Independence, Accountability and Human Rights

by Lorne Sossin

As part of the Yukon Human Rights Modernizing initiative, a number of models are being considered. All but one (a pure “court based” model) involves an administrative body of some kind responsible for various functions in the human rights system (which could include a human rights commission, a human rights tribunal, or both, and a mix of functions including public education, policy-making, advocacy, investigation, adjudication and enforcement). The brief comments below are directed to the question of how to ensure such an administrative body or bodies can achieve the important and mutually reinforcing goals of independence and accountability.

Independent administrative bodies such as human rights commissions and/or tribunals do not fit easily into Canada’s political, constitutional or legal landscape. While they have come to play an integral role in the lives of many Canadians, the public tends to pay attention to them only when there is a problem or scandal. Lately, the public has been paying a lot more attention. On the one hand, there has been media attention to claims that human rights bodies have become laws unto themselves and lack accountability. On
the other hand, recent allegations of political interference have involved Elections Canada, the Canadian Military Complaints Commission, the Canadian Nuclear Safety Commission, the Veteran’s Ombudsman and Statistics Canada (just to cover the recent, high profile incidents involving the federal Government). These incidents have brought the challenge of how best to balance the independence and accountability of administrative bodies into stark relief. They suggest that the independence of these bodies will be respected only until that independence conflicts with the Government’s political (or partisan) priorities, and that the line between accountability and interference is not well demarcated.

While each crisis arises in a particular matrix of factual and legal circumstances, together they raise broader questions. To what extent and in what ways should Government be constrained from intervening in the decision-making of an independent body? To what extent and through what mechanisms may a government legitimately seek to influence the direction, approach and decision-making of independent administrative bodies? Does independence enhance or limit the accountability of these administrative bodies? These are the questions I seek to answer.

First, I need to address the nature and scope of “independence” in this context. These bodies, after all, are created by a legislative act in order to further a policy end. As Chief Justice McLachlin memorably observed, writing for a unanimous Supreme Court in *Ocean Port*, “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.” In this
sense, all administrative bodies in Canada are, by definition, dependant for their existence on their legislative mandate, and the political will that mandate reflects. These bodies are not free to adopt the mandate they believe is most appropriate, but must discharge the responsibilities provided to them. Further, these bodies do not choose the people best able to carry out this mandate; rather, the Government makes appointments to these bodies, and in doing so is constrained only by the criteria set out in the bodies’ empowering statutes, and by whatever other criteria the Government of the day deems appropriate. Lastly, these bodies do not control free-standing budgets to meet their needs, but rather must make do with the resources that the Government of the day (or, in some cases, the legislature) sees fit to provide.

Independence in this context relates not to an administrative bodies’ control over its resources or authority, but to its autonomy of decision-making. In order to discharge its mandate, these bodies must have the space to adjudicate and to develop policies and mechanisms tied to its adjudication without interference.

The greatest threat to the independence of tribunals is not accountability but partisanship. Partisanship in politics, of course, is nothing new, nor is it inherently detrimental to the democratic process; indeed it is the lifeblood of elections and parliamentary politics. Partisanship in Canadian Parliamentary democracy is alive and well. What appears to be eroding is a shared sense of the boundaries of partisanship, and the shared respect by governments for certain “no-go zones” that need to be (at least relatively) non-partisan if democracy is to work.
An analogy for adjudicative administrative bodies may be found in Canada’s court system. While we accept Canadian courts as independent, that independence is largely dependent on the support of the government. Government builds courthouses, hires and pays court staff, appoints judges and ultimately must enforce judicial orders if they are to have any legitimacy. Despite all the ways in which a Canadian government could subvert the judiciary, however, none has done so, even after judges began striking down government actions and laws under the Charter in the 1980s and not even when courts began compelling more generous judicial salaries under the principles of judicial independence in the 1990s. I argue that the independence of the judiciary flows far less from institutional guarantees than from the political calculation of those in power that to challenge the courts would be deeply unpopular, and ultimately self-defeating. Ultimately, though, the moral of the story of the Canadian judiciary’s success is that independence is as much a product of political leadership in an entrenched democracy as it is testament to the abilities and vigilance of an independent judiciary, an independent Bar and a public committed to the rule of law.

While most would agree that democratic politics requires courts as independent arbiters of social, economic and political disputes, recent events in Canadian politics raise the question of whether or not that same logic apply to independent accountability and adjudicative bodies like a human rights commission or tribunal. Given their disparate mandates, diverse make-up and variable powers, can one even speak of these independent bodies as part a coherent sector of administrative justice? If there is a unifying thread

3 See, for example, Nathalie DesRosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals” in Madam Justice G.A. Smith & H. Dumont, eds., Justice to Order:
animating all independent bodies, it is simply that they are expected to act impartially and objectively, and to advance only the legislative purposes for which they were created. Beyond this core, any consensus on how active or passive such bodies ought to be will likely break down. But this core commitment is more than enough to justify both a requirement of a measure of independence and a concomitant requirement for a measure of accountability.

The members of human rights commission and tribunals are neither fish nor fowl. Unlike public servants, they owe no duty of loyalty to the government, though in many jurisdictions, they are bound by many of the same standards of public servants with respect to conflicts of interest and ethical standards.4 Similarly, while the substance of their adjudication may look quite similar to that of judges, the constitutional protection of judicial independence does not extend to these bodies.5 In other words, these administrative bodies, as McLachlin C.J. put it in Ocean Port, “span the constitutional divide between the judiciary and the executive.”6

In light of this backdrop, how can a human rights commission or tribunal be both independent and accountable? I would suggest the answer lies in transparency. While it is not legitimate for the Government of the day to influence the decision-making of a

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4 For example, the Public Service of Ontario Act contains conflict of interest provisions which apply both to public servants and to adjudicative boards and regulatory agencies. See O. Reg. 381/07.


6 Ibid. at para. 32.
human rights body through back-channel pressure, or threats of budget cuts, it ought to be able, in the transparency of the legislative process, to impose its policy choices on such bodies. For example, in P.E.I., political belief is a protected ground in that province's human rights discrimination provision. In Ontario, it is not. This is not a matter of improper influence but rather falls within the heart of policy-making. Governments should also make the appointment process a transparent one, with the selection criteria and process publicly available and will all appointments made on a merits basis, consistent with the goals of the legislation, and with appropriate input from the Chair or leadership of the tribunal or commission itself.

By the same token, while a human rights body's deliberations must remain confidential, how it spends its resources, should be a matter of public record. Reason should be provided for all its decisions. Further, where a commission or tribunal wishes to adopt a particular position with respect to its mandate, or the interpretation of a provision of its governing legislation, non-binding but publicly available guidelines should be produced. Public information about the commission or tribunals rules, its structure, and relevant timelines or administrative requirements to access its process, should all be produced and disseminated in accessible formats.

These accountability and independence structures work, ideally, in tandem. Independence creates the need for greater accountability, and greater accountability creates the conditions for strengthened independence. The commission and/or tribunal should make itself as transparent as possible without compromising the independence of its decision-making, and Government should make its role in the affairs of the commission and/or
tribunal, from appointments to budgeting to policy-making as transparent as possible without compromising the public interest.

Independence and accountability should be seen, in other words, as twin pillars which support any institution responsible for human rights decision-making. The goal of this mutually reinforcing approach to independence and accountability is not just to sort out effective, efficient and appropriate institutional relationships, but ultimately to enhance public confidence.

It is worth emphasizing that independence, as a legal matter, is not an entitlement of an administrative body or its members, but rather is a right owed to those affected by administrative decision-makers. While there is a legal dimension both to the independence and accountability of a human rights commission or tribunal, however, the enforcement of law through the courts cannot achieve either goal. The independence of a human rights body can only be assured, in the long run, through political leadership. The crucible of an administrative body's independence is a Government's respect for it, even when, and especially when, its partisan interests would be served by undermining the body.

Similarly, ministerial oversight cannot assure accountability. Only leadership from the body itself, whether through a commitment to transparency or otherwise, can lead to genuine accountability. In both cases, legislated structures may be necessary (requiring, for example, greater transparency in appointments by inserting expertise requirements in the governing legislation of an administrative body, or requiring the body to make its

budgetary expenses or interpretive guidelines publicly available), but legislation alone is not sufficient.

To the extent that transparency and structures that reflect a respect for independence are the organizing principles of a human rights institution, any of the models currently under consideration could advance the goals of independence and accountability. What independence and accountability share, ultimately, is reliance on leadership if these goals are to be achieved. In other words, for the Yukon, selecting the model best able to facilitate independence and accountability is a necessary first step to human rights reform, but the establishment of this next model should be understood to be the beginning of this process, not the end.

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