



***INDEPENDENCE AND ACCOUNTABILITY:  
JUST HOW COMPATIBLE ARE THEY?***

Speech by  
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I am very pleased to be here with you once more and to have this opportunity to share with you my thoughts on what is a very topical, but complex and delicate issue. As the President of the Commission des lésions professionnelles du Québec, I am faced every day with these two concepts, which may at first appear to be at variance but which are nevertheless reconcilable: the independence and accountability of the tribunal and its members.

We live in a democratic society, and both citizens and members of the tribunals agree that judges must be independent in order to guarantee the rights of individuals. Where they tend to disagree is when the government or another authority controls, or appears to control, the operation of the tribunals.

When I was asked to give you my views on this topic, the first question I asked myself was: who is the Commission des lésions professionnelles accountable to and what it is accountable for? This is what I would like to talk to you about first.

I will then discuss a number of provisions from the law that established our tribunal, which indicate how the Commission des lésions professionnelles is accountable and, as I see it, also ensure its independence and that of its members.

Lastly, I will show you how I think these two concepts, independence and accountability, can be reconciled.

***WHO IS THE COMMISSION DES LÉSIONS PROFESSIONNELLES ACCOUNTABLE TO AND WHAT IS IT ACCOUNTABLE FOR?***

To answer this question, I will first have to review with you how the Board came to be created on April 1, 1998.

In my talk last year about our conciliation service, I stressed the importance of the parties, workers and employers in Québec's occupational health and safety system. This is also relevant to my talk today because it was these partners who led the reform aimed at humanizing, simplifying and accelerating administrative justice in the field of occupational health and safety.

The Commission des lésions professionnelles is part of this reform. Its structure and operation reflect the vision of these partners and their expectations in terms of administrative justice. They wanted an independent, impartial tribunal that would be able to render quality decisions rapidly. They were also set on a less formalist tribunal that would be closer to its clients' mentality. This is why equal representation was introduced at the last stage of the decision-making process. Two members from union and employers' associations now sit with and advise the Commissioner.

Even though these two members do not have decision-making powers, they definitely contribute to the development of a new culture and a less procedural kind of justice, in keeping with the partners' wishes.

Since the Commission des lésions professionnelles was created as part of the reform, it is responsible for doing its utmost to see that the objectives sought are met. It is therefore accountable to the partners, who played an important part in this reform.

This is in fact why I regularly meet with the leaders of the employers' and union associations and the Conseil consultatif du travail et de la main-d'œuvre du Québec in order to bring them up to date on the Board's activities. It is a way of ensuring that the tribunal is doing a good job of addressing their expectations and those of the occupational health and safety sector.

I would like to point out that the partners' expectations have nothing to do with the content of our decisions and have no influence over it. My regular contacts with these partners occur within a context of absolute respect for the independence enjoyed by the administrative judges who make up the Board and are in fact aimed at ensuring the partners' respect for this independence.

The Board's responsibility for actualizing the reform objectives is clearly reflected in the *Act respecting industrial accidents and occupational diseases*, which contains provisions establishing the Commission des lésions professionnelles. Several sections in this Act address the parties' expectations and oblige the Board, and its management, to account for the tribunal's administration to the executive branch of government. The legislation therefore provides a clear framework for the interdependent links that must exist between the executive branch of government and the tribunal. Allow me to give you a few examples.

- Section 381 obliges the Board to send the Minister responsible any information he/she requires on its activities, as well as a report on its activities, which is then tabled before the National Assembly.

- Section 418 entrusts the President of the Board with responsibilities relating to the administration and general management of the Board. This section also lists a number of the President's duties. Within the context of our reflection on the independence of the tribunals, some of these duties are well worth emphasizing :
  - The President must coordinate, assign and supervise the work of the members who, as the Act makes very clear, shall comply with the President's orders and directives in that regard.
  - The president must also promote the professional development of the Commissioners as regards the exercise of their functions.
  - In addition, the President must, "foster the participation of Commissioners in the formulation of guiding principles for the Board so as to maintain a high level of quality and coherence of decisions." The challenge presented by this obligation is once more to ensure the decision-making independence of the members of the tribunal. The Board has introduced mechanisms to ensure quality and consistency that respect the framework suggested by the Supreme Court of Canada.

***ACCOUNTABILITY WITH REGARD TO THE QUALITY AND CONSISTENCY OF THE DECISIONS***

I would now like to take a few moments to elaborate on the matter of quality and consistency.

To do so, I am going to make reference to the following decisions:

- In *Tremblay*,<sup>1</sup> Justice Gonthier stressed that "the objective of consistency responds to litigants' need for stability but also to the dictates of justice".
- In *Consolidated Bathurst*,<sup>2</sup> the same Judge pointed out that the outcome of litigation should not depend on the identity of the people making up the bench. Such a situation would be difficult to reconcile with the concept of equality before the law.
- In *Domtar*,<sup>3</sup> Justice l'Heureux-Dubé cited a number of authors and added that consistency of precedent was also important for the administrative tribunal's image. It helps build the public's confidence and gives an impression of common-sense and good administration, whereas manifest inconsistency tends to damage the tribunal's credibility.

To use the words of Mtre. Louise Boucher, the Board Commissioner who chaired committee on quality and consistency, I would like to add that it is also, [translation] "*important to remind ourselves that promptness and specialization are among the raisons d'être of administrative tribunals.*"

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<sup>1</sup> *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.R.C. 952;

<sup>2</sup> *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.R.C. 282;

<sup>3</sup> *Domtar inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.R.C. 756.

*Furthermore, quality decisions and the desire for consistency are indications of this specialization. When a tribunal acts as the last instance, it must make especially sure that the litigants are treated equally and fairly. As well, it must give first-instance decision-makers clear indications as to the interpretation of the law.*

*The concept of equality before the law is important because it is in the interests of the litigants to receive similar treatment in similar cases. Is this not the very essence of justice? Inconsistency gives rise to insecurity and an inability on the part of taxpayers to make informed decisions. Consistency is plain common sense. It can foster people's confidence in their institutions.*

*Although consistency is desirable, it cannot be imposed upon the decision-maker, neither from outside nor from within.”<sup>4</sup>*

This is clearly a challenge for an administrative tribunal such as the Commission des lésions professionnelles, which has over a hundred decision-making members.

### ***ACCOUNTABILITY IN TERMS OF THE TRIBUNAL'S MANAGEMENT***

I would now like to go back to the sections of the *Act respecting industrial accidents and occupational diseases* which relate to the Board's accountability with regard to the management of the tribunal.

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<sup>4</sup> BOUCHER, Louise, Commissioner, La qualité et la cohérence décisionnelle, Commission des lésions professionnelles, June 1998.

- Section 427 obliges the President to present to the minister responsible, every year, "a plan in which he shall state his management objectives aimed at ensuring the accessibility of the Board and the quality and promptness of its decision-making process and give an account of the results achieved in the preceding year."
  
- In keeping with section 428, I must also send the Minister responsible a monthly report covering eight specific points. Here are a few of them:
  - the number of days on which hearings were held and the average number of hours devoted to them;
  
  - the number of cases taken under advisement, their nature, and the time devoted to advisement;
  
  - the number of decisions made;
  
  - the time devoted to proceedings, from the filing of the introductory application to the beginning of the hearing and the making of the decision.

With respect to the time devoted to proceedings, section 429.51 of the *Act respecting industrial accidents and occupational diseases* imposes specific time limits, obliging us to make decisions within 90 days or 9 months, depending on the nature of the proceedings.

Other sections of the Act deal with the Board's financial management :

- In accordance with section 429.10, the President must prepare the Board's budgetary estimates. These estimates are first submitted to the Minister responsible, and then submitted to the government for approval.
- In keeping with section 429.11, the books and accounts of the Board are audited by the Auditor General every year and whenever ordered by the government.
- Lastly, section 429.12 explains that the sums required for the Board's activities are taken out of the tribunal's fund. This fund consists of the sums paid into it annually by the Commission de la santé et de la sécurité du travail (the CSST), in the amount and on the terms and conditions determined by the government.

As you can see, there are many sections in the statute which established the Board that make us accountable for our activities to the government. Some people are bound to see these provisions as threatening or undermining the tribunal's independence. It is my opinion, however, that these obligations are designed solely to ensure that the reform's objectives are met, that Board addresses the expectations which led to its creation, and that its administrative and jurisdictional activities are transparent.

The Board is therefore obliged to be highly visible, which, I believe, ensures greater protection of its independence.

In Québec, there are a number of other statutes and bills that are also aimed at the sound management of public agencies and at making sure that such agencies adequately address the expectations of citizens. For instance, under the *Act respecting the accountability of deputy ministers and chief executive officers of public bodies*, managers are accountable for their administrative management to the Quebec National Assembly.

The Québec government recently adopted the *Public Administration Act* (Bill 82). Some of the provisions in the Bill originally tabled could, in my view, have compromised the independent image of administrative tribunals. As a result of our representations and those of the Administrative Tribunal of Québec to the executive branch, the situation was rectified and the principles of independence which must characterize administrative justice were respected.

The government is also working on another bill dealing with financial administration (Bill 94). Certain provisions in this bill would allow the government to appropriate surpluses accumulated by an agency other than a budget-funded agency, such as the Commission des lésions professionnelles. We are concerned about the effect these provisions might have on the tribunal's independence as well as on its image of independence. We have therefore taken steps vis-à-vis the government to have provisions amended and allow the Board to keep its budgetary surpluses.

### ***INDEPENDENCE OF THE BOARD AND ITS MEMBERS***

I would now like to take a look at the provisions in the *Act respecting industrial accidents and occupational diseases* which protect the independence of the Board and its members.

The main issue here is the recruitment of Commissioners and the renewal of their term of office. This process is set out in detail in the Act and leaves little room for arbitrary acts. Thus, according to section 387:

Only a person who has the qualifications required by law and at least ten years' experience pertinent to the exercise of the functions of the Board may be a commissioner of the board.

Section 388 describes the appointment process, specifying that:

Commissioners shall be appointed by the Government from among persons declared to be qualified according to the recruiting and selection procedure established by government regulation.

Furthermore, the *Act respecting industrial accidents and occupational diseases* sets out the conditions that may lead to the suspension of a Commissioner. Section 399 stipulates that:

The Government may remove a member from office for loss of a qualification required by law for holding the office of member, or if, in the opinion of the Government, a permanent disability prevents the member from performing the duties of his office satisfactorily. Permanent disability is ascertained by the Conseil de la justice administrative, after an inquiry conducted at the request of the Minister or of the President of the Board.

Section 400 adds the following:

The Government may also dismiss a member if the Conseil de la justice administrative so recommends, after an inquiry following a complaint concerning a failure to observe the code of ethics, to perform the duties imposed ... or to comply with the requirements relating to conflict of interest or incompatible offices.

In other words, in order for Commissioners to be removed from office, or for their term of office not to be renewed, there have to be very serious reasons, which ensures the independence of Board members. The process is in all respects modeled on that for removal from office of members of judicial courts.

Several clauses in our *Code of Ethics*, which should be adopted soon, and various sections in the *Regulation respecting the remuneration and other conditions of office of commissioners of the Commission des lésions professionnelles* also reflect our concerns, and those of the legislator, with regard to the impartiality and independence of members of the tribunal.

In spite of all these provisions, we are not beyond the pale of questions. For instance, following a judgment rendered by the Superior Court of Québec with regard to the Administrative Tribunal of Québec, the Commission des lésions professionnelles is also the subject of litigation concerning its independence and impartiality.

These motions request the Superior Court:

- to rule on the independent and impartial nature of the Board,
- to declare void those provisions in the *Act respecting industrial accidents and occupational diseases* which involve the duration and renewal of office of Board Commissioners, their remuneration and the procedure for evaluating their performance.

***INDEPENDENCE AND ACCOUNTABILITY: RECONCILABLE CONCEPTS***

At the beginning of my talk, I said that independence and accountability can be reconciled. In my opinion, this is possible if:

- they are both aimed at maintaining the public's confidence in administrative judges,
- and administrative judges can perform their duties and make their decisions without interference from the executive or legislative branches of government.

At the Commission des lésions professionnelles, it seems to me that these conditions are met. As I have said, we must be accountable to the government for our administration. I believe that we should see this as implying an interdependent relationship, and not as an obstacle to our obligations as members of a tribunal.

This is, in fact, the opinion of several authors who have given some thought to this issue, and who rightly point out that:

- the tribunals are merely a link in the judicial system's long chain; and
- governments remain responsible for the overall operation of the system.

This view certainly helps us accept the rules of accountability to which we are subject. I also believe that it fosters the transparency and responsibility which our clients and the public at large are entitled to expect from us.

I would like to thank you for your attention and I would be happy to discuss this issue with you. I think that it is in our interests to give this matter a great deal of thought, and in the interest of justice and all those it must serve.