

A CANADIAN PERSPECTIVE ON TRIBUNAL INDEPENDENCE ¹

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Introduction

For at least the past decade, no single issue has captured the imagination of people who work in the administrative tribunal sector in Canada quite as strongly as tribunal independence. Some of this interest has been generated by litigation aimed at strengthening the constitutional protection of judicial independence, and by the possibility that similar protections could be made available to adjudicators who are members of administrative tribunals rather than judges. ² Some of it has flowed from the work of organizations seeking to promote improvements to our system of administrative justice, ³ efforts that in some instances have helped to put administrative justice on the

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² See case references and discussion in S.R. Ellis, “The Justicizing of Quasi-Judicial Tribunals, Part I” (2006), 19 *Canadian Journal of Administrative Law and Practice* 303, “The Justicizing of Quasi-Judicial Tribunals, Part II” (2007), 20 *Canadian Journal of Administrative Law and Practice* 69; J. Gagnon, “L’indépendance judiciaire: fondement du principe et son application aux tribunaux administratifs” (2004), 83 *Canadian Bar Review* 895; P. Bryden, “Structural Independence in the Wake of *Ocean Port*” (2003), 16 *Canadian Journal of Administrative Law and Practice* 125; K. Wyman, “The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence” (2001), 14 *Canadian Journal of Administrative Law and Practice* 61.

³ See, for example, P. Bryden and R. Hatch, “British Columbia Council of Administrative Tribunals Research and Policy Committee – Report on Independence, Accountability and Appointment Processes in British Columbia Tribunals” (1999), 12 *Canadian Journal of Administrative Law and Practice* 235; Society of Ontario Adjudicators and Regulators, “Principles for Appointments to Adjudicative / Regulatory Tribunals” (1997 updated June 2006) online at <http://www.soar.on.ca/soar-appoint.htm>; Society of Ontario Adjudicators and Regulators “Principles of Administrative Justice: A Proposal” (1995 updated April 2005) online at http://www.soar.on.ca/soar-1st_princ.htm.

law reform agenda for government.⁴ And some of it is simply a recent manifestation of a long-standing interest in developing a better understanding of administrative tribunals as institutions and enhancing the contributions they make to effective government.⁵

In the eyes of people who work as adjudicators in Canadian tribunals, independence is broadly believed to be what Martha Stewart might describe as “a good thing”. When one looks at Canadian writing about tribunal independence more closely, however, it is apparent that different people mean slightly different things when they refer to independence. As those differences are highlighted, the reasons why some commentators favour a more limited, or at least more nuanced, commitment to some aspects of tribunal independence become more evident. One of my goals in this paper is to discuss four distinct aspects of tribunal independence (adjudicative independence; institutional independence; administrative autonomy; and independent policy-making) and to explore how these aspects receive legal and political recognition in Canada. The other is to

⁴ See, for example, British Columbia Administrative Justice Project White Paper, *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia* (2002) online at <http://www.gov.bc.ca/ajo/>; W. Mackay, “Administrative Institutions From Principles to Practice: Guidelines for Review and Design” (2006), 19 *Canadian Journal of Administrative Law and Practice* 63; D. Flood, E. Loughran and R. Rogers, “British Columbia’s New *Administrative Tribunals Act*” (2005), 18 *Canadian Journal of Administrative Law and Practice* 217.

⁵ Over the past twenty-five years there have been many examples of reports concerning the role played by Canadian administrative tribunals. The proper scope of tribunal independence typically plays a prominent part in the authors’ recommendations. In addition to the British Columbia Administrative Justice Project White Paper referred to in note 4, the most notable reports include Law Reform Commission of Canada Report 26, *Independent Administrative Agencies* (Law Reform Commission of Canada, 1985); Y. Ouellette, *Les tribunaux administratifs: Rapport du groupe de travail sur les tribunaux administratifs* (Les Publications du Québec, 1987); R. Macaulay, *Directions: Review of Ontario’s Regulatory Agencies* (Ontario Management Board of Cabinet, 1989); E. Ratushny, *Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies* (Canadian Bar Association, 1990); P. Garant, *Une justice administrative pour le citoyen* (Les Publications du Québec, 1994); Law Reform Commission of Nova Scotia, *Final Report: Reform of the Administrative Justice System in Nova Scotia* (Law Reform Commission of Nova Scotia, 1997); and Agency Reform Commission on Ontario’s Regulatory and Adjudicative Agencies, *Everyday Justice* (Ontario Queen’s Printer, 1998).

identify some of the strengths and limitations of reliance on different legal and other instruments to establish an appropriate regime of tribunal independence. The basic thrust of this aspect of my paper is that the further one moves from adjudicative independence, the more important it is for the legislative and executive branches of government to play a constructive role in the design of systems of tribunal independence and accountability.

1. General Observations about Tribunal Independence in Canada

While the bulk of this paper is devoted to an exploration of Canadian thinking about the four specific aspects of tribunal independence that I have just identified, I believe it is useful to begin by making four general observations about the independence of administrative tribunals and the legal and other instruments used in Canada to define the scope of that independence and to safeguard it. These observations concern the rationales offered for tribunal independence; the relationship between independence and accountability; the institutional structure of Canadian administrative tribunals; and legal and political mechanisms used to define and safeguard tribunal independence in Canada.

a. The Rationales for Tribunal Independence

The first general observation I wish to make is that tribunal independence is a means to an end rather than an end in itself. The Supreme Court of Canada has made it clear that this is true of judicial independence, and that the goal of judicial independence is to provide objective guarantees to litigants that judges will adjudicate their disputes in a fair

and impartial manner.⁶ The same rationale can be, and often is, offered for tribunal independence.⁷ Judith McCormack, former Chair of the Ontario Labour Relations Board, has given a compelling statement of this justification for tribunal independence. It is:

. . . the idea that adjudicators will base their decisions on the evidence and the law before them, and not on extraneous considerations, including fear, self-interest or prejudice. . . . The goal is to ensure that the issues in a case are dealt with as much as possible on their own authentic terms.⁸

This line of reasoning explicitly links tribunal independence with judicial independence, since independence is supposed to be a characteristic of the process of adjudication itself rather than of the person who is doing the adjudication.

There is, however, a second line of thinking in Canada in which tribunal independence is viewed as the foundation for a set of governance relationships that are needed to enable tribunals to carry out their statutory mandates. According to the proponents of this approach, the purpose independence serves is to ensure that the tribunal is able to carry out its statutory mandate in a manner that has integrity. Thus, the Canadian Bar Association Task Force Report on *The Independence of Federal Administrative Tribunals and Agencies* observed:

One basic premise of this report is that Canadians should be told by Parliament whether or not a tribunal or agency is independent of government, and they should be entitled to rely on what they have been told. Anything less will

⁶ See, for example, *R. v. Lippé* [1991] 2 S.C.R. 114 at 139 (Lamer, C.J.); *R. v. Beauregard* [1986] 2 S.C.R. 56 at 69-70 (Dickson, C.J.).

⁷ See, for example, *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919 at paras. 105-110 (L'Heureux-Dubé, J.) (hereafter "*Régie*").

⁸ J. McCormack, "The Price of Administrative Justice" (1998), 6 *Canadian Labour and Employment Law Journal* 1 at 16.

diminish the integrity of administrative decision-making. What is clearly undesirable is for a Government to pay lip service to the independence of a tribunal and then proceed to undermine that perceived independence in a variety of ways.⁹

The advantage of this way of thinking about tribunal independence is that it enables us to encompass the governance needs of a very diverse set of tribunals, and frees us from reliance on the judiciary as the exclusive model for independence. The difficulty with it is that it is potentially so malleable that it provides no basis for distinguishing wants from needs, and threatens to turn every discussion about the effectiveness of administrative tribunals into a debate about tribunal independence. Former Ontario Municipal Board Chair Robert Macauley disavowed the use of the word “independent” to describe tribunals for just this reason. He thought it was confusing and an inaccurate way to describe the actual relationship between tribunals and government, and he preferred to use the term “arms length” to describe the appropriate relationship between tribunals and government.¹⁰ On the other hand, when one examines Macauley’s analysis of Ontario’s tribunals and regulatory agencies and his recommendations for making them function more effectively, it is apparent that he shared many (though not all) of the views expressed by commentators who see independence as the centerpiece of reform of Canada’s tribunal system.

⁹ Ratushny, note 5 above, at 10. See also N. Des Rosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals” in G.A. Smith and H. Dumont (eds.), *Justice to Order: Adjustment to Changing Demands and Co-ordination Issues in the Justice System in Canada* (Les Éditions Thémis, 1999) 53.

¹⁰ Macauley, note 5 above, at 2-17 - 2-22. See also J. Sprague, “The Quest for the Holy Grail of Agency Institutional Independence: A Case Comment on *Bell Canada v. Canadian Telephone Employees Association*” (2003), 16 *Canadian Journal of Administrative Law and Practice* 315 at 326.

It seems to me that three comments can usefully be made about this aspect of the Canadian debate over tribunal independence. The first is that whatever we may think about the merits of a broad as opposed to a narrow view of tribunal independence, it is useful to move beyond generalities in our discussion of independence and to identify more precisely who ought to be independent from whom and in respect of what. The second is that the utility of a broad conception of tribunal independence is that it enables us to address a range of considerations that can serve, at least potentially, as a justification for the obvious gap between the judicial model of independence and the reality of most Canadian tribunals with respect to such central issues as security of tenure and remuneration. Whether or not that justification is adequate remains to be seen, but my own view is that the attempt to explain the gap on the basis that there is a fundamental distinction between judicial and tribunal adjudication is doomed to failure. The third comment I would make is that even a broad understanding of tribunal independence needs to have some limits. I believe that if one confines the discussion of independence to a tribunal's internal and external governance relationships, this provides a sufficiently clear line of demarcation that independence issues can be distinguished meaningfully from other aspects of the tribunal's effective operation.

b. The Relationship Between Independence and Accountability

The second general observation I wish to make is that independence and accountability are inextricably linked. To say that adjudicators must be free to decide a case based on their own understanding of the evidence and the law before them is not the same as

saying that adjudicators must be free to decide cases according to the dictates of their own consciences. To paraphrase the great American Supreme Court Justice Felix Frankfurter, “Self-willed adjudicators are the least defensible offenders against government under law.”¹¹ The question once again is not whether tribunal members, or tribunals as institutions, are free from accountability but what types of accountability mechanisms are appropriate (or inappropriate) with respect to what types of activity. For example, the removal of a member of an administrative tribunal from office as a result of his or her misconduct¹² does not compromise the independence of the tribunal, at least if the tribunal member is treated fairly in determining whether or not misconduct has taken place and the appropriate removal process has been followed.¹³ It is, on the other hand, a different matter if the tribunal member is removed simply because his or her decision in a particular case is unpopular with the government of the day.

It seems to me that there are at least four types of accountability that ought to be discussed, and that they are loosely related to the four aspects of independence that I will be discussing below, though there is not an exact correspondence between them. The first is accountability of both individual adjudicators and the tribunal as a whole for producing decisions that comply with legal rules and standards. The second is the

¹¹ The proper quotation is “Self-willed judges are the least defensible offenders against government under law.” F. Frankfurter, “John Marshall and the Judicial Function” in A. Sutherland (ed.), *Government Under Law* (Harvard University Press, 1956) 31.

¹² See, for example, *Weatherill v. Canada (Attorney General)* (1999), 168 F.T.R. 161, 22 Admin. L.R. (3d) 192 (F.C.T.D.); *Wedge v. Canada (Attorney General)* (1997), 133 F.T.R. 277, 4 Admin. L.R. (3d) 153 (F.C.T.D.).

¹³ This is equally true of the removal of judges from office for misconduct or inability to carry out their judicial duties. See *Ell v. Alberta*, [2003] 1 S.C.R. 857; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249; *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267; *Gratton v. Canadian Judicial Council* (1994), 115 D.L.R. (4th) 81 (F.C.T.D.).

accountability of tribunal chairs and members for misconduct that affects their ability to continue to serve on the tribunal. The third is accountability for effective performance of the role assigned to the tribunal member or chair, or to the tribunal itself. This accountability goes beyond compliance with minimal legal standards and relates to such things as the timeliness with which decisions are produced, the quality of the reasons offered, and the effectiveness of the tribunal's use of the resources made available to it to pursue its statutory mandate. Finally, the fourth type of accountability is accountability for the policy direction being pursued by the tribunal in the exercise of its mandate.

The independence principle does not undermine the desirability of ensuring accountability in each of these dimensions. Rather, it constrains the use of certain mechanisms to achieve the desired type of accountability, and reinforces procedural and substantive limits on the manner in which mechanisms that are appropriate in and of themselves are actually employed.

c. The Institutional Structure of Canadian Tribunals

My third general point concerns the institutional structure of Canadian tribunals. Canadian tribunals are extremely varied, both in their subject matter jurisdiction and in the volume of their caseloads. The financial resources available to the federal government and the ten provincial and three territorial governments are also extremely uneven. Finally, the attitudes of governments toward tribunals vary from jurisdiction to jurisdiction and over time within each jurisdiction. It is difficult even to decide exactly

which institutions fall into the category of independent administrative tribunals. The adjudicative activities of municipalities, elected professional regulatory bodies and statutory decision-makers within ministries all have elements of commonality with the work of quasi-judicial administrative tribunals, yet the decision-makers responsible for these decisions are accountable for them in a way that does not fit comfortably within our usual understanding of tribunal independence.

On the whole, the Canadian constitution provides limited guidance with respect to what types of adjudicative activities must be assigned to courts as distinct from tribunals or other administrative decision-makers. Sections 96-100 of the *Constitution Act, 1867* have been interpreted to impose some constraints on Parliament and the provincial legislatures from removing adjudicative authority from provincial superior courts,¹⁴ but for the most part it is permissible to assign adjudicative authority to a tribunal as long as there is no attempt to insulate the tribunal's decisions entirely from judicial review.¹⁵ Although the contrary view has been expressed by former Chief Justice Lamer,¹⁶ there is no general restriction on the authority of Parliament or provincial legislatures to confer on administrative tribunals the power to interpret the Canadian constitution in the course of making decisions and to refuse to follow a requirement of the tribunal's enabling

¹⁴ See, for example, *Macmillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *McEvoy v. New Brunswick (Attorney General)*, [1983] 1 S.C.R. 704; *Reference re: Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714.

¹⁵ See, for example, *Sobey's Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

¹⁶ *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at paras. 10-21 (Lamer, C.J.).

legislation that, in the adjudicator's view, is inconsistent with the constitution.¹⁷ The *Canadian Charter of Rights and Freedoms* does little to advance the argument that only courts enjoy sufficient independence to be entitled to adjudicate certain types of cases. Section 11(d) of the *Charter* gives persons "charged with an offence" the right to be tried "by an independent and impartial tribunal", but the Supreme Court of Canada has confined that right to persons charged with criminal offences as distinct from persons facing regulatory or disciplinary sanctions.¹⁸ Section 7 of the *Charter* protects individuals from being deprived of "life", "liberty" or "security of the person" except "in accordance with the principles of fundamental justice." To date, at least, this right has not been construed to prevent ministers or ministry officials as distinct from courts or tribunals from making decisions that affect interests protected by section 7.¹⁹

It is not difficult to discern reasons why Canada's Parliament and its provincial and territorial legislatures would prefer to assign certain types of decisions to appointed tribunals rather than to judges on the one hand or ministers and civil servants on the other. The advantages of using decision-makers who have specialized knowledge and who are insulated to a greater or lesser extent from the political arena have been evident for some time. This has spawned both a considerable expansion of the use of tribunals in every Canadian jurisdiction over the past 50 years and a reasonable degree of consistency from one jurisdiction to the next with respect to the types of decisions that are allocated

¹⁷ *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

¹⁸ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Shubley*, [1990] 1 S.C.R. 3.

¹⁹ See, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Mohammad v. Canada (Minister of Citizenship and Immigration)*, [1989] 2 F.C. 363 (Fed. C.A.).

to tribunals. What is not particularly consistent, either from one jurisdiction to another or within any jurisdiction over time, is the approach taken to the basic institutional structure of tribunals. This is most evident when one considers the different approaches taken to the security of tenure offered to members of tribunals.

At one extreme, since the coming into force on January 1, 2006 of the 2005 amendments to the Quebec *Administrative Justice Act*²⁰ the members of the Administrative Tribunal of Quebec “hold office during good behaviour”.²¹ In terms of the most important indicator of institutional independence, this tribunal now appears to be indistinguishable from a provincial court exercising specialized jurisdiction. More common is the move in larger jurisdictions such as British Columbia to reliance on tribunals whose full-time members hold renewable term appointments of between two and five years.²² This is, however, a comparatively recent development. In 1997, when Ron Hatch and I did a study of British Columbia tribunals for the British Columbia Council of Administrative Tribunals, the members of most of the tribunals we studied had term appointments of between one and three years, and many had terms of less than a year.²³ At that time,

²⁰ S.Q. 2005, c. 17. In force January 1, 2006, (2005) G.O. 4853.

²¹ Quebec *Administrative Justice Act*, R.S.Q. c. J-3, s. 38. For a discussion of this development, see S.R. Ellis, “Misconceiving Tribunal Members: Memorandum to Québec” (2005), 18 *Canadian Journal of Administrative Law and Practice* 189. Of course, this is not necessarily a permanent change. Until recently, the Chairman of the New Brunswick Public Utilities Board held appointment “during good behaviour”. *Public Utilities Act*, R.S.N.B. c. P-27, s. 3(1). In the fall of 2006, the New Brunswick Legislative Assembly enacted the *Energy and Utilities Board Act*, R.S.N.B. c. E-9.18, which abolished the Public Utilities Board and, in s. 85, removed the Chairman from office without compensation. Section 5 of the *Act* provides that the Chair of new Energy and Utilities Board is appointed for a term of 10 years, and holds office during good behaviour but is removable by the Lieutenant-Governor in Council for cause. See P. Bryden, “The Revocation of Tribunal Appointments in Bill 81: Does Tribunal Independence Enjoy Constitutional Protection?” (2006), 22 *Solicitor’s Journal* 4.

²² British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 2-3. For a discussion of a recent

British Columbia was also heavily reliant on tribunals composed exclusively or primarily of part-time members. Of the 46 tribunals we surveyed, 48% were composed only of part-time members and a further 30% were composed of a full-time chair and part-time members.²⁴ Only 22% of the tribunals we surveyed had more than one full-time member.²⁵ In smaller jurisdictions such as my current home province of New Brunswick, the use of tribunals composed largely or exclusively of part-time members is still the norm.

This has implications for our thinking about important aspects of the institutional independence of tribunal members, such as security of tenure and remuneration. On one hand, the levels of remuneration of part-time members of tribunals have traditionally been sufficiently low that membership on a tribunal is as much a form of public service as it is a source of income.²⁶ As a result, it could be argued that security of tenure is of less significance for part-time members than for full-time adjudicators, since the withdrawal of a member's appointment is less likely to have a significant impact on his or her material well-being. This is sometimes thought to render part-time members less vulnerable to manipulation through threat of withdrawal or non-renewal of their appointments than their full-time counterparts. On the other hand, part-time adjudicators

²³ Bryden and Hatch, note 3 above, at 271-272. As James Sprague points out, when term appointments are relatively short and the government has no obligation to the tribunal member in respect of renewal, the tribunal member may have less job security as a practical matter than a person who holds an appointment "at pleasure". Sprague, note 10 above, at 327-328.

²⁴ Bryden and Hatch, *ibid.* at 249.

²⁵ *Ibid.*

²⁶ *Ibid.* at 270, 273-274.

are more vulnerable than full-time adjudicators to manipulation through the assignment of cases, since part-timers are typically paid on a *per diem* basis when they are doing the work of the tribunal, whereas full-time adjudicators are typically paid the same salary regardless of the number of cases they are assigned.²⁷

There is no clear consensus among Canadian commentators on an ideal tribunal structure that is able to serve the needs of every jurisdiction, all types of caseloads and disputants, and all types of subject matter. This tends to complicate the search for simple solutions to the problem of striking an appropriate balance between tribunal independence and accountability, and may even undermine our ability to reach agreement on a set of broad principles that are universally applicable.

d. Instruments for Defining and Safeguarding Independence

The final comment of a general nature I wish to make concerns the types of legal and policy instruments we use in Canada for defining and protecting tribunal independence. I find it convenient to divide them into four categories. The first group is comprised of constitutional and quasi-constitutional protections. The second is common law rules. The third is statutes, and includes both general regimes governing tribunals and the enabling legislation of particular tribunals. The final group encompasses non-legal mechanisms, ranging from fairly explicit guidelines affecting tribunals to memoranda of understanding between a tribunal and its host ministry to more informal policies and practices that may depend to a greater or lesser extent on the relationships among the

²⁷ *Ibid.* at 250. See also Sprague, note 10 above, at 328.

minister, deputy minister and tribunal chair. Each of these instruments has characteristic advantages and disadvantages as means of ensuring that tribunals enjoy an appropriate degree of independence.

The great advantage of constitutional and quasi-constitutional safeguards for tribunal independence is their ability to overcome the deficiencies of inappropriate or ill-conceived legislative design. Moreover, persons affected by tribunal decisions generally have access to the courts to challenge the shortcomings they perceive in the tribunal's independence. At least in theory, this mechanism allows those persons whose interests the independence principle is primarily designed to serve – the parties to proceedings before the tribunal – an opportunity to ensure that the tribunal actually enjoys the independence needed to adjudicate their cases fairly. The major difference between constitutional and quasi-constitutional principles is that constitutional principles apply to tribunals in every jurisdiction in the country, whereas quasi-constitutional principles apply only to tribunals in those jurisdictions (the federal jurisdiction,²⁸ Quebec²⁹ and Alberta³⁰) whose legislatures have enacted such legislation.

Unfortunately, the very power of constitutional and quasi-constitutional safeguards can also be a source of weakness when an attempt is made to invoke these safeguards with respect to institutions as varied as administrative tribunals. Judges have reason to doubt whether they are particularly well-qualified to make difficult institutional design choices,

²⁸ *Canadian Bill of Rights*, R.S.C. 1985, App. III, especially ss. 1(a) and 2(e).

²⁹ *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, especially s. 23.

³⁰ *Alberta Bill of Rights*, R.S.A. 1980, c. A-16, especially s. 1(a).

and to question whether the litigation arena is well-suited to generate the information needed to make those choices intelligently. As a result, Canadian judges have tended to be reluctant to embrace broad principles of tribunal independence that may have unintended consequences that are not easily corrected. Moreover, judges have been concerned that the traditional remedial mechanism available to them – the invalidation of decisions made by a tribunal that does not meet constitutional standards – is inadequate to the task of ensuring that litigants actually have access to tribunals that are appropriate to their needs. Litigation tends to produce piecemeal solutions where systematic approaches would be more effective. Litigation can, of course, act as a spur to more systematic reform, but it is far from inevitable that it will do so.

Common law rules also have the advantage of enabling litigants to challenge the independence of a tribunal that is adjudicating a dispute to which they are a party. Once a common law rule is recognized, it applies to every comparable tribunal in every jurisdiction. This includes Quebec, which uses a civil law system for private law matters but common law in areas of public law. Unlike constitutional or quasi-constitutional rules, common law rules do not prevail over inconsistent legislation.³¹ This undermines their usefulness as tools for dealing with structural problems embedded in legislation, but it also means that it is easier for legislators to address any unintended consequences that may flow from an overly expansive judicial interpretation of the requirements of tribunal independence. In addition, we have a tradition of adapting common law rules to the particular statutory setting in which they are applied. As a result, common law rules may

³¹ See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781 (hereafter “*Ocean Port*”).

be somewhat more flexible than constitutional or quasi-constitutional rules.³² Taken together, these features may encourage judges to take a more expansive view of tribunal independence at common law than they might be prepared to embrace if they were invited to embrace the same requirements as constitutional or quasi-constitutional principles. At the end of the day, however, common law rules have many of the same limitations as constitutional or quasi-constitutional rules as vehicles for making systematic improvements to the ability of tribunals to operate independently.

I think most Canadian commentators would agree that legislation has a number of distinct advantages as a vehicle for defining and protecting tribunal independence. In preparing legislation for introduction, governments are able to gather information from a wide variety of sources and receive comments from people who are affected before change is introduced. Legislation can be used to provide a general framework for tribunal independence and accountability while identifying in advance the circumstances that warrant exceptional treatment. It is no accident, therefore, that Canadian law reform efforts directed at the administrative justice system generally and the role of tribunal independence specifically tend to promote legislation as the instrument of choice for addressing these issues. The difficulty with legislation as a vehicle for promoting tribunal independence is that it is difficult to get and hold governmental attention long enough to force administrative justice reform onto the legislative agenda. Significant strides have been taken in Quebec through the enactment and amendment of the

³² See, for example, *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405.

province's *Administrative Justice Act*³³ and in British Columbia through the enactment of the *Administrative Tribunals Act*.³⁴ In many Canadian jurisdictions this type of law reform effort is a “once or twice in a generation” phenomenon, and in others comprehensive administrative justice reform is something to be dreamed about rather than actually experienced. In these jurisdictions legislative reform tends to take place, if at all, on a tribunal by tribunal basis.

In some instances, however, Canadian tribunals can still achieve a significant measure of independence at a practical level through informal understandings between the tribunal chair and the host ministry. These relationships are especially important in the area of administrative autonomy, which will be discussed below. The difficulty with such understandings is that they may not survive a change in minister or deputy minister or tribunal chair, let alone a change in government. One initiative that has been employed to address the problem in some instances is the use of memoranda of understanding to identify areas of agreement with respect to a number of important operational matters. These agreements, which are typically made between a tribunal's chair and its host minister, can cover issues as varied as finance and administration, personnel management, facilities, communications and consultation.³⁵ In a formal sense memoranda of understanding are likely to be of limited duration, but they have the capacity over time to form a foundation for a secure and mutual understanding of the

³³ Note 21 above.

³⁴ Note 22 above.

³⁵ The British Columbia Administrative Justice Office has a model memorandum of understanding on its website at http://www.gov.bc.ca/ajo/down/mou_draft_iv_no_watermark.pdf.

relationship between the ministry and the tribunal. One of the other initiatives British Columbia undertook as a result of its Administrative Justice Project was the creation in the Ministry of the Attorney General of the Administrative Justice Office.³⁶ This office offers an institutional presence in support of continuing administrative justice reform,³⁷ and may also act as a counterweight to institutional tendencies in host ministries in which administrative justice and tribunal independence considerations may take a back seat to ministry control over substantive policy direction. The advantage of informal institutional arrangements that recognize tribunal independence is that it is possible to make progress on an incremental basis without the need to muster the same level of political commitment that is needed to get administrative justice issues onto the legislative agenda. The disadvantage is that in the absence of formal legal recognition, gains that were achieved under one government or minister may easily evaporate when another takes office.

With these observations as background, I will now turn to more specific consideration of four aspects of tribunal independence: adjudicative independence; institutional independence; administrative autonomy; and independent policy-making.

³⁶ A statement of the Administrative Justice Office's mandate is available online at http://www.gov.bc.ca/ajo/popt/about_the_ajo.htm.

³⁷ Mackay, note 4 above, at 106.

2. Adjudicative Independence

By adjudicative independence I mean the ability of the individual adjudicator or panel of adjudicators hearing a case to decide it without improper interference from others, including their tribunal colleagues or government officials. This type of independence is also called individual independence. What adjudicative independence guarantees to participants in administrative proceedings is that, where improper interference can be detected, its existence has the effect of invalidating any decision that is tainted by this type of intervention. As it is traditionally understood in Canada, adjudicative independence does not require the existence of institutional guarantees that adjudicators are not vulnerable to improper interference, though it does prevent tribunals from putting in place institutional arrangements that unreasonably interfere with the ability of adjudicators to decide cases free from improper pressure.³⁸

Historically, the main guarantees of adjudicative independence in Canada have been found in the common law. Common law doctrines tend to be adequate to this task because it is rarely if ever the case that statutory regimes in Canada expressly authorize interference with the adjudicative independence of members of tribunals. A variety of Canadian doctrines, most of them borrowed from English common law, support the proposition that parties to proceedings before quasi-judicial tribunals are entitled to

³⁸ See *IBEW, Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R. 221 (hereafter “*Ellis-Don*”; *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 (hereafter “*Tremblay*”); *IWA, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (hereafter “*Consolidated-Bathurst*”).

assume that the decision of the tribunal was the result of the exercise of personal judgment by the person or persons who actually heard the case. These doctrines include the rule against dictation,³⁹ the presumption against sub-delegation of quasi-judicial decision-making authority,⁴⁰ and the rule that only those tribunals members who were actually present throughout the hearing may participate in the decision.⁴¹ The more interesting question for present purposes is what kinds of institutional measures are tribunals permitted to take to ensure that different adjudicators follow a consistent and coherent approach in exercising their decision-making authority?

One approach available to tribunals that have the authority to make their own rules is the development of rules that must be followed by adjudicators. It is not particularly common for Canadian tribunals to have the authority to make binding substantive rules, and even where a tribunal does have rule-making authority the rules themselves are inevitably subject to interpretation. Another approach is for tribunals to have the authority to issue guidelines, which an adjudicator must consider but is not strictly speaking obliged to follow.⁴² A final approach that is relatively common is for the tribunal to develop internal consultation mechanisms to help develop consensus on issues

³⁹ See *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Muliadi v. Canada (Minister of Employment & Immigration)*, [1986] 2 F.C. 205 (Fed. C.A.).

⁴⁰ See *Vic Restaurant v. Montreal (City)*, [1959] S.C.R. 58; *Ahmad v. College of Physicians & Surgeons (British Columbia)*, [1971] 2 W.W.R. 60 (B.C.C.A.).

⁴¹ See *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344.

⁴² See *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 16 (F.C.C.); *Fouchong v. Canada (Secretary of State)* (1994), 88 F.T.R. 37 (F.C.T.D.); L. Sossin and C. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government" (2003), 40 *Alberta Law Review* 867.

of policy⁴³ and to enhance the consistency and quality of tribunal members' reasons.⁴⁴ Canadian courts have consistently upheld the ability of tribunals to take measures to enhance quality and consistency, but not at the expense of the ability of the adjudicators who actually heard the case to decide it themselves free of improper influence.⁴⁵

Some commentators have expressed concern that the social pressure on adjudicators not to expose non-compliance with the legal limits on the tribunal's ability to force members to adopt views with which they do not agree makes those limits very difficult to police, especially when this pressure is combined with testimonial immunities that restrict the ability of parties who suspect non-compliance to call adjudicators as witnesses.⁴⁶ Others, while not attacking the *Consolidated-Bathurst*⁴⁷ and *Tremblay*⁴⁸ decisions themselves, have warned of the risk that too much weight will be placed on the autonomy of tribunal decision-makers and insufficient attention paid to the tribunal's need to function in a coherent manner.⁴⁹ My own view is that the balance struck in cases such as *Consolidated-Bathurst* and *Tremblay* between tribunal coherence and the autonomy of decision-makers is workable only in an environment in which tribunal members are

⁴³ See *Ellis-Don*, note 38 above; *Consolidated-Bathurst*, note 38 above.

⁴⁴ See *Weerasinghe v. Canada (Minister of Employment & Immigration)*, [1994] 1 F.C. 330 (Fed. C.A.); *Bovbel v. Canada (Minister of Employment & Immigration)*, [1994] 2 F.C. 563 (Fed. C.A.); *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 9 O.R.(3d) 641 (Ont. C.A.).

⁴⁵ See *Tremblay*, note 38 above.

⁴⁶ D. Mullan, "Policing the *Consolidated-Bathurst* limits – Of Whistleblowers and Other Characters" (1993), 10 *Administrative Law Reports* (2d) 241.

⁴⁷ Note 38 above.

⁴⁸ Note 38 above.

⁴⁹ *Ellis*, note 21 above.

prepared to work together in a good faith effort to advance the tribunal's statutory mandate. Neither tribunals that insist on the right to bend their members to the will of the majority, nor tribunals in which members insist on their right to march to the beat of their own drummer regardless of the views of others, have a great deal to recommend them. It is not obvious to me that tilting the balance between tribunal coherence and adjudicative independence markedly in one direction or the other would be of great assistance in addressing the problems of the dysfunctional tribunal. The current jurisprudence has the virtue of presenting a model of internal tribunal governance to which it is worth aspiring, and my sense is that it has proved to be reasonably workable for most Canadian tribunals.

3. Institutional Independence

By institutional independence I mean structural guarantees that are designed to satisfy litigants that tribunal members are protected from improper governmental interference in their decisions. The guarantees that are considered relevant for this purpose are the same types of guarantees offered to judges: security of tenure, security of remuneration and administrative independence.⁵⁰ Most of the focus of Canadian litigation in the area of tribunal independence is on security of tenure, which was also the focus of early litigation concerning provincial court judges under section 11(d) of the *Charter*.⁵¹ In the past decade, however, the major developments in constitutional jurisprudence governing

⁵⁰ See *C.U.P.E. v. Ontario (Minister of Labour)*, note 32 above; *Régie*, note 7 above; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (hereafter "*Matsqui*").

⁵¹ See *Valente v. The Queen*, [1985] 2 S.C.R. 673.

judicial independence have come in the area of security of remuneration.⁵² It is difficult to do justice to this complex body of jurisprudence in a brief paper such as this, but I will attempt to do so by addressing four themes. The first is whether there is a general constitutional principle protecting institutional independence for tribunals. The second is the identification of more specific sources of constitutional and quasi-constitutional protection for institutional independence and a discussion of the scope of that protection. The third is the scope and limitations of common law protection of institutional independence for tribunals. And the fourth is statutory measures to enhance the institutional independence of tribunals.

a. General Constitutional Guarantee of Adjudicative Independence

Prior to the Supreme Court of Canada's decision in *R. v. Campbell*,⁵³ Canadian constitutional law did not recognize any general principle of institutional independence for judges. Constitutional guarantees of institutional independence were provided for superior courts through sections 96-100 of the *Constitution Act, 1867*, and guarantees of the independence of courts that tried persons charged with offences were guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms*. Since provincial courts typically have the jurisdiction to try persons for criminal offences, the section 11(d) protections extend to them. Prior to *Campbell*, however, there was no obvious

⁵² See, for example, *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405; *R. v. Campbell* [1997] 3 S.C.R. 3 (indexed as *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*) (hereafter "*Campbell*").

⁵³ *Ibid.*

constitutional impediment to the creation of a provincial court exercising exclusively civil jurisdiction whose judges did not enjoy the constitutional protections of security of tenure and remuneration provided to superior court judges and to judges exercising criminal jurisdiction. In *Campbell*, the Supreme Court of Canada majority took the view that institutional independence for all courts was impliedly required by the structure of the Canadian constitution, and that this principle was given textual expression by the requirement in the preamble to the *Constitution Act, 1867* that Canada's constitution be "similar in principle to that of the United Kingdom".

It is unnecessary for present purposes to dwell on the curious leap of logic that enabled the Supreme Court of Canada to transform a set of institutional safeguards that were not generally available to inferior courts in the United Kingdom into a set of constitutional protections that are available to all judges in Canada. What is relevant is the question raised by Mr. Justice La Forest in dissent, which is what is meant by the term "court". As he put it:

If one is to give constitutional protection to courts generally, one must be able to determine with some precision what the term "court" encompasses. . . . The word "court" is a broad term and can encompass a wide variety of tribunals. In the province of Quebec, for example, the term is legislatively used in respect of any number of administrative tribunals. Are we to include only those inferior courts applying ordinary jurisdiction in civil matters, or should we include all sorts of administrative tribunals, some of which are of far greater importance than ordinary civil courts? And if we do, is a distinction to be drawn between different tribunals and on the basis of what principles is this to be done? ⁵⁴

To date, no clear answer has been forthcoming to Mr. Justice La Forest's question. In *Ocean Port Hotel Inc. v. British Columbia (General Manager, Liquor Control &*

⁵⁴ *Ibid.* at para. 323 (La Forest, J. dissenting).

Licensing Branch),⁵⁵ Chief Justice McLachlin rejected the application of the judicial independence principle identified in *Campbell* to the British Columbia Liquor Appeal Board, so it is difficult to assert that the same institutional independence guarantees available to provincial courts are equally available to all administrative tribunals.⁵⁶ What is less clear is whether the constitutional guarantee might be applicable to some tribunals, even if it cannot be invoked in respect of others.

This argument is currently being advanced before the British Columbia Court of Appeal in *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*.⁵⁷ This case concerns the termination without cause of Mary McKenzie's five year term appointment as a Residential Tenancy Arbitrator under the British Columbia *Residential Tenancy Act*⁵⁸ and the *Manufactured Home Park Tenancy Act*.⁵⁹ The questions at the heart of the case are whether a tribunal member holding a term appointment can have that appointment terminated without cause as long as that person receives compensation

⁵⁵ Note 31 above at paras. 29-33.

⁵⁶ Chief Justice McLachlin's reinforced her rejection of a general application of the constitutional guarantee of judicial independence to tribunals in the following observation in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 883 at [29]. "Bell also argues that the Tribunal is bound by a constitutional principle -- the "unwritten principle of judicial independence" -- which confers on it the same degree of independence as a court established under s. 96 of the *Constitution Act, 1867: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. Bell presents no authority for this argument. As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function." For a recent example of a case rejecting the application of the constitutional guarantee of judicial independence to administrative tribunals, see *Martin v. Vancouver*, 2006 BCSC 1260, 59 B.C.L.R. (4th) 10 (B.C.S.C.).

⁵⁷ 2006 BCSC 1372, notice of appeal filed September 29, 2006 (hereafter "*McKenzie*").

⁵⁸ S.B.C. 2002, c. 78.

⁵⁹ S.B.C. 2002, c. 77.

mandated by statute, and if so whether the statute authorizing that action is consistent with a constitutional guarantee of tribunal independence. Mr. Justice McEwan of the British Columbia Supreme Court held:

The question left unanswered by *Ocean Port* was what to make of tribunals that are not "government" decision makers. In finding that tribunals such as the Liquor Appeal Board are not constitutionally required to be independent, the court was addressing a decision-making entity with functions that could not conceivably be folded straight back into the courts, owing to its nature. Its policy-making and policy-driven adjudicative responsibilities are of a type that could only ever be supervised, not performed, by courts.

Tribunals that are assigned responsibilities lifted straight from the courts' jurisdiction are obviously different. If the Respondents are correct, the same function, depending *solely* on whether it is located in a court or in a tribunal, may require the constitutional protection of a fair and independent arbiter, or may be left to whatever cowed or needy sycophant the government, in its absolute discretion, thrusts into the judgment seat. This is such an affront to the notion of "a fair and public hearing by an independent and impartial tribunal," guaranteed in writing elsewhere in the constitutional firmament, and is so fundamentally illogical and arbitrary, that it cannot be reconciled with the concept of the rule of law itself.

...

A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the *PEI Reference* [*sub nom. R. v. Campbell*] and in *Ell* [*v. Alberta*]. The work of residential tenancy arbitrators is a judicial function that "relates to the basis on which [that] principle is founded".⁶⁰

Canadian appellate courts may or may not accept Mr. Justice McEwan's conclusion that the constitutional guarantees of independence provided to "courts" must be extended to at least some tribunals. Even if one assumes that they will do so, however, it will still fall to

⁶⁰ . *McKenzie*, note 57 above, at paras. 149-50 and 152, quoting *Ell v. Alberta*, note 13 above, at para. 20. Mr. Justice McEwan also ruled that the termination without cause of Ms. McKenzie's appointment was not authorized by s. 14.9(3) of the British Columbia *Public Sector Employers Act*, R.S.B.C. 1996, c. 384 (as amended), and therefore it was not strictly speaking necessary for him to address the issue of the constitutional validity of that provision.

them to define what precisely it is that distinguishes these types of tribunals from the tribunals governed by the rule in *Ocean Port*. The passage quoted above from Mr. Justice McEwan's reasons refers to four different situations, and it is useful to separate them because they have different consequences for which tribunals would be embraced by the constitutional principle he recognized. They are (1) tribunals that exercise jurisdiction that has been removed from a court; (2) tribunals that try legal disputes between private parties; (3) tribunals that exercise "judicial" functions that could be folded back into the courts as distinct from "governmental" or "regulatory" functions that could not; and (4) tribunals that adjudicate on a "judicial" or "quasi-judicial" basis. There is a great deal of overlap among these situations, and all apply to residential tenancy arbitration in British Columbia, but considered in isolation they apply to quite different tribunals.

Determining which tribunals, if any, are entitled to constitutional protection of their independence is only the first task facing the British Columbia Court of Appeal in *McKenzie*. Equally daunting is the challenge of defining the precise content of that constitutional guarantee, should the court find that one exists. Since the court would be extending the unwritten constitutional guarantee of judicial independence to at least some administrative tribunals, it seems likely that the court would be guided by the jurisprudence governing judicial independence in determining the basic content of the guarantee, which includes security of tenure, security of remuneration and administrative control.⁶¹ What is less clear is how flexibly those concepts would be applied when shifted into the administrative tribunal setting. More fundamentally, it is not obvious that

⁶¹ See the cases referenced at note 52 above.

independence guarantees modeled on those provided to courts can be successfully integrated into the institutional design of many Canadian tribunals, most notably those that rely heavily on part-time adjudicators. The basic concern of many commentators who are skeptical about the recognition of a general constitutional guarantee of tribunal independence is that it is asking a great deal of the courts to use an unwritten constitutional principle to make what may be fairly fundamental changes in the institutional design of our existing system of administrative justice.⁶²

b. Specific Constitutional and Quasi- Constitutional Principles

The absence of a general constitutional guarantee of institutional independence comparable to that enjoyed by courts is not fatal to the claim that some tribunals may be entitled to independence guarantees provided by specific constitutional or quasi-constitutional provisions. A more exhaustive treatment of the relevant constitutional and quasi-constitutional provisions and the effect these provisions have on the guarantees of independence offered to particular types of tribunals is available elsewhere.⁶³ For present purposes it is sufficient to observe that outside of quasi-judicial tribunals in Quebec, whose independence is guaranteed by s. 23 of the Quebec *Charter of Human Rights and Freedoms*,⁶⁴ and federal tribunals that determine rights and obligations,

⁶² For two interesting attempts to articulate basic ground rules for the institutional independence of tribunals, see Ellis, note 1 above, especially “The Justicizing of Quasi-Judicial Tribunals, Part II”, and G. Heckman and L. Sossin, “How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence” (2005), 50 *McGill Law Journal* 193.

⁶³ See the articles referenced in note 2 above.

⁶⁴ Note 29 above.

which are covered by s. 2(e) of the *Canadian Bill of Rights*,⁶⁵ the adjudicative work done by most Canadian tribunals is not subject to any special constitutional or quasi-constitutional protection. Even where tribunals are protected by constitutional or quasi-constitutional guarantees of institutional independence, Canadian courts have taken a more flexible approach to those guarantees for tribunals than they have to comparable guarantees for courts.

This is not to say that these guarantees are meaningless. For example, the Supreme Court of Canada has held that if persons adjudicating liquor license suspensions in Quebec were appointed on an “at pleasure” basis, they would not have sufficient security of tenure to satisfy the requirements of s. 23 of the Quebec *Charter*.⁶⁶ Similarly, in *Barreau de Montréal v. Québec (Procureur general)*⁶⁷ the Quebec Court of Appeal ruled that s. 23 of the Quebec *Charter* guaranteed the Administrative Tribunal of Quebec a high standard of institutional independence, although not precisely the same standard of independence as provincial courts. The problem with this approach, in the eyes of some commentators, is that this flexibility is difficult to reconcile with taking the idea of institutional independence seriously. As James Sprague has put it:

. . . *if* independence is to be anything real, it cannot be a half way house. One cannot be “a little bit” independent. One either is or is not. And agencies cannot be structurally or institutionally independent and retain their traditional nature as agencies.⁶⁸

⁶⁵ Note 28 above.

⁶⁶ *Régie*, note 7 above.

⁶⁷ [2001] R.J.Q. 2058 (Que. C.A.).

⁶⁸ Sprague, note 10 above, at 326.

Even if one is inclined to be more optimistic than Mr. Sprague about the possibility of varying degrees of independence, the fact remains that it is difficult to discern from the jurisprudence to date exactly how flexible institutional independence standards ought to be in any particular situation.⁶⁹

c. Common Law Independence Principle

Prior to the Supreme Court of Canada's decision in *Canadian Pacific Ltd. v. Matsqui Indian Band*,⁷⁰ it was generally understood that when Canadian courts referred to a common law principle protecting tribunal independence they meant that common law guarantees of fair procedure included a right to adjudicative independence on the part of a tribunal rather than institutional independence. Tribunals could not adopt institutional arrangements that improperly interfered with the independence of adjudicators, but their decisions were not subject to challenge on the basis that there were no institutional arrangements in place that affirmatively guaranteed that tribunals and their members enjoyed security of tenure, security of remuneration and administrative control over those decisions. The *Matsqui* decision was an awkward birthplace for the common law principle of institutional independence since the Court was deeply divided. Only six of the nine justices addressed the issue of institutional independence, and the three who did not do so formed part of a 5-4 majority with respect to the ultimate outcome of the case. Moreover, the approach to institutional independence taken by the two members of the

⁶⁹ For an attempt to identify some of the factors that seem to be relevant to courts in making this determination, see Bryden, note 2 above, at 151-158.

⁷⁰ Note 50 above.

majority who did address the issue differed markedly from the approach taken by the four dissenting judges. Over time, however, the broad outlines of the principle have become relatively clear.

The common law guarantee of institutional independence does not prevail where it would be inconsistent with the clear meaning of relevant statutory provisions. Thus, where legislation clearly states that tribunal members serve “at pleasure”, it is not open to a party to challenge a decision of the tribunal on the basis that the decision was procedurally unfair due to the lack of independence of the persons who made it.⁷¹ On the other hand, when the tribunal is established by delegated legislation, failure to meet the standards of institutional independence will render the tribunal’s decisions vulnerable to challenge.⁷²

The type of institutional independence required by the common law is modeled on the institutional guarantees of independence for judges: once again, security of tenure, security of remuneration and administrative control.⁷³ As is the case with quasi-constitutional guarantees of institutional independence for tribunals, however, the independence standards applicable to courts will be applied much more flexibly in the tribunal context. Moreover, courts will look at the actual experience of the tribunal in assessing whether adequate guarantees of independence are available, rather than

⁷¹ *Ocean Port*, note 31 above.

⁷² *Matsqui*, note 50 above.

⁷³ *Matsqui*, *ibid.*; *Ocean Port*, note 31 above.

insisting that objective guarantees of independence be embedded in legislation. Thus, in *C.U.P.E. v. Ontario (Minister of Labour)* the Supreme Court of Canada ruled that, in light of the history of successful *ad hoc* interest arbitration of labour relations disputes in Ontario, a generic objection to the lack of institutional independence on the part of *ad hoc* arbitrators could not be sustained.⁷⁴ Similarly, in *Katz v. Vancouver Stock Exchange* the Supreme Court accepted the argument that because the Stock Exchange had always in the past paid the bills of lawyers who acted as adjudicators in disciplinary proceedings for the Exchange, there was no need to provide objective guarantees that the Exchange would do so in the future in order to satisfy the requirement of institutional independence.⁷⁵

Once again, one might argue that a flexible standard of institutional independence is no standard at all, especially when even that weak guarantee can be overridden by explicit legislation. It seems to me, however, that the common law rules governing institutional independence of tribunals do have some value as interpretive principles. The resolution of ambiguities in the text of legislation in favour of an interpretation that strengthens the security of tenure and remuneration of tribunal members seems to me to be a positive step, and the British Columbia Court of Appeal's interpretation of section 14.9(3) of the British Columbia *Public Sector Employment Act*⁷⁶ in the *McKenzie* case is likely to be a good test of how far that interpretive principle can be carried.

⁷⁴ Note 32 above, at paras. 191-193 (Binnie, J.) and 42-44 (Bastarache, J.)

⁷⁵ Note 32 above.

⁷⁶ See note 60 above.

d. Statutory Regimes Guaranteeing Independence

Finally, it is useful to make one or two observations about the use of legislation to provide guarantees of security of tenure and remuneration for members of administrative tribunals. While it is not unusual for the term of appointment of tribunal members to be included in the tribunal's enabling legislation, this is far from an invariable practice.⁷⁷ Traditionally it has been much less common for the principles governing remuneration of tribunal members to be embedded in the tribunal's enabling legislation.⁷⁸

One of the notable features of administrative justice reform in Quebec has been the establishment of considerable security of tenure for the members of the Administrative Tribunal of Quebec in the Quebec *Administrative Justice Act*.⁷⁹ The *Act* also provides for the enactment of regulations governing remuneration of Tribunal members⁸⁰ and states: "Once fixed, a member's remuneration may not be reduced, except to take into account a retirement pension from the Quebec public sector that is paid to the member."⁸¹

⁷⁷ In a study of 46 British Columbia tribunals undertaken in 1997, only 20% of the tribunals had the terms of members' appointments established in legislation. For most tribunals (67%) the term of appointment was established in the order in council or ministerial order appointing the tribunal member. Bryden and Hatch, note 3 above, at 271.

⁷⁸ Only one of the 46 British Columbia tribunals surveyed in the 1997 study had the remuneration of its members established by statute. In most instances (72%) remuneration was established by treasury board or ministerial guidelines. In a surprising number of cases (20%) members received no remuneration other than the reimbursement of their expenses. *Ibid.* at 270-271.

⁷⁹ Section 38 of the *Act*, note 20 above, states that members of the Tribunal hold office "during good behaviour". This provision came into force on January 1, 2006. Prior to that time the *Act* established renewable appointment terms of five years.

⁸⁰ Note 21 above, ss. 56-57.

⁸¹ *Ibid.* s. 58.

The recent British Columbia administrative justice reforms are not quite this generous, but the British Columbia *Administrative Tribunals Act* does provide renewable statutory terms of three to five years for tribunal chairs⁸² and renewable statutory terms for members of two to four years on initial appointment and up to five years on reappointment.⁸³ The *Act* also makes provision for the establishment of rates of remuneration by the tribunal's host minister in accordance with treasury board directives,⁸⁴ though there is no provision comparable to the restriction on the reduction of rates of remuneration found in the Quebec *Administrative Justice Act*.

4. Administrative Autonomy

The third aspect of tribunal independence that deserves consideration is administrative autonomy. By administrative autonomy I mean the ability of administrative tribunals to secure the resources needed to perform their adjudicative functions effectively and to manage those resources in order to carry out their statutory mandates. Although the constitutional guarantee of institutional independence for the judiciary includes the concept of administrative independence, this has been confined to “assignment of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions”⁸⁵ as distinct from “an increased measure of autonomy for the courts over financial and

⁸² Note 22 above, s. 2.

⁸³ *Ibid.* s. 3.

⁸⁴ *Ibid.* s. 10(2).

⁸⁵ *R. v. Campbell*, note 51 above, at para. 251, quoting *Valente v. The Queen*, note 50 above, at 709.

personnel aspects of administration”.⁸⁶ For commentators interested in ensuring that Canadian tribunals operate under governance arrangements that enable the tribunals to carry out their statutory mandates effectively, however, the personnel and financial aspects of administration typically assume critical importance. In addition, considerable attention has been paid to ensuring that tribunals have adequate procedural powers to manage their caseloads.

I have never heard it suggested by an advocate for enhanced tribunal independence in Canada that tribunals should be completely independent of governmental control over their personnel or procedural powers, much less their finances. What is normally sought is an open and merit-based appointment process for tribunal members, input by the tribunal chair into the selection of appointees, adequate procedural and rule-making authority to meet the tribunal’s needs, and a budgeting process that gives due consideration to the tribunal’s needs for staff, facilities and financial resources for important activities such as training. It has always been possible to find examples of Canadian tribunals that enjoy adequate arrangements in some of these areas, at least at a day to day operational level. What has been more difficult to achieve is recognition of the desirability of embedding these arrangements at an institutional level rather than simply at an operational level that depends on the relationship between the tribunal chair and the host ministry.

This is an area in which the model of judicial independence protected by the constitution offers limited guidance, though it is interesting to note that the Canadian Judicial Council

⁸⁶ *Ibid.* quoting *Valente, ibid.*, at 712 (emphasis in original).

has been taking a much more active interest in the governance and effective administration of the justice system than was the case in the past.⁸⁷ It seems to me that when Canadian governments decide to become seriously engaged in administrative justice reform, it is now apparent that the most promising approach is to integrate consideration of institutional design, tribunal appointments, appropriate statutory powers and perhaps even the role of judicial review.⁸⁸ The challenge has always been to get governments to take the administrative justice reform agenda seriously, and then to make sure that such progress as can be made does not simply find its way into the statute books but becomes an ongoing part of the way tribunals and their host ministries actually operate.

5. Independent Policy-Making

The final aspect of tribunal independence that I wish to explore is the idea that tribunals should enjoy independence in choosing the policy direction to be pursued in interpreting and carrying out their statutory mandates. A claim to autonomous policy-making authority on the part of tribunals may seem inconsistent with Chief Justice McLachlin's observation in the *Ocean Port* case that administrative tribunals are "created precisely for the purpose of implementing government policy"⁸⁹ and that this feature is what

⁸⁷ See Canadian Judicial Council, *The Way Forward, Final Report of the Special Committee on Future Directions to the Canadian Judicial Council* (Canadian Judicial Council, 2002) online at http://www.cjc-ccm.gc.ca/cmslib/general/way_forward.pdf.

⁸⁸ For an insightful view of this process offered by the head of British Columbia's Administrative Justice Project, see Mackay, note 3 above.

⁸⁹ *Ocean Port*, note 31 above, at para. 24.

distinguishes tribunals fundamentally from courts.⁹⁰ Where supporters of independent policy-making by tribunals would disagree with Chief Justice McLachlin's observation is in her use of the word "government" policy as distinct from "legislative" policy. Some would argue, in other words, that Parliament or the legislature is entitled to direct a tribunal by changing its statutory mandate, but that once that mandate has been conferred it is up to the tribunal to carry out that mandate as it sees fit rather than to take direction from the government of the day, or for that matter the courts.

It would be a gross exaggeration to say that the robust view of independent policy-making by tribunals that I have just described has carried the day in Canada. There are, however, at least three ways in which consideration of the tribunal's role as an independent policy-maker has achieved prominence. The first concerns the relationship between individual adjudicators and the tribunal as an institution. As I suggested in discussing adjudicative independence above, Canadian law prevents a tribunal chair from dictating the result of a case to the adjudicator who actually heard it, and also prevents the tribunal from adopting institutional arrangements that put undue pressure on an adjudicator to conform to a dominant view within the tribunal concerning a question of statutory interpretation. On the other hand, the law does allow tribunals to take institutional steps to enhance the coherence and consistency of their decisions as long as those measures are not inconsistent with adjudicative independence. As ardent a defender of tribunal independence as former Ontario Workers Compensation Appeal Tribunal Chair Ron Ellis has recently warned that the pursuit of adjudicative

⁹⁰ *Ibid.* at paras. 23-24.

independence and appropriate security of tenure for tribunal members should not be allowed to overwhelm the ability of tribunals accomplish their institutional goals of achieving policy consistency, coherence and effective quality control.⁹¹

The second area in which the role of tribunals as independent policy-makers comes into play concerns the relationship between tribunals and courts. This is not the place to explore the arcane mysteries of the Supreme Court of Canada's jurisprudence on the standard of review of administrative tribunals.⁹² It is, however, worth noting that one of the foundational principles of that jurisprudence is the idea that there may be circumstances in which administrative tribunals are in a better position than the courts to understand the implications of choosing one plausible interpretation of the tribunal's governing legislation over another. In such circumstances it will normally be appropriate for the court to defer to the tribunal's interpretation, at least if that interpretation is not unreasonable or patently unreasonable.⁹³ In recent years the Supreme Court of Canada has been somewhat more reluctant to defer to the interpretations of legislation offered by specialized regulatory tribunals than might have been the case in the past.⁹⁴ The Court has not, however, done anything to signal a fundamental shift in its assumption that

⁹¹ See Ellis, note 21 above.

⁹² For a useful recent treatment of this subject, see D Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *Canadian Journal of Administrative Law and Practice* 59.

⁹³ See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *National Corn Growers Assn. v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324; *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

⁹⁴ See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152; *Barrie Public Utilities v. CCTA*, [2003] 1 S.C.R. 476; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100.

tribunals are entitled to some measure of deference based on their expertise in administering the legislation for which they have primary responsibility.

A third area in which the idea that tribunals have an important independent policy-making role has been evident is in the controversy surrounding the authority of the executive branch of government to give explicit policy direction to a tribunal with respect to the exercise of its statutory mandate. Where this guidance takes the form of delegated legislation that falls within the scope of statutory authority to enact such legislation it is relatively uncontroversial, at least as a matter of law. The practice of allowing tribunal decisions to be appealed to a political authority (whether a minister or Cabinet) or of allowing ministers or others to issue explicit policy directives to tribunals, on the other hand, has been more controversial. The criticism of appeals to a political authority is that they undermine the integrity of the adjudicative process pursued by the tribunal, since the appeals themselves are generally unconstrained by notions of procedural fairness⁹⁵ and may be based on political considerations that would be inappropriate if considered by the tribunal.⁹⁶ A number of commentators have suggested that political appeals be abolished for these reasons, though it has been suggested that the issuance of non-binding policy directives to tribunals might be an acceptable alternative mechanism for allowing the executive to give policy guidance in some situations.⁹⁷

⁹⁵ *Inuit Tapirisat v. Canada (Attorney General)*, [1980] 2 S.C.R. 735; *National Anti-Poverty Organization v. Canada (Attorney General)*, [1989] 3 F.C. 684 (Fed. C.A.).

⁹⁶ See *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106.

⁹⁷ See, for example, Ratushny, note 5 above, at 134-153; M. Rankin, "The Cabinet and the Agencies: Toward Accountability in British Columbia" (1985), 19 *University of British Columbia Law Review* 25; A. Roman, "Governmental Control of Tribunals: Appeals, Directives and Non-Statutory Mechanisms" (1985), 10 *Queen's Law Journal* 476.

In *Bell Canada v. Canadian Telephone Employees Association*⁹⁸ the Supreme Court of Canada was invited to rule that the Canadian Human Rights Commission's power to issue guidelines to the Canadian Human Rights Tribunal in pay equity cases constituted an impermissible interference with the Tribunal's independence and rendered the Tribunal unable to hear such cases. The Court found that Parliament had in fact conferred on the Commission a power to enact binding delegated legislation rather than a power to issue mere "guidelines", but it went on to consider whether the fact that the Commission was a party to pay equity complaints before the Tribunal rendered the issuance of this sort of direction by it suspect as an interference with the Tribunal's independence. The Court concluded that this was not. It did, however, note that if there had been evidence that the Commission misused its power to issue guidelines in order to manipulate the outcome of a particular case, this would give rise to different considerations.⁹⁹

Conclusion

There is a reasonably broad consensus in Canada that adjudicative independence for members of administrative tribunals is important, and this is reflected in the stability and strength of common law guarantees of this type of independence. There is also an emerging view that institutional independence for tribunals is important, but much less

⁹⁸ Note 56 above.

⁹⁹ *Ibid.* at paras. 45-49.

clarity around the extent of guarantees of security of tenure and remuneration that are essential to effective administrative adjudication. My own view is that Canadian courts are unlikely to add significantly to the current range of independence guarantees available at common law or through constitutional or quasi-constitutional guarantees of fair procedure, and that legislative action is the more promising avenue for reform in this area. Jurisdictions that have begun to move toward greater reliance on tribunals composed of full-time members who enjoy enhanced guarantees of institutional independence have also tended to recognize that some measure of administrative autonomy and greater formalization of the relationships between tribunals and their host ministries is equally important. These developments are uneven across the country, however, and in many smaller jurisdictions part-time tribunals with weak mechanisms for administrative autonomy are still the norm. Attitudes toward the degree of independent policy-making authority tribunals ought to enjoy are extremely mixed, and in my view developments in this area are likely to continue to take place on a sporadic, tribunal by tribunal basis.

One thing that is clear to me is that the effort to engage political actors in the struggle to strike an appropriate balance between tribunal independence and accountability is critically important. In practice, institutional independence, administrative autonomy and independent policy-making are too closely connected to make significant changes in one area without making corresponding adjustments in the others. Courts have an important role to play in ensuring that governments live up to the promises they hold out to the public that administrative tribunals are able to operate effectively and independently. At

the same time, the institutional design challenges associated with balancing independence and accountability are sufficiently daunting that it is, in my view at least, unrealistic to ask courts to play the leading role in fashioning a comprehensive regime of tribunal independence.