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FUNDAMENTALS OF AN INDEPENDENT AND TRANSPARENT REGULATOR

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INTRODUCTION

Regulatory bodies within the Caribbean operate in a landscape where social and political intimacy has traditionally existed among policy makers and the corporate and wider community - where limited financial and human resources has forced upon us a recognized and locally acceptable level of co-dependency. The question therefore arises, can we fashion independent regulatory bodies within such a claustrophobic environment? This seemingly daunting task is not truly arduous for within this paradigm judicial independence has nonetheless existed for centuries[2]. Sound judicial decisions and a revered court system have emanated from what to the outside observer appears to be a potentially incestuous web of relationships and indecent proximity of actors. As we seek to determine what are the pre-requisites for a quasi-judicial regulator to be independent and transparent some guidance can be found even by a cursory examination of the primary elements which have made judicial bodies in the region sacrosanct.

While some may argue that the lynchpin of judicial independence stems from a judge's security of tenure, it would be remiss of us not to mimic the other characteristics that have secured for them their independent status. The careful observer notes that in the Commonwealth Caribbean judges' authority to act, their functions and duties are fully enshrined in legislation[3]. The mode, process of appointment, tenure and termination of judicial officers are likewise clearly defined and set out in legislation[4]. Against this backdrop, we see that a substantial degree of formal independence has been conferred on the judiciary by its structure and by statute law. Secondly, the processes utilised by the courts to hear and determine cases are established as documented rules of procedure which are often enshrined in subsidiary legislation and form binding rules and obligatory practice directions. While this Paper does not provide an exhaustive list of the factors that assist regulatory bodies in attaining independence or transparency it does (a) highlight those fundamental to the regulator establishing credibility, legitimacy and effectiveness and (b) suggest that a regulatory body will be particularly vulnerable to stakeholder and political pressure if these key factors are not given statutory protection:

[2] Most English speaking Caribbean nations have adopted and embraced the Westminster style of government which ascribes to the doctrine of the separation of powers which enshrines in the Constitution of each country the separation of the legislative, the executive and the judiciary or the isolation of immunity or independence of one branch of government from the action and interference of another.

[3] The Constitution - the supreme law in our jurisdictions sets out the rules and procedures for the appointment termination and functions inter alia of judges.

[4] In Barbados the decision makers such as the judges and the magistrates are governed by legislation which outlines the methods of appointment and grounds on which judicial officers can be removed from office. The judges are primarily governed by the Barbados Constitution and Judges Remuneration and Pension Act. Whereas magistrates are primarily governed by the Magistrate's Jurisdiction and Procedure Act.

a. A Separate Legal Existence

Independence can only be properly defined within the context of the legal character of the regulatory body and the scope and extent of the functions assigned. Within the context of small island states independence is best expressed or measured in degrees. Colin Scott in **Paradoxes of Independence and Accountability in Commonwealth Regulatory Governance** states that "no person or organization is wholly independent". Interestingly he found that "few Commonwealth regulators have full independence within their regime". The regulator that is a department of a government ministry or public body will not enjoy the degree of independence and latitude afforded to the regulator who has a distinct statutory authority and whose existence is enshrined in statute. It is therefore important that the regulator's enabling legislation adequately and clearly confers the formal requirements of independence namely that the regulator is intended to be autonomous and exist and operate separate from its policy ministry and the regulated entities.

b. A Clearly Defined Statutory Mandate

The duties, powers and role of the regulator including where its jurisdiction ends and that of other agencies or the Minister, begins must be unambiguously and definitively set out in governing legislation. Regulators should be provided with a distinct legal mandate and the circumstances under which Ministerial policy direction will be given should likewise be set out in the governing legislation. It is therefore critical that the nature of policy directives and the requirement that they be in writing are definitively laid out in law. Where Parliament has in legislation determined that the regulator must follow Ministerial policy directives the regulator who refuses to do so is not acting "independently" but flouting the provisions of the law. Some commentators and regulatory bodies, however, maintain that being independent means to be:

> *? " **1** free from outside control; not subject to another authority. ? (of a country) self-governing. **2** not depending on another for livelihood or subsistence. **3** not connected with another; separate"*
> **Concise Oxford Dictionary**

Guided by this intoxicant called "full independence" some regulators desire a not only a separate existence from the utilities they regulate but are also wary of policy directives being given to them by a Minister; cringe at the thought of having to report to the political directorate; and scorn any antecedent ties to a government agency. To them, independence includes the unshackling of one's self from one's birth parents - to have the wild abandon of being free from any form of external control. Most utility regulators, however, recognize that independence can only be defined within the context of the authority and mandate given to the regulator and that as the International Telecommunications Union (ITU) has suggested "Perhaps the most traditional way to delineate the separate roles of the ministry and the regulator is to let the ministry establish overall policy, while the regulatory agency sets and enforces the rules that express

and implement these policies." Hence regulators should not, in the quest for independence spurn the obligation to account to policy makers for the execution of the mandate assigned to them. As long as the regulatory body is permitted, within the policy framework statutorily fashioned, to make the decisions they deem necessary without interference from the political directorate their independent status is not jeopardised.

c. Enforcement Powers

Regulators should have the power to investigate possible infractions of laws and regulations including their own decisions. In addition, regulators should to able to direct service providers to perform specific actions or take on obligations in pursuit of government policy objectives. For example, in Barbados the Fair Trading Commission, in pursuant of the Telecommunications Act has the power to direct Cable & Wireless (Barbados) Limited to file a Referenced Interconnection Offer.

d. Identified Source of Funding

To have a degree of independent existence the regulator must be provided with the resources particularly financial to facilitate it fulfilling its mandate. The Federal Commerce Commission states that "to be independent a regulator must be adequately funded from reliable and predictable revenue sources[5]". This is one of the main planks on which independence stands. The financing of the regulatory body should be identified and enshrined in legislation. In Barbados, the Fair Trading Commission's Act has allowed that regulator to enjoy a significant degree of financial independence. The Fair Trading Commission's utility regulatory activities are funded by levy on the regulated entities and by government loan.

Section 19 of the Fair Trading Commission Act states that*:*

> *The funds and resources of the Commission shall consist of:*
>
> *(a) such amounts as may be voted for the purpose by Parliament;*
>
> *(b) such sums as are levied on the service providers to meet the annual expenses of the Commission; and*
>
> *(c) all other amounts which may become payable to or vested in the Commission in respect of any matter incidental to its functions.*

e. Security of Tenure

Regulators should be appointed for fixed terms and should be protected from arbitrary removal. As one commentator has stated "Mechanisms have to be put in place in order to ensure that the regulator has sufficient legal tenure to enable decisions to be taken without fear of immediate consequences." Staggering of terms of appointment so that they do not coincide with the election cycle and for a board or commission

is one means of doing this. Staggering the terms of the members and protection from removal for giving a politically unfavourable decision serve to insulate the regulatory body from untoward advances and pressure from politicians. Specific circumstances and the process under which regulatory adjudicators can be removed from office should therefore be stipulated in legislation.

f. Adequate Staffing

Depriving a regulatory body of the ability to attract, engage and retain adequate staff and expertise will compromise its effectiveness and independence. The regulatory body should therefore be exempt from civil service salary rules which make it difficult to attract and retain well-qualified staff. As the regulated entities largely as private sector companies traditionally provide compensation packages with which the public sector cannot compete to constrain renumeration budgets to that in the public service can significantly curtail the regulator's ability to acquire essential expertise. It is integral to a regulatory body being functionally independent that it has the requisite staffing to meet its research, technical and administrative needs. The Info-Communications Development Authority (IDA) ¯ the Singapore regulatory body – which demonstrates an enviable level of independence[6] is free from the constraints on hiring, firing, and benefits policies that affect the civil servants employed by the Ministry of Communications and Information Technology (MCIT) and other line ministries of the Singapore government. This freedom has allowed the IDA to establish compensation packages that are commensurate with what its employees will receive if they went to work in the private sector.

g. Executing Mandate

Failure by the regulator to execute the mandate assigned can result in his power being usurped or the factor decision being made by an unauthorized party. Where a regulator fails to fulfill its statutory duty it is in danger of having its powers usurped by a higher authority like the Minister, who is forced to ensure that the regulator's duties and obligations are met. This type of problem could result in the regulator being seen only as a "rubber stamp" agency with no real powers.

h. Not Acting Ultra Vires

The independence of a regulator is often based on how the regulator operates in its territory. The regulator who acts contrary to it's enabling legislation can diminish it's legitimacy. Where a regulator is viewed to be acting ultra vires, stakeholders will lose confidence in its decision making abilities. This will expose the regulator to claims of bias and will pave the way for judicial review. As with all administrative tribunals, a regulator must act in conformity with both the specific statute which establishes its regulatory authority and

[6] IDA does not, however, have full independence from its oversight ministry, MCIT. The Ministry is the final arbiter of many decisions, including those with significant monetary, political, economic, and social implications for Singaporean society. While IDA does have powers established by statue, that legislation gives the Ministry a clear, ongoing role in supervising the agency's activities.

the general legal provisions of administrative law which often enshrine the principles of natural justice.

TRANSPARENCY

Transparency is generally seen as a means of ensuring fairness in the regulatory process. The general rule in setting up a transparent regulatory regime is that all aspects of regulation should be as open and accessible as possible. Transparent procedures should be established at inception of the regulator's existence or this is not possible in the early stages of a regulator's existence. Tracey Cohen, author of Transparency and Fairness argues that transparency is imperative in order for a regulator to avoid "regulatory capture". Transparency, he says, protects a regulator from becoming too dependent on the industry it regulates which can cause it to lose its ability to make tough choices in the interest of the society as a whole. The doctrine of transparency is not an end in itself but a means of safeguarding the independence of the regulator who seeks to establish its legitimacy and confidence in the eyes of stakeholders. It can therefore, be seen that transparency and independence are mutually supportive.

Transparency hinges on the following and should prevail except in the face of legitimate claims regarding confidentiality, national security or public safety:

1 *Stakeholders, which includes the general public and the regulated industries, being informed and consulted through public comment, procedures on hearing prior to decisions.*

Most regulators allow the stakeholders or persons with significant interests in a matter to make contributions either during a formal public hearing or through less formal channels like during a consultation process. Section 4 (4) of the Fair Trading Commission Act provides that the Commission shall in performing its functions consult with service providers, representatives of consumer interest groups and other parties that have an interest in the matter before it. The Commission may therefore hold public consultation forums or issue consultation papers whereby persons are given the opportunity to submit their views[7]. Parties are able to give their submissions either orally or in writing, which will in turn be considered by the decision makers when making a final determination of the matter.

2 *Proposals and decisions being published and distributed openly to the public.*

It is recognized that the giving of reasons for a decision is one of the ways for a regulator to be seen as transparent. By giving reasons the regulator subjects itself to scrutiny and ascertains a

[7] See Conducting Consultations authored by the Fair Trading Commission Barbados – 2002/05/16. To date the Commission has published a series of consultation papers, among these are the Interim Mechanism Rate Setting Principles 2002/08/26 and the Interconnection Guidelines – Accounting, Costing and Pricing Principles 2003/06/30.

legitimate basis for decisions. Where there is a legal duty, as in a duty to give reasons, then a failure to do so may be a ground for review. Section 35 of the Fair Trading Commission Act stipulates that the Commission shall within one month of giving a decision publish that decision in writing with supporting reasons.

3 *Decisions of the regulator should be subject to review or appeal by a higher body*.
Most regulators' decisions are subject to some form of review or appeal by the regulator itself or by a court, or both. Granting an opportunity to parties to review or appeal a decision is a process which any fair and credible regulator permits. It validates good decisions and strengthens the regulator's performance.

4 *There are rules governing the regulator's decision making processes that allow the public to hold the regulator accountable for its actions.*
Documented rules communicate the expectations and procedure of the regulator to all involved namely, the parties, the representatives, the staff and the adjudicators. Rules also often act as a self protection device for the regulator, as it protects it from parties trying to do things through illegitimate means. Rules not only benefit the immediate parties, but the regulator as well. For a regulator, the additional benefit of having rules or regulations is that it brings a degree of predictability to the regulatory process.

Where proper rules are in place, parties at all levels can also be assured that they are being treated fairly and not being subjected to bias or arbitrariness on the part of the regulator. For example, citing a rule to a party in a hearing and explaining that this rule applies to all parties and to all proceedings is useful in removing any impression of unfair treatment. The quality of a regulator's rules can bolster and secure its independence as it lends transparency to the regulator's decision making process.

5 *There being a code of ethics that governs the behaviour of regulators.* While codes of conduct are largely on internal administrative matters for the staff of the regulator, public knowledge of them can only serve to enhance transparency of operation and improve sector confidence. In small Caribbean societies, daily contact between regulators and industry representatives is often inevitable. Professional relationships and even friendships may already exist or may emerge over time. It is important therefore for regulatory adjudicators to keep these relationships at arm's length. On the issue of fraternization one administrative judge writes[8]:

[8] Society of Ontario Adjudicators and Regulators, A Manual for Ontario Adjudicators, Pages 171 – 173

> "*Public attitudes about judicial conduct have become stricter in recent years, and judges should be sensitive to this change. A judge should limit social activities with friends or colleagues if there is any likelihood of their being involved in matters coming before the Judge. It is not enough merely to avoid discussing pending matters; a Judge should shun situations that might lead anxious litigants or worried lawyers to think that the Judge might favour or accept the views of friends more readily than those of unknown parties.*
>
> *One approach is for Judges to maintain their personal ties but disqualify themselves in any case in which a friend appears.…… An alternative course is to describe publicly the relationships whenever a friend or associate is involved and offer to disqualify oneself if so requested.……In any event, a Judge must avoid the appearance of impropriety.……*
>
> *Judges must accept a certain amount of loneliness. They needn't become recluses, but they should realize they are no longer "one of the boys" and that they live in a critical and suspicious would."*

The imperative that "justice must not only be done, but must also be seen to be done" is as vital for regulators as it is for members of the judiciary.

6 *Regulators must disclose financial interest and avoid conflicts of interest*. Where a member of the board of the regulator holds financial or material interest in a regulated company it becomes very difficult to avoid allegations of bias. Bias can be established in a number of ways. It may be apparent, for example, from a recent prior involvement with one of the parties or from an expression of an opinion before or during a proceeding, indicating a pre-formed view about the proper outcome of the hearing. Typically bias may be perceived where an individual holds a direct interest, financial or otherwise in the outcome of proceedings.

If necessary the individual should request to be excused from the matter. Prohibition against financial or material gain by regulators is often included in an agency's authorizing legislation. Sections 8 and 9 the Fair Trading Commission Act provide that Commissioners who hold a personal, pecuniary or proprietary interest in any regulated company must disclose that interest, and if the interest is deemed significant they are not allowed to sit on the panel which is hearing matters involving that interest.

7 *Citizens and companies having the right or ability to contact regulators and policymakers to express their views or ask questions.* The sage regulator provides the regulated entities and consumers with methods by which they can legitimately influence its decisions. Stakeholders have a real and legitimate interest in the process and the outcome of the regulatory decisions. It is therefore quite proper for them to try to influence the way a regulator decides a matter. Legitimate processes such as hearings and consultations with prescribed governing rules should be established through which stakeholders can give their input in matters before the regulator. The results of stakeholder input should be reflected in the regulatory body's actual decision or proposals. In setting up systems and procedures the regulator demonstrates that it recognizes that it is also accountable to the industries it regulates. Regulatory bodies must have clear processes that allow stakeholders the right to be heard and where parties are assured that their views are taken into consideration by the regulator before arriving at a decision.

8 *There being a limit on the value of gifts a regulator or its staff can receive.* Companies may sometimes try to build relationships with other members of the corporate community by sending corporate gifts or courtesies such as tickets to concerts or sport events. Regulators are often included in the list of recipients. However, because of the nature of the relationship between the regulator and the industry, rules are required to prevent to development of bias or perception of bias stemming from the acceptance of gifts.

CONCLUSION

With the advent of globalization and liberalisation there has been a recent and growing clamour for regulators worldwide to be both independent and transparent. The World Trade Organisation's Fourth Protocol to the General Agreement on Trade in Services (GATS) to our Caribbean governments are signatories, requires that our regulatory bodies be:

> *"separate from, and not accountable to any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants."*

While that Agreement speaks of the partitioning of the regulator from the regulated entities, insulation from ad hoc political involvement in the regulatory process is a second widely accepted component of an independent existence[9]. As William H. Melody opines in his text **Telecom Reform Principles, Policies**

[9] Warwick Smith has postulated that to be independent a regulator should have

- an arm's length relationship with regulate firms consumers and other private interests
- an arm's length relationship with political authorities and

and Regulatory Practices "being independent does not mean independent from government policy or the power to make policy but rather to have the ability to implement policy without political or stakeholder interference". The regulator, when acting as an adjudicative tribunal needs to be allowed to make decisions devoid of any improper or undue influence. Consumers expect that decision makers will be neutral and will regulate a market objectively and transparently. Independence therefore according to John Alden[10] requires the regulators to be **seen** as "unbiased referees in the markets which they oversee". Competitors and potential investors likewise must be confident that they will encounter fairness, non-discrimination and due process in their interaction with the regulator.

Independent regulators whose activities are transparent inspire market confidence among investors and is strategic to attracting foreign capital particularly in the telecommunications sector which is vital to the success of economies in the region. To be functionally independent a shrewd regulator must also establish legitimate procedures through which stakeholders or interested parties can participate in its decision making process. This decision making process should be prescribed, promulgated, adhered to and conform to the dictates of natural justice and the principles of fairness.

A regulator will be permitted a full range of independent action, so long as it effectively fulfills its assigned mandate and produces well-reasoned decisions without overstepping its legal and regulatory authority. Likewise, a regulator that consistently fails to perform its assigned roles and tasks or constantly goes beyond its authority will inevitably lose its independence and regulatory capture will ensue or another government agency may step in and fill the vacuum thereby usurping the regulator's authority. By the same token, no agency or authority can be truly effective if its actions are constantly constrained by a lack of resources, political meddling, or a perception that it lacks integrity because of links to one or more regulated operators. Through the use of well documented procedures that allow stakeholders to be heard and incorporate the rules of natural justice as well as the timely issuance of reasoned decisions which are open to further scrutiny by review and appellate processes regulators assure their status as worthy custodians of decision making power.

- the attributes of organisational autonomy necessary to foster the requisite expertise and to support those arm's length relationships.

[10] Financing the Regulatory Authority and Regulating in the Public's Interest; Trends in Telecommunication 2002: Effective Regulation, International Telecommunication Union. Chapters 8 & 9.

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