they are associated.

I want to make clear that I have not served as a member of an administrative tribunal; and I have never negotiated or implemented an MOU of the sort we discussing here. But during my years in government I have had a fair bit to do with defining the relationship between tribunals and their associated departments, and in dealing with the problems that can arise when those relationships are not working as well as they should.

I should note as well that my government experience is entirely at the federal level, so my remarks today will reflect that perspective. I would expect, however, that in the matters before us, the attitudes and expectations of the federal government are not terribly different from those of the provincial authorities. You can tell me if I am wrong.

I want to talk today about the expectations that governments have of the relationship between administrative tribunals and the Ministers and departments with which those tribunals are associated.

That 'association' has at least three dimensions:

1. One is formal (legal) in the sense that every administrative tribunal reports to the legislature through a Minister. The Minister's department is the entity to which the Minister will look for advice and support in his or her dealings with the tribunal. The Chair of the tribunal knows this, and will therefore make an effort to foster a clear and constructive relationship with the Deputy Minister and, by implication between the tribunal and the department.
2. The second is the informal (and often unwritten) set of relationships that exist between the Chair, Members and staff of the tribunal on the one hand, and the officials of the associated department on the other, in relation to the substantive business of the tribunal.

Essentially these are the perfectly normal, legitimate and non-coercive 'clear lines of communication' that enable the tribunal to know what the government thinks, in policy terms, about the areas in which the tribunal has responsibilities. By the same token, this kind of relationship allows the tribunal an opportunity to tell the government what its views are on matters where the government may have the authority to direct, over-ride or regulate the tribunal.

I would point out that this is the same kind of relationship that applies in the case of other arm's length organizations such as Crown corporations.

3. The third sense of 'association' is the less formal sense in which the department ought to be, in an appropriate way, the entity to which the members and staff of the tribunal can look for administrative support and certain kinds of expertise.

Now, not every tribunal requires support from a department. Some, like the Immigration and Refugee Board or the CRTC, are as big as some departments. They may be largely or even entirely self-sufficient from an administrative point of view. Here too, however, the requirement for a good working and administrative relationship between department and tribunal remains, though it may not be enshrined in a formal MOU.

In my remarks today I wish to make the following points:

1. In my experience, governments are as concerned to respect the independence of tribunals as are the Chairs themselves.

Ministers and senior officials understand that any effort, real or apparent, to subordinate the tribunal to the department will rebound badly on the government.

2. The substantive independence that is essential to the credibility, effectiveness and legitimacy of tribunals is not the same as administrative independence.

Or to put it another way, being substantively independent does not mean the tribunal must be completely independent, in an administrative sense, of the department with which it is associated.

3. As a practical matter, most tribunals are not big enough to justify having their own administrative substructure. They must look to their associated department for some services, facilities and core administrative capabilities.
4. This, in my view, is where an MOU between the tribunal and the department is relevant and, in most cases, necessary. An MOU sets out the terms under which two substantively independent entities have agreed to work together on administrative matters, or where one has agreed to provide defined services to another.
5. It is not, as far as I know, practice at the federal level to work out MOUs on matters affecting the membership of administrative tribunals, their rules of operation, or their substantive business. Those things we tend to leave either to law and regulation, to the discretion of the Chair and Members, or to that of the GiC.

I'm not saying things always work perfectly at our level – clearly, they don't.

You know the kinds of cases where problems have arisen:

- problems within tribunals, often over the authority of the Chair and the rights and responsibilities of Members in relation to the Chair;
- problems with administration (or perhaps I should say problems with Chairs who have acted improperly in matters of administration);
- operational problems, often occasioned by inadequate resourcing of tribunals that are overburdened with work.

So what is it that we should expect of tribunals (and especially Chairs of tribunals) in relation to the matters that fall properly under the ambit of an MOU with the associated department?

The first thing we should expect is acknowledgement that members of tribunals are not judges – they are *quasi-judges*.

They are a special part of the government, not part of the judiciary. They exercise policy, regulatory or adjudicative responsibilities in areas where Ministers or officials *could* decide, but where, for a variety of reasons, governments have decided to place authority in the hands of independent decision-makers.

What are those reasons? You know them as well as I do:

- to obtain the benefit of specialized expertise
- to secure public confidence in the perceived integrity of decision-making on matters where there are winners and losers and governments do not wish to be seen as taking sides
- to ‘de-politicize’ decision-making in areas of potential public controversy
- to provide faster and less costly access to administrative justice than is possible through the courts

The key point is, tribunals are part of the government. What does this imply? Well, among many other things it implies that:

- tribunals must be administered according to public service standards of transparency, probity and efficiency
- tribunals should be staffed by public servants who are selected and employed according to public service standards of fairness, transparency, professionalism and non-partisanship
- tribunals have an obligation to work effectively, and often closely, with government departments and their Ministers.

Now, about MOUs. (I think you can see where I am heading with all this.)

I do not see an MOU between a department and a tribunal as a way of saying differently, or in greater detail, what the legislature has already said in the legislation that created and mandated the tribunal.

Fundamental issues of mandate, responsibilities, authorities, accountability and reporting are all set out in statute. I see no useful purpose in further negotiating any of those matters in detail between the Tribunal Chair and the Minister, or between the Chair and the Deputy. Such an endeavour is either unnecessary or downright dangerous, because it risks confusing in practice what is already clear in law.

Second, at the federal level, most issues relating to the rules and procedures of tribunals are addressed either in the law or, more frequently, in regulation. If those matters are not so addressed, then they fall to the discretion of the Chair and Members of the tribunal. They are issued as guidelines.

Here again, I see no purpose to be served in making these the subject of an MOU with the associated department because such an arrangement could be seen as an intrusion by the executive into the substantive business of the tribunal.

Third, issues related to the administrative accountability of the tribunal to the Treasury Board (for financial and related matters) or the Public Service Commission (for some personnel matters), are similarly set out in statute or in the policies and regulations governing the operations of those central agencies. Once again, these matters should not be the subject of a negotiated MOU, at least nothing any different in kind than would be agreed in respect of any other department or agency of government.

What, then, can an MOU between a tribunal and a department cover?

- It can, as I have already suggested, cover an administrative arrangement between the tribunal and its associated department for the provision of administrative services and facilities that the tribunal could not be expected to provide for itself. These would include such things as financial and personnel services, computing services, access to meeting rooms, contracting and procurement services and even such basic things as rental of office space.
- It can cover access to specialized services (e.g., laboratories or other facilities that would be too expensive for a tribunal to duplicate)

- It can cover mutually-beneficial arrangements in areas such as training and development, or interchange.

Beyond these sorts of straightforward administrative arrangements, which can and should be set out and mutually agreed, lie more difficult issues such as:

- the nature and quality of appointments to the tribunal
- the tenure of members
- the interest of the Chair in being consulted on appointments
- the size of the tribunal's budget
- the rules governing the access of the Chair and administrative staff of the tribunal to processes of internal departmental decision-making on matters affecting the tribunal

At the federal level, the rule with respect to these issues is to work as much as possible in an informal manner, and not to try to codify these aspects of the tribunal's relationship with the Minister and the government.

Why not address these matters in an MOU? Three reasons:

1. first, because the effort to secure perfect clarity in a written MOU risks creating new kinds of confusions and sources of potential dispute – it can too easily mean trying to work out a contract that binds both parties in ways that either or both may try to use to push their interest vis a vis the other
2. second, because Ministers and governments change, and officials are properly reluctant to create agreements that may appear to impose obligations on new Ministers that they may not wish to accept, but that would be difficult to get out of.
3. third, because MOUs can too easily stray into matters of substance. And I believe in as much substantive independence for tribunals as the law allows.

My bottom line? Two points:

1. MOUs are fine, but they should be used only in the proper circumstances – to cover administrative arrangements between a tribunal and its associated department
2. Don't try to codify in writing what is better left to the dynamics of an open, collegial and professional relationship between a tribunal Chair and a Minister or Deputy.

Thank you.