

The Attorney General of Québec

v.

**Barreau de Montréal
and others**

**Court of Appeal of Québec
(No. 500-09-009146-002)
September 5, 2001**

Background:

This is an appeal by the Attorney General of Québec of a trial decision that allowed the Barreau de Montréal's motion to strike down several sections of the *Act respecting administrative justice (AAJ)*.

The trial judge found, among other things, that provisions in *AAJ* which created appointments for 5 years and which created performance based pay were contrary to the *Quebec Charter*. The *Charter* includes a provision requiring independent administrative tribunals. Pursuant to section 23 of the *Quebec Charter*, the trial judge concluded that the members of Administrative Tribunal of Quebec (ATQ) must benefit from a level of guarantee of judicial independence that was less than the judicial courts but higher than other administrative tribunals.

Held: The Court of Appeal of Québec allowed the appeal, in part.

Reasons:

The Supreme Court of Canada in *Valente v. The Queen* (later refined in *Reference re Judges of the Provincial Court*) articulated three essential conditions for judicial independence: security of tenure, financial security, and administrative independence. This was the framework used by the court.

Even though the ATQ had exclusive adjudicative jurisdiction and a broad range of powers, the ATQ was not part of judicial courts in the context of the Constitution. Because the ATQ did not form part of the judicial power of the government, there was no guarantee offered by the Constitution. However, the Court of Appeal upheld the trial judge's finding that the ATQ was accorded a higher level of guarantee than other administrative tribunals. The exclusive adjudicative function of the ATQ that required establishment of procedures similar to courts of justice accorded this high level. In addition, the cumulative effect of the frequency of the government's involvement as both judge and party, and the extent of financial and political interests of the government in these disputes warranted high level of guarantees of independence.

The functions of the members must be “secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.” The Court of Appeal held that the five-year term did not in itself prejudice the security of ATQ members. Case law on this issue indicated that terms of office of fixed duration were valid with respect to administrative tribunals. Furthermore, what mattered was whether a reasonable and well-informed person would fear that the executive or the authority responsible for appointments would interfere with the functions of the members. In this case, the Court of Appeal held that no such fear arose.

However, in regard to the renewal procedure, the Court of Appeal noted the presence of a government representative in the process for renewal of tribunal members. They found that this created an atmosphere of dependence. Moreover, the presence of the ATQ President on the renewal committee was inappropriate because the president occupied an important place in the administration and general management of the ATQ members. An opportunity to be heard should be warranted in cases of unfavourable decisions.

The essence of financial security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive. The court’s concern was that the ATQ president had the power to assess performance of members for the purpose of revising salaries. They concluded that a reasonable person would fear that the President might exert pressure on the ATQ members. The guarantee of judicial independence required financial security free from interference not just from the government in the narrow sense of the term but also from the ATQ president.

The Court of Appeal found that the annual performance assessment was incompatible with the guarantee of judicial independence. This was because of the exclusive adjudicative function, the broad range of powers and jurisdiction, and the extent of the government’s interests in proceedings. The members should be able to benefit annually, determined on the basis of an identical percentage for all members. Performance assessment was not rejected entirely and it was accepted as useful to the training of members.

The decision is being appealed to the Supreme Court of Canada.