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Article

A Smoking-Gun Reform Strategy for Rights Tribunals [a1]

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The author distinguishes between "regulatory agencies" and "rights tribunals"; argues for a particular reform focus on the latter; reminds us of the special importance of "rights" and the rule of law "promise" in Canada's multicultural society; asserts that, outside of Québec, Canadian rights tribunals notoriously fail to deliver on the rule of law promise; and attributes the endemic failure of reform attempts to the quality of the evidence of tribunal shortcomings being typically insufficient to overcome the powerful resistance of governments, bureaucracies and political parties whose interests the status-quo serves. He proposes a bi-annual, national survey of administrative law lawyers and tribunal members as a strategy that would ultimately produce the needed, smoking-gun evidence, and offers a model draft for the readers' consideration.

For my part of this morning's panel presentation, I intend to ***280** confine my remarks to the reform of "rights tribunals", and to a particular reform proposal that, just to be sure to catch your attention, I am calling the "smoking-gun reform strategy".

By "rights tribunals", I mean those tribunals that are court-like in terms of their dominant responsibility for adjudicating disputes about relatively tightly defined, and private, statutory rights or benefits. These are the tribunals whose adjudicative functions and responsibilities are in point of fact indistinguishable from the adjudicative functions and responsibilities of provincial courts, when those courts are exercising their civil law jurisdictions in, for example, family law matters.

Rights tribunals are to be distinguished from tribunals with more general, public-interest oversight responsibilities, or those that exercise delegated political powers — tribunals that are, indeed, appropriately labelled "regulatory agencies" or, in some cases, perhaps "government agencies". I will refer to them here as "regulatory agencies". Prominent examples in Ontario are the Ontario Securities Commission and the Ontario Energy Board and, in the federal system, the CRTC.

Support for this distinction is to be found most recently in the Québec Court of Appeal's 2001 decision in *Barreau de Montréal c. Québec (Procureur général)* [2] (leave to appeal to the Supreme Court of Canada denied). [3] This is the decision of Mr. Justice René Dussault in the so-called *TAQ* case — the case in which the Montreal Bar challenged the constitutional validity of some of the provisions in the 1998 legislation establishing le tribunal administrative du Québec — *ie.*, "TAQ". The *TAQ* case is sometimes also referred to as the *Barreau* case.

In that case, Justice Dussault, speaking for the Court of Appeal, agreed with the judge of first instance that, notwithstanding its court-like powers and responsibilities, TAQ did not form part of the "judicial power" of the government — principally because it did not have any inherent powers to enforce its own decisions — and was, therefore, indeed, an administrative tribunal. Justice Dussault described TAQ as an administrative tribunal whose sole function is to decide proceedings by relying on objective legal standards — an administrative tribunal that does not participate directly as such in "economic or social missions". (Now there, ***281** it seems to me, is a really useful — and, I think, novel — way of characterizing regulatory agencies: agencies that have been assigned economic or social missions.) TAQ was, in short, a "board acting solely in an adjudicative capacity", to use the terminology of Mr. Justice Cory in the Supreme Court's decision in *Newfoundland Telephone*. [3a] There is, Justice Dussault noted, "a broad spectrum of administrative tribunals, starting from a regulatory commission and extending to a tribunal approximating a court of justice", and TAQ, in his view, was a tribunal approximating a court of justice. [4]

It is essential that tribunals with no economic or social mission — to use Justice Dussault's felicitous phrase — but with the sole function of deciding proceedings by relying on objective legal standards and factual findings, be singled out and clearly distinguished from regulatory agencies. The "rights tribunal" label seems to me to be an appropriate means of marking that distinction.

This distinction between rights tribunals and regulatory agencies is also effectively the same as that recommended by Professor Ratushny in his 1990 Report to the CBA on the Independence of Federal Administrative Tribunals and Agencies. Professor Ratushny proposed that the term "tribunal" be reserved for "independent adjudicative bodies" and that the terms "board", "commission" or "agency" be reserved for "independent bodies which are required" — and I quote — "to apply policy to their decision-making and are responsible for more comprehensive regulation of a particular subject area".

In my estimation, an objective review of tribunals would show that most of the tribunals we now refer to as administrative justice tribunals are in fact rights tribunals like TAQ. In Ontario, three, particularly prominent examples are: The Workplace Safety and Insurance Appeals Tribunal, the Social Benefits Tribunal and the Rental Housing Tribunal.

I am confining my comments this morning to reform initiatives for rights tribunals because administrative justice structures and administrative justice administration policies in Canada have always been deflected from rule-of-law imperatives by their designers' traditional assumption that all tribunals belong to the same, regulatory agency species ***282** — a species in which government interests have always been seen to trump rule-of-law imperatives. The use of the label "administrative tribunals" as an all-encompassing generic term in the Supreme Court's *Ocean Port* decision [5] is only the most recent — albeit perhaps the most disturbing — evidence of that traditional assumption at work.

And with *Ocean Port*'s use of words that can be read as characterizing all administrative tribunals as "ultimately operating as part of the executive branch of government" and having the "primary function" of "policy-making", it is now especially important to insist on the distinction between so-called administrative tribunals that are rights tribunals and so-called administrative tribunals that are, indeed, regulatory agencies.

Of course, most regulatory agencies are also, in part, tribunals. They typically do adjudicate legal rights. But the rule-of-law issues presented by regulatory agencies that also perform rights tribunal functions are different in nature and, from a political perspective, probably inherently more intransigent, than the rule-of-law issues presented by rights tribunals that do not perform regulatory agency functions, but are structured and administered as though they did.

It is not impossible to conceive of an answer to the regulatory agency, rule-of-law issues. One need only look south to the U.S. federal administrative law system to find one solution. There the adjudicative work of regulatory agencies is separated from the agency's regulatory work and is assigned to "administrative law judges". These judges are selected through an independent, rigorous, merit-based and highly competitive selection process. Appointed for life, U.S. federal administrative law judges are independent, in the true sense of the term, from both the government and the regulatory agency whose adjudicative work they do. [6]

However, we cannot wait for a political environment to emerge in which such a reform of regulatory agencies would be feasible — experience teaches that life is too short. What I propose is that we put that problem aside for another day. We need to concentrate now on addressing the truly pressing rule-of-law problems in rights tribunals. There the solutions are obvious and the need, in my submission, shockingly clear. ***283** Moreover, rights tribunals, are not inherently conflicted with the structural complications for the rule of law that do arise — in practice and in theory — from a regulatory agency's status as part of the executive branch of government.

Now, before describing my smoking-gun reform initiative, I propose to speak for a moment on the subject of the particular importance of rights and of the rule of law in the Canadian context.

In September 2000, during the Supreme Court of Canada's 125th anniversary Symposium, Michael Ignatieff, Canadian author of *The Rights Revolution*, was invited to address the justices of the Supreme Court assembled on that occasion. He chose as his theme the special importance of rights — of the rule-of-law — in the Canadian context.[7] "In Canada", he said to the justices, "rights are central to our identity in special ways". "Indeed", he said, "Canada is not held together by much else". "Because of the multicultural nature of our society [and he noted in this respect the 75 mother tongues currently being spoken by students in the schools of the Toronto District School Board] it is rights not roots", he said, "values not origins that hold our country together. The rule of law is", he continued, "the very principle of our national cohesion as a society".

Then, after noting the gulf that in his view exists between the rule-of-law as implicitly cherished by the Supreme Court Justices and what he referred to as the often grim reality of law as actually experienced by citizens of Canada, he said this: "the rule of law is not an abstraction, it's a machine, and every day it grinds out outcomes that many of our citizens feel express contempt for them rather than respect". Mr. Ignatieff admonished the Justices to take care. "When you speak of the rule of law", he said, "more than take care that our institutions actually measure up to the promise. For our very survival as a people depends on whether they do".

That is an admonition that may with equal validity and comparable relevance be directed to the members of our legislatures, and to the Premiers, Ministers and Deputy Ministers — federal and provincial — who have been entrusted with our rule-of-law and are responsible for the design, enactment, administration and performance of Canada's rights tribunals. Those individuals should also do more than take care that our tribunals actually measure up to the rule-of-law promise.

***284** And, what is that promise? Let us remind ourselves that the rule-of-law promise is that disputes about rights will be resolved on the basis of law and evidence, in fair hearings, before independent and impartial tribunals. In the context of this conference, the particular question that Mr. Ignatieff has posed is this: Do Canadian rights tribunals measure up to that promise? In my view, they do not.

With the exception of Québec, where there has been fundamental reform,[8] it is, I believe, a notorious fact that in every jurisdiction across this country rights tribunals typically fail to deliver on the rule-of-law promise — they are commonly not independent, they are frequently not seen to be impartial, and, too often, they have unqualified members.

For this audience that may well be a controversial statement, and, naturally, it is not intended to apply to all rights tribunals. Those of you who are chairs or members of rights tribunals that, in terms of their structure, their relationship to government, and their performance, do deliver on the rule-of-law promise, know who you are and will not, I trust, take offence.

To say that, in Canada, rights tribunals fail to deliver on the rule of law promise is not to say anything that is at all radical. It is not a statement that should come as a surprise to anyone. It is a statement of a fact that may be seen reflected in the recommendations for fundamental reform in a litany of royal commission inquiries and independent studies ***285** and reports over the last three or four decades, of which the B. C. White Paper is only the most current.

The truth of the statement may also be seen evidenced in the almost daily parade of sharply critical articles in the academic literature; in the pervasive media reports of the patronage abuses that are endemic in our appointments processes; in judicial review decisions of the courts; in complaints to ombudsmen; in the frequent controversy over the performance of particular tribunals as reported in the media; in the anecdotal — and not to be attributed — "horror" stories emanating from fed-up counsel; most interestingly, in the Human Rights complaint in the *Kaiser* case in Nova Scotia; [9] even in the Supreme Court's surprising, general discounting of the priority of the rule-of-law promise in respect of administrative tribunals in its *Ocean Port* decision; in the arbitrary, secret and illegitimate re-appointments processes in all jurisdictions except Québec; and, finally, in the ubiquitous back-channel gossip amongst members of our various administrative justice systems, and within the ranks of administrative law counsel, about the abuses of the appointments and reappointments processes.

Why is this the reality? How does one explain the failure of Canadian governments ever to heed the persistent calls for fundamental reform? Why were, effectively, none of the significant recommendations of the *Ratushny*, [10] *Wood*, [11] *Guzzo*, [12] and the *1997 Nova Scotia Law Reform Commission Reports*, and, effectively, none of the significant recommendations of the dozen studies and reports that pre-dated *Ratushny*, ever implemented? Why, in the year 2003, in what is widely regarded as an enlightened, major study of the administrative justice system in British Columbia, is the principle product of B.C.'s White Paper [13] a proposal for the reform of an appointments process that in rights tribunals has been known to be incompatible with the rule of law for decades.

***286** In my submission, the explanation for these baffling years of futile reform efforts in Canada may be found in two overarching facts. One is that those who are well served by the *status quo* — namely governments, political parties, and the bureaucracies — are all-powerful, and their behind the scenes use of that power in defense of their interests in the *status quo* has always been single-minded and creative. The other is that the *evidence* of the failure of our rights tribunals to deliver on the rule-of-law promise has never had sufficient weight to turn that power around.

Experience teaches us that the *principles* of law and ethics are not enough. Amongst our political leaders, the proposition that a government's appointment of unqualified individuals to determine other people's legal rights should be regarded as, self-evidently, a shameful breach of a sacred trust seems to attract few adherents; [14] neither, apparently, does the age-old axiom that one must not be

the judge in one's own case; [15] and to hold that a rights tribunal adjudicator should be truly, in fact and not just in appearance, independent and impartial appears to be seen by the governing powers in Canada, outside of Québec, to be simply naïve.

Since arguments from principle have proven to be ineffective, what reformers obviously need is creditable and powerful evidence of the actual consequences that flow from ignoring these principles.

Regrettably, we have never had that kind of evidence. The evidence that reformers typically work with is a mélange of refutable anecdotal and opinion evidence: complaints from parties or their counsel ***287** routinely discounted because of their partisan interests; critical analysis from authors of professional articles who are seen to have their own axes to grind; and the recommendations of royal commissions and studies and reports by academics that can also be discounted as being based on inherently suspect anecdotal evidence, or as reflective of opinions derived from the same "wet" principles that have, as I have said, never themselves cut any ice with Canadian politicians or governments.

Moreover, when governments turn to their own experts for evaluation of radical administrative justice reform proposals, they will typically find the allies they are looking for. The bureaucracy is addicted to *de*pendent tribunals and will take all measures to defend the *status quo*. And the chairs or members of a government's existing tribunals have an interest in defending their own and their tribunal's performance. Moreover, they are beholden to that government for their appointments, and dependent on the government bureaucracies for their resources. Thus, to the extent they are able to see or are prepared to acknowledge a problem, they will be reluctant to challenge the government or the government bureaucracies. In our modern world, speaking truth to power is not in fashion nor is it often productive. [16] The soothing words from the system's inside experts will also often find reinforcement in the relative silence from members of the administrative law bar, distracted by the demands of their busy practices, sensitive of their own interests in ongoing government work, and wary of damaging their goodwill with tribunals before whom they practice.

In my view, it is past time that we cut through all of that and start to think in terms of evidence with the compelling weight of the proverbial smoking-gun.

What, precisely, do I mean by that?

The smoking-gun evidence I envision is a bi-annual, national, and statistically sound survey of a random sample of rights tribunal members, and a similar survey of lawyers and paralegals who appear before rights tribunals on a regular basis; surveys designed in collaboration with social science survey experts and administered by a national body of impeccable neutrality and credibility; surveys which would measure the extent to which, in the confidential views of members and of counsel, individual tribunals are in fact delivering on the rule-of-law promise.

***288** In general terms, think *Maclean's* magazine's annual reports on universities, and medical institutions, and the *Canadian Lawyer's* annual rating of law schools. [17]

What might such a survey look like? You will find a draft of a survey questionnaire for Ontario lawyers and paralegals who act for parties appearing before Ontario's rights tribunals and regulator agencies attached as an Appendix to this paper. I have no training in the science of statistically sound surveys, so the questionnaire in that respect is strictly amateur. However, I am hopeful that this concrete illustration of the kind of thing that could be attempted might strike a spark of interest in some well-funded, responsible quarter. The draft questionnaire will no doubt be thought in dire need of a good editor, but, viewing it as an illustration of what might be done, I felt entitled to run on a bit.

In the development of such a questionnaire, one naturally needs to start with agreement on the criteria against which tribunals and agencies are to be measured. Two obvious criteria are the ones that the *Universal Declaration of Human Rights*, the *Canadian Bill of Rights*, the *Québec Charter*, and the common law principles of natural justice require of any tribunal to which the determination of legal rights has been assigned — that is, that they be both independent and impartial.

Now let us suppose that *Maclean's* or the *Canadian Lawyer* did develop such a survey, and that it included questionnaires addressed to both tribunal members and to administrative law counsel. And, assume ***289** that one of the questions in the members' questionnaire was a multiple choice question designed to assess the quality of a tribunal member's independence, as he or she perceived it. Suppose, then, that, out of a balanced and fair list of possible answers to the question of how members would characterize the quality of their own independence, *Maclean's* reported that a significant majority of rights tribunal members — re-assured of the confidentiality of their answers by an air-tight, survey security protocol— chose the following answer:

> When, in a high profile case, I am faced with a choice between government or other influential interests and another party's rights, I am aware that if I decide for the other party I will be jeopardizing my re-appointment.

And, say that *Maclean's* also reported that a large majority of counsel responding to the lawyer and paralegal questionnaire believed that, if tribunal members were answering frankly and honestly about their own understanding of the quality of their independence, the latter is the answer the majority of tribunal members must choose from amongst those offered.

Or, say that, faced with a similar multiple choice question about the quality of their *impartiality, Maclean's* was to report that a significant majority of members chose the following answer, and

that a significant majority of counsel also thought that, if tribunal members were speaking honestly, this is the answer the majority would have to choose:

> In my adjudicative decision-making, I am not impartial in any objective sense. I believe adjudication is at bottom inherently ideological and my decision-making is, I believe, properly influenced by my perception of the government's inclinations and attitudes concerning the issues that come before me. I believe that I am supposed to be biased in favour of decisions that support the government's interests.

If *Maclean's* began to report evidence of this nature on an annual or bi-annual basis, then those reports would be, in my submission, evidence in the nature of a smoking-gun. Unlike royal commission reports, they could not be discounted, shelved and forgotten.

Of course, it might happen that the *Maclean's* Report would show that a significant majority of tribunal members were fully confident about their independence and never concerned about possible repercussions from controversial decisions; that they all felt sure of their impartiality, and that most counsel shared those perceptions. And, obviously, if that turned out to be the case, the reformers could retire and find something else to do.

***290** The point, however, is that we do not have any objective empirical data about the actual status or quality of our rights tribunals. And, until empirical data of that nature becomes available on a routine basis, we will continue to have nothing with which to effectively confront the powerful interests that are addicted to the *status quo*.

Perhaps, one could not expect private sector publications to have the same interest in reporting on the quality of rights tribunals as they have in reviewing the quality of universities, medical services, or law schools. If the administrative justice issues' traditional lack of political legs were any indication, such a survey would probably not do much for a subscription list. What is needed are bi-annual surveys designed and administered by a national organization of unquestioned neutrality, credibility, and expertise, and we no doubt would have to create one especially designed for the purpose. One might think of an organization sponsored by, say, a coalition of law schools, the Canadian Bar Association, the Canadian Institute for the Administration of Justice, and perhaps the Institute of Public Administration of Canada. We might call it the Administrative Justice National Survey, Inc.

Once a National Survey organization was in the business of routinely checking on the quality of our administrative justice systems, it would want to choose a number of performance criteria in addition to the issues of independence and impartiality. For example, there is the list of eight

tribunal goals recommended by Ontario's 1998 Report *Everyday Justice* (The *Guzzo Report)* [18] and accepted by the Ontario government:

> **Fairness; Accessibility; Timeliness; Quality and Consistency; Transparency; Expertise; Optimum Cost; and, Courtesy**.

Take a moment. Imagine the interest with which we would all await the published reports of a National Administrative Justice Survey on the extent to which our various tribunals measured up to the independence and impartiality standards and to these eight goals.

And, then, you non-Québecers out there, come back to earth — to the futility and frustration of our *status-quo*, evidence-lite, administrative justice culture, long coerced by rhetorical assurances from on high that our rights tribunals do deliver on the rule-of-law promise, when those who know, know differently.

Footnotes

a1 The following are the author's speaking notes for a paper he presented as a member of a plenary panel on the "Reform of Administrative Tribunals" at CCAT'S 19th Annual Conference in June 2003 at Gatineau, Québec.

1 Ronald Ellis is a Toronto labour arbitrator and administrative justice practitioner. First chair and CEO of the Ontario Workers' Compensation Appeals Tribunal from 1985 to 1997; first President of the Society of Ontario Adjudicators and Regulators from 1992 to 1996; associate professor of law at Osgoode Hall Law School, 1975 to 1981.

2 [2001] Q.J. No. 3882, 2001 CarswellQue 1950, (sub nom. *Québec (Procureure générale)) c. Barreau de Montréal)* [2001] R.J.Q. 2058, 48 Admin. L.R. (3d) 82 (Qué. C.A.).

3 (2002), 2002 CarswellQue 2078 (sub nom. *Barreau de Montréal v. Québec (Procureur général))* 302 N.R. 200 (note) (S.C.C.), reconsideration refused (2002), 2002 CarswellQue 2683 (S.C.C.).

3a *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, 1999 CarswellNfld 170 (S.C.C.).

4 In commenting on the TAQ decision, the author is relying on an informal translation prepared by the National Judicial Institute. See paras. 115 to 123 in the original text.

5 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 204 D.L.R. (4th) 33 (S.C.C.).

6 See United States Office of Personnel Management, *Program Handbook for Administrative Law Judges*, 1989, as illuminated by U.S. Federal Administrative Judge Ann Marshall Young's paper "Judicial Independence in Administrative Adjudication: Past, Present and Future", *The ABA Judges' Journal*, 38:3 (Summer 1999) at 16.

7 The text of his address is to be found in Michael Ignatieff, "Challenges for the Future" (2001) 80 C.B.R. 209.

8 I refer here principally to the provisions of the Province of Québec's *Act Respecting Administrative Justice*, (Bill 130) enacted in December 1996. This *Act* created the TAQ — le tribunal administratif du Québec and its supervising council, le Conseil de la justice administrative — and assigned TAQ the adjudicative responsibilities of a high proportion of the Québec tribunals involved in the adjudication of rights in four major areas: (1) social affairs, (2) immovable property, (3) territory and environment, and (4) economic affairs. The *Act* specifies transparent, merit-based appointments and re-appointments processes and removes any limits on the number of re-appointments, thus, effectively, creating a system of professional adjudication in Québec rights tribunals. Recently — at the same CCAT Conference where this paper was presented — the Québec Minister of Justice announced the new Liberal government's intention to introduce tenured appointments — *ie.*, so called lifetime appointments — for Québec tribunal members. However, with respect to this last proposal, it is this author's respectful opinion that Québec will be seen to have gone a step too far. In the author's opinion, tenured appointments are incompatible with the culture of institutionalized decision-making (as approved in *Consolidated-Bathurst*). Institutionalized decision-making is an essential attribute of any rights tribunal environment and it depends on a relationship of accountability between members and their tribunals different from the relationship between trial judges and their courts. In the author's opinion, lifetime appointments are inherently iminicable to such a relationship of accountability.

9 For a full account of this case, see "Kaiser Kicks Back", a front page article written by Dean Jobb in *Canadian Lawyer*, January 2003.

10 *Canadian Bar Association*, "Report on The Independence of Federal Administrative Tribunals and Agencies", by Professor Ed Ratushny, September 1990.

11 Ontario *Government Task Force on Agencies, Boards and Commissions, Report on Restructuring & Adjudicative Agencies* [The *Wood Report*], February 1997.

12 *Everyday Justice, Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies*, April 1998 — (The *Guzzo Report*).

13 B.C. Administrative Justice Project — White Paper on Administrative Justice Reform: "*On Balance — Guiding Principles for Administrative Justice Reform in British Columbia*", July 2002.

14 For the most recent public confirmation of the lack of adherents to the latter principle see the *Toronto Star*, Saturday, June 14, 2003, headline: "Refugee Board Under Fire For Political Appointees" and the Report by Allan Thompson (Ottawa Bureau) of his interview of Peter Showler, recently retired Chair of the Immigration and Refugee Board. Showler is reported by Thompson to have said that "political patronage is a devastating blight on Canada's Immigration and Refugee Board ..."; that "there were several very, very weak members who, because of the pervasive political influence within the board, ended up with reappointments, whereas they really shouldn't have ..."; that "the real problem at the refugee board is not corruption ... it is mediocrity and incompetence among some of its members ...", a weakness, Thompson reported, that Showler blames directly on political patronage. It is a telling indication of the sorry, complacent state of our administrative justice systems that what should be seen as a shocking and shameful exposé by a respected chair of one of the principal federal administrative justice tribunals has received virtually no national media exposure, and has shown itself to have had zero political legs.

15 See, Ronald Ellis, "Disturbing Omissions in B.C. White Paper, Parts I, II and III", *Lawyers Weekly*, (17 January 2003), at 8; (24 January 2003), at 8; and (31 January 2003), at 6.

16 See note 14, above.

17 By way of making the point that such a survey is not a radical proposal for an administrative justice system, readers are directed to an article by William T. Litant in the March 1997 issue of the *Lawyers Journal* — the newspaper of the Massachusetts Bar Association — reporting on a "A groundbreaking Massachusetts Bar Association survey asking workers' compensation lawyers to evaluate [the performance and expertise] of Department of Industrial Accident administrative judges and administrative law judges". The article reports that the survey "has revealed that while most rate passing grades, a few are seen as having one or more serious flaws in their performance." Surveys were mailed to 500 lawyers and 180 responded. The Article names the judges who received the high and low scores. There is also a precedent for a survey of the adjudicative performance of Canadian judges — this time a confidential survey. See the Nova Scotia Judicial Development Project — Final Report by Dr. Dale H. Poel, School of Public Administration, Dalhousie University, Halifax, Nova Scotia, which, as far as I know, remains unpublished. See also *National Post* July 15, 2002,

article by Theresa Tedesco in which she reports that, in an international review of competition watchdogs in eight industrial nations, the *Canadian Competition Bureau* tied for last place, with its independence and expertise being categorized as "points still open".

18 See above, note 12.

*291 SMOKING-GUN REFORM STRATEGY

APPENDIX

Draft Covering Letter for Counsel and Paralegal Survey — Ontario Section

ADMINISTRATIVE JUSTICE NATIONAL SURVEY

February XX, 2004

Mr./Ms. Xxxxxx

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Dear Mr./Ms. Xxxxx,

Re: Administrative Justice System National Bi-annual Survey — Ontario Section

We understand that you are active in Ontario as a counsel or paralegal appearing on behalf of clients before one or more of our provincial or federal rights tribunals or regulatory agencies. If that understanding is not correct, please accept our apologies and move directly to the second-last paragraph of this letter.

In recent years, rights tribunals and regulatory agencies have been recognized as the individual components of provincial or federal administrative justice *systems*. However, because these tribunals and agencies (for convenience we will hereafter refer to them all as "tribunals") have traditionally been structured and administered as autonomous, separate, and *ad hoc* entities by a variety of line ministries or departments, little in the way of comparative systemic data has been developed concerning the bar's or users' experience with their performance. In the absence of such data, systemic policy analysis is principally dependent on information that is anecdotal and/or speculative and constrained by the well-known and understandable reticence of people working with or within these systems.

In an attempt to cure these deficiencies — to create a comprehensive database that will allow administrative justice policy discussions to be conducted in the future on a sound factual foundation — the Administrative Justice National Survey Inc. (AJNS) has been established and charged with the responsibility of carrying out a bi-annual, confidential survey of Canada's administrative justice system advocates — lawyers and paralegals — whose practice involves

regular advocacy before any tribunal. ***292** A list of administrative justice tribunals operating in Ontario has been compiled and will be found attached to the enclosed questionnaire. The target group for this Ontario section of the survey is a randomly selected group of advocates whose practice is believed to include appearances before one or more of the listed tribunals. You are one of those so selected.

A critical feature of these bi-annual surveys is the assurance provided to individual respondents concerning the confidential treatment of their identity. The survey is a "confidential" survey and by that we mean it is a survey whose questionnaires are to be processed in accordance with a "security protocol" that will give absolute assurance to respondents that their identity will not be disclosed, and that their individual answers to the survey questionnaire will be utilized solely for the purpose of creating a statistical database and cannot be attributed to them. In our view, there would be no point in attempting such a survey unless a security protocol were used that would be seen by all as clearly providing such an assurance. For the details of the security protocol, see the first page of the questionnaire.

Given the confidentiality assurances, we hope that you will agree to participate in the survey. If the database to be developed through these bi-annual surveys is to be credible and useful, participation by a high proportion of the administrative law lawyers and paralegals selected for the survey is essential.

It is impossible to be sure that we have accurately identified each member of the target group. We may have mistaken you for someone else, or we may have incorrectly identified you as an administrative-law advocate. If so, to help us with the control of the survey we would be grateful if you would note on the enclosed copy of this letter that we have made an error, and return the copy to us in the enclosed, stamped, self-addressed envelope. If we have correctly identified you, but you have decided not to participate in the survey, please return the copy of this letter with that message endorsed on it to the AJNS in the same pre-stamped and self-addressed envelope.

The Survey Questionnaire is enclosed. Thank you for your attention and anticipated participation.

Yours truly,

AJNS CEO

***293 *DRAFT* ADMINISTRATIVE JUSTICE NATIONAL SURVEY**

COUNSEL AND PARALEGAL 2004 SURVEY — ONTARIO SECTION

Qualifications for Responding to this Questionnaire - Please Check:

For this survey to produce credible and reliable data, the respondents to this questionnaire must be confined to lawyers or paralegals who have significant experience of representing clients who have had their legal rights or obligations determined by one or more of the rights tribunals or regulatory agencies operating in Ontario during the survey period. These are hereafter given the generic label of "tribunals". Accordingly, we are limiting the survey to lawyers or paralegals who, over the course of the survey period, were responsible — either directly or indirectly — in each year of that period, for a minimum of three separate matters in which a client's legal rights and obligations were at issue before the tribunal or tribunals that the respondent chooses to feature in his or her responses to this questionnaire.

If you are not an administrative law lawyer or paralegal with experience of acting for clients before one or more of these tribunals, or if your experience does not qualify you as a respondent to this survey in accordance with the above criteria, do not complete this questionnaire. **However, in the latter case, please endorse the enclosed copy of the covering letter with a "not qualified for this survey" notation and mail that copy back to the AJNS in the enclosed, stamped and self-addressed envelope**.

SECURITY PROTOCOL

1. Enclosed in your survey package you will find three envelopes, one labelled "OUTSIDE ENVELOPE" stamped and self-addressed to retired Justice XXXX; one labelled "INSIDE ENVELOPE" with no other markings on it; and one ordinary envelope stamped and self-addressed to the AJNS which is the envelope referred to in the covering letter and in the Note, above.

2. Neither the *Inside Envelope* nor the Questionnaire itself have any markings on them that are personal to you.

3. The *Outside Envelope*, however, is stamped with a number that identifies the envelope as the one that was sent to you.

***294** 4. The *ordinary envelope* addressed to the AJNS is for the return of the copy of the covering letter addressed to you. The AJNS needs this mailed back to it in order to confirm that you received a survey form, that you are or are not an administrative lawyer or advocate with the qualifying experience, and that you will or will not be participating. (See Note above.)

5. The completed Questionnaire is to be placed in the *Inside Envelope*, and the sealed *Inside Envelope* placed in the *Outside Envelope*.

6. Retired Justice XXXXX, to whom the *Outside Envelope* is addressed, has agreed to act as the respondents' trustee in this matter. He will receive the *Outside Envelopes* and record the

numbers that appear on those envelopes, thus establishing a record that will show who has responded to the survey — information that is necessary to establish the statistical validity of the survey. Then, he will open the *Outside Envelopes*, ensure that those envelopes are discarded, and deliver the *Inside Envelopes* unopened to the AJNS. Justice XXXXX has specified that he not have access to the register that ties the numbers on the *Outside Envelopes* to individual names.

7. The AJNS's professional survey secretariat staff will open the *Inside Envelopes* and enter the questionnaire answers into the survey database. The staff will certify to the AJNS and to Justice XXXXX that the questionnaires have not been photo-copied and after the data has been entered they will return them to Justice XXXXX to be referred to again by the secretariat staff only under his supervision and only if necessary for technical reasons related to the administration of the database. After one year of storage, Justice XXXXX will destroy the questionnaires.

QUESTIONNAIRE

Instructions: Please read carefully

· **What to do if you are qualified to respond with respect to more than one tribunal**

It is possible, perhaps even likely, that qualified respondents to this questionnaire will have had the minimum qualifying experience with respect to more than one tribunal. The questions in this document are related to only one tribunal — a tribunal to be selected by you as the tribunal with which you are *most* familiar. If you are very familiar with other tribunals, it would then be important for you to complete a separate questionnaire ***295** form with respect to each of those other tribunals. Those forms should be solicited from the AJNS by fax or telephone with a reference to the number that appears on the OUTSIDE ENVELOPE that came with this questionnaire (see the security protocol described above). The additional forms will then be forwarded to you together with the ordinary and INSIDE and OUTSIDE envelopes under another covering letter — one separate set of envelopes for each additional agency — with the OUTSIDE ENVELOPES numbered with the same number that appears on the present version of the OUTSIDE ENVELOPE.

· **Using additional sheets of paper**

Where a question invites you to write an answer (as opposed to checking one or more of several specified choices), if the space provided in the form proves insufficient, please feel free to continue the response on a separate sheet of paper. Just be sure to cross-reference that sheet to the question number.

· **Questions you are not comfortable answering**

If you are uncomfortable about answering any particular question, please feel free to leave it unanswered. However, when you elect do so, we would appreciate your noting, in the margin of the question, that you have "decided not to answer" — "DNA". If possible, a word of explanation would also be appreciated.

· **N/A questions**

For questions that are "not applicable" to you or your situation, please endorse an "N/A" in the margin of the question.

Name of Tribunal to which the Answers in this Questionnaire Relate

You will find in the package accompanying this questionnaire a numbered and alphabetical list of the tribunals to be covered by this survey (the Tribunal List).

The Problem of Migratory Adjudicative or Regulatory Functions

From time to time, particular tribunals may cease to exist. This may be because there is no longer any need for their function. However, it may also be that a tribunal has been merged with another tribunal with the former tribunal's basic adjudicative or regulatory functions continuing to be carried on by the latter tribunal. Another possibility is that a tribunal may have been reconstituted under a new or substantially amended statute ***296** as a new entity with a new name, but with the new entity continuing to perform basically the old tribunal's same, adjudicative or regulatory functions. Thus, recently, the Ontario Social Assistance Review Board (SARB), became the Social Benefits Tribunal (SBT), but the SBT's responsibilities continues to include hearing appeals from welfare decisions, which had been SARB's assignment. Counsel and paralegals acting for clients in a particular administrative law field will typically follow a tribunal's basic adjudicative or regulatory functions as they migrate from institution to institution and continue to participate in the merged or new tribunal's exercise of those functions.

We are not interested in learning about truly defunct adjudicative or regulatory functions, but it is important that this survey encompass the history of the administration of a particular adjudicative or regulatory function even if that function has changed its nature from time to time and been moved to other tribunals.

Accordingly, if the basic adjudicative or regulatory functions that have been the focus of the practice experience on which you are relying in responding to this questionnaire have been moved during your practice from one tribunal to another, please adhere to the following instructions.

In response to the request to identify the tribunal in respect of which you intend to answer this questionnaire, enter the name of the tribunal that is exercising those functions as of December

31, 2003, and, as well, the names of any predecessor tribunals that have exercised those functions in the past, together with the approximate year in which those tribunals to the best of your recollection ceased to exist or ceased to perform those functions.

It is our believe that the enclosed Tribunal List encompasses all tribunals that now or at some period of time during the survey period were performing adjudicative and/or regulatory functions in the Province of Ontario. If you cannot find on that list the tribunal or tribunals to which your experience relates, please nevertheless insert the name of the institution and any predecessor institutions which in your experience had adjudicative or regulatory functions, and carry on with the questionnaire.

***297 Identification of Subject Tribunal**

1. As of December 31, 2003, the name of the adjudicative or regulatory tribunal to which the answers in this questionnaire will relate was:

the _____ (Tribunal List No: _____)

If there were predecessor tribunals as referred to above, references to "this tribunal" in what follows shall be deemed to encompass both the predecessor tribunals and the current tribunal as though, taken together, they were one ongoing institution.

Your Qualifications for Critically Assessing this Tribunal

2. Are you a lawyer or a "paralegal" or "consultant"? Lawyer: ___; Paralegal or Consultant: ___

3. If you are a lawyer, within what two-year period were you called to the bar? Within the period from _____ to _____. (The request to identify your call date only within a two-year period is intended as a further protection of your identity.)

4. If you are a paralegal or consultant, how many years of advocacy experience do you have? _____ years

5. What is the total number of 12-month periods ending Dec. 31, 2003, within which you estimate you were directly or indirectly responsible for three or more separate matters for a client or clients whose legal rights or obligations were at issue at this Tribunal? _____

6. During the latter periods, approximately what number of separate matters did you typically average per year? _____

7. Does December 31, 2003 fall within your most recent qualifying period? Yes _____ No _____

8. If No, then within what two, calendar-year period did your last qualifying period end? _____ to _____

9. In what professional environment were you *principally* engaged while you were accumulating the foregoing experience?
a. Private Practice: _____

b. Sole practitioner: _____

c. Small firm: _____

d. Medium-sized firm: _____

***298** e. Major firm: _____

f. Government legal services representing the government or an arm of government participating as a party in this agency's hearings: _____

g. Legal Services Clinic under the Legal Aid Plan: _____

h. Corporate counsel or legal staff: _____

i. Other (please specify): _____

10. Where in Ontario were you principally located while you were accumulating the foregoing experience?
a. Downtown Toronto: _____

b. City of Toronto: _____

c. Greater Toronto Area: _____

d. Ottawa: _____

e. Hamilton: _____

f. Windsor: _____

g. Sarnia: _____

h. London: _____

i. Cambridge: _____

j. Kitchener-Waterloo: _____

k. Sudbury: _____

l. Thunder Bay: _____

m. Timmins: _____

n. Sault St. Marie: _____

o. Cornwall: _____

p. Brockville: _____

q. Kingston: _____

r. Belleville: _____

s. Oshawa: _____

t. Other city: _____

u. Other town: _____

11. Compared to the qualifications of other counsel or advocates who are known by you to deal with this tribunal (not including tribunal staff or members), how qualified do you feel yourself to be to critically assess the performance of this tribunal from the perspective of a counsel or client? Better qualified than most: _____; As qualified as anyone: _____; Qualified, but not as qualified as some: _____

12. In the fields of law in which some tribunals operate, the parties typically fall into informally designated general categories such as landlords, or tenants, or employers, or unions, or injured workers, ***299** or welfare recipients, or developers, or private property owners, or patients or doctors, or children, etc. Advocates often specialize in acting for clients in only one of those categories. In the matters for which you were responsible at this tribunal did you specialize in acting for one category of client? Yes _____ No _____

13. If yes, please describe the category of client for whom you typically acted: _____

Tribunal's Performance

Please discount disproportionate influences

It is generally perceived — at least by tribunals — that the views of counsel and paralegals concerning the qualities of a particular tribunal may be disproportionately influenced by one big personal loss or win, perhaps especially if the professional wound or sense of triumph is relatively fresh. In answering the following questions, you are asked to be conscientious in appropriately discounting such possibly disproportionate influences.

The Survey Period

The period of this tribunal's performance to be covered by this survey is the period from January 1, 2001 to December 31, 2003.

The Performance Criteria

In April 1998, the *Agency Reform Commission on Ontario's Regulatory & Adjudicative Agencies*, chaired by Conservative MPP Garry Guzzo, issued its report on "ways to improve the services of Ontario's regulatory and adjudicative agencies". The report is entitled "Everyday Justice" and is commonly known as the "Guzzo Report". The report was generally well received and the government accepted the report and its recommendations.

On the subject of tribunal performance, *Everyday Justice* identified eight "common goals" that in the Commission's view were "critical to effective and efficient performance and service quality". In the following questions, you will be asked to assess the performance of this tribunal during the survey period relative to those eight goals.

***300** The eight goals as defined by the Commission (at page 18 of the report) are as follows:
1) **Fairness**: the provision of service and performance of statutory functions in an impartial, lawful, unbiased and just manner.

2) **Accessibility**: The ability to provide information and services that are simple and easy to use.

3) **Timeliness**: The performance of tasks within established time frames based on reasonable expectations.

4) **Quality and Consistency**: The production of accurate, relevant, dependable, understandable and predictable information and results with no errors in law or fact.

5) **Transparency**: The use of policies and procedures that are clear and understandable to everyone involved.

6) **Expertise**: The possession and use of the skill, knowledge and technical competence required to discharge all statutory responsibilities and maintain public confidence.

7) **Optimum Cost**: The provision of services at a cost that is based on best practices and is cost effective for everyone involved.

8) **Courtesy**: The demonstration of respect to everyone who comes into contact with the agency.

14. **Fairness**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the Fairness goal, as defined above, during the survey period. Circle the appropriate number: **(1), (2), (3), (4), (5)**

The statements from which the choice concerning *Fairness* is to be made are as follows:
(1) Leaving aside differences respecting legal and factual issues on which reasonable people might reasonably differ, this tribunal could always be counted on to operate in an impartial, lawful, unbiased and just manner.

(2) Leaving aside differences respecting legal and factual issues on which reasonable people might reasonably differ, this tribunal usually operated in an impartial, lawful, unbiased and just manner, but it could not always be counted on to do so.

***301 (3) This tribunal frequently left me and/or my clients with the impression that it was not operating in an impartial or unbiased and just manner**.

(4) This tribunal is not impartial or unbiased and it does not operate in a just manner.

(5) Your words (Please, use this space only if none of the standard statements come close to fairly approximating your views):

_____

15. **Accessibility**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the Accessibility goal, as defined above, during the survey period. Circle the appropriate number: **(1), (2), (3), (4), (5), (6)** In making these choices, assume that the "information" referred to in the definition of "accessibility" is information available to clients about the tribunal's process and procedures. Also, the assessment of simplicity and ease of use must bear some reasonable relationship to the relative complexity or difficulty of the tribunal's functions.

The statements from which the choice is to be made in respect of this tribunal's *accessibility* are as follows:

(1) Making fair allowances for the complexity and difficulty of its functions, this tribunal's information and services were almost always simple and easy for a client to use.

(2) Making fair allowances for the complexity and difficulty of its functions, this tribunal's information and services were usually reasonably simple and easy for a client to use.

(3) Even making fair allowances for the complexity and difficulty of its functions, this tribunal's information and services were often not simple or easy for a client to use.

(4) Even making fair allowances for the complexity and difficulty of its functions, this tribunal's information and services were never simple or easy for a client to use.

(5) Getting information and services from this tribunal was always difficult for a lawyer or advocate, never mind a client, *302 and when one got it, it was rarely simple or easy to use — certainly not for a client.

(6) Your words (Please, only use this space if none of the standard statements come close to fairly approximating your views):

_____

16. **Timeliness**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the timeliness goal, as defined above, during the survey period. Circle the appropriate number: **(1), (2), (3), (4), (5), (6), (7)**

In making this choice, take reasonable account of the inherent complexity and difficulty of this tribunal's tasks.

The statements from which the choice concerning *timeliness* is to be made are as follows:
(1) This tribunal established time frames for its performance that, having regard for the complexity and difficulty of its tasks, were based on reasonable expectations. It committed to usually performing within those time frames and could generally be counted on to do so.

(2) This tribunal established time frames for its performance that, having regard for the complexity and difficulty of its tasks, were based on reasonable expectations. It committed to usually performing within those time frames, but too often it failed to do so.

(3) This tribunal established time frames for its performance that, having regard for the complexity and difficulty of its tasks and the demands of a fair hearing and decision-making process, were unreasonably short.

(4) I was not aware that this tribunal had established time frames for the performance of its tasks. However, it usually completed its tasks within time frames that were reasonable having regard to the complexity and difficulty of those tasks.

(5) I was not aware that this tribunal had established time frames for the performance of its tasks. Moreover, it frequently failed to complete its tasks within time frames that *303 were reasonable even taking account of the complexity and difficulty of those tasks.

(6) Even making fair allowances for the complexity and difficulty of its functions, it must be said that this tribunal almost always failed to perform its tasks within reasonable time frames.

(7) Your words (Please, only use this space if none of the standard statements come close to fairly approximating your views):

_____

17. **Quality and Consistency**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the quality and consistency goal, as defined above, during the survey period. Circle the appropriate number: **(1), (2), (3), (4), (5), (6)**
The statements from which the choice is to be made concerning *quality and consistency* are as follows:

(1) The quality and consistency of this tribunal's work was almost always excellent.

(2) The quality and consistency of this tribunal's work was generally very good.

(3) The quality of this tribunal's work was generally good but consistency in the interpretation of the statutes for which it is responsible was uneven.

(4) The quality and consistency of this tribunal's work was only average.

(5) The quality of this tribunal's work was usually poor and predicting outcomes in its proceedings was always hazardous.

(6) Your words (Please, only use this space if none of the standard statements come close to fairly approximating your views):

_____

***304** 18. **Transparency**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the transparency goal, as defined above, during the survey period. Circle the appropriate number: **(1), (2), (3), (4), (5)**
The statements from which the choice is to be made concerning *transparency* are as follows:

(1) This tribunal had no secrets. It worked hard at ensuring that everyone knew what it was doing and why.

(2) This tribunal's policies and procedures were reasonably transparent.

(3) This tribunal took no steps to make its decisions publicly accessible in a searchable format and published no written policy guidelines. Accordingly, it was always difficult to discover its policies respecting the interpretation or application of its statute.

(4) This tribunal worked behind closed doors. One was never told more than was absolutely necessary to one's proceedings and it was hard work to get that.

(5) Your words (Please, only use this space if none of the standard statements come close to fairly approximating your views):

_____

19. **Expertise**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the expertise goal, as defined above, during the survey period. (Please re-read the definition.) Circle the appropriate number: **(1), (2), (3), (4), (5), (6)**
The statements from which the choice is to be made concerning *expertise* are as follows:

(1) The level of skill, knowledge and technical competence in this tribunal was always excellent.

(2) The level of skill, knowledge and technical competence in this tribunal was generally good.

***305 (3) The level of skill, knowledge and technical competence in this tribunal was dependent on which of the members of the tribunal one ended up dealing with. Many were excellent, some were not very skilful, knowledgeable or competent**.

(4) The level of skill, knowledge and technical competence in this tribunal was dependent on which of the members one ended up dealing with. Not many were excellent, most were not very skilful, knowledgeable or competent.

(5) The level of skill, knowledge and technical competence in this tribunal was generally poor.

(6) Your words (Please, only use this space if none of the standard statements come close to fairly approximating your views):

_____

20. **Optimum Cost**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the goal of optimum cost, as defined above, during the survey period. (Please re-read the definition.) Circle the appropriate number: **(1), (2), (3), (4), (5)**.
The statements from which the choice is to be made concerning *optimum cost* are as follows:

(1) This appeared to be a very well managed tribunal that utilized the funding it received to optimum effect.

(2) This appeared to be a tribunal that was managed reasonably well and utilized its funding to good effect.

(3) This appeared to be a tribunal with indifferent management and that utilized its funding to only average effect.

(4) This appeared to be a tribunal that was poorly managed and did not make good use of its funding.

(5) Your words (Please, only use this space if none of the standard statements come close to fairly approximating your views):

21. **Courtesy**: Please select from the following list of numbered statements the *one* statement that *best* describes your view of this tribunal's performance relative to the goal of treating everyone with ***306** "courtesy" during the survey period (Please re-read the definition.) Circle the appropriate number: **(1), (2), (3), (4), (5), (6)**
The statements from which the choice is to be made concerning the tribunal's courtesy are as follows:

(1) This tribunal routinely treated everyone it encountered in everything it did with natural courtesy and respect.

(2) This tribunal's staff was always courteous and respectful to me and to my clients, but the hearing environment was often discourteous and disrespectful.

(3) This tribunal's hearing environments were typically courteous and respectful, but its staff were often discourteous and disrespectful.

(4) The courtesy and respect shown to me and to my clients by this tribunal — both its staff and members — was too often not what one would hope for.

(5) Courtesy and respect to me or to my clients is not something I associated with this tribunal at any level.

(6) Your words (*Please*, only use this space if none of the standard statements come close to fairly approximating your views):

_____

The Nature of this Tribunal's Functions and the Role and Status of its Members

In the following section of the questionnaire, we need to be working with a common understanding of certain concepts. Consider each of the following definitions and indicate whether you strongly agree, agree, are unsure, disagree, or strongly disagree, that it reasonably reflects your understanding of the concept.

Definition of "Adjudication":

Deciding disputes about legal rights or obligations on the basis of applying relevant statutes or regulations or other relevant law — interpreted in accordance with recognized cannons of legal reasoning — to the adjudicator's own findings of fact, after he or ***307** *she has heard evidence and argument from the affected parties in a fair hearing*.

22. (i) Strongly Agree _____; (ii) Agree _____; (iii) Unsure _____; (iv) Disagree _____; or (v) Strongly Disagree _____

23. If you are unsure, disagree, or strongly disagree, with this definition of "Adjudication" identify the problem and/or say how you think the definition might be changed or clarified:

_____

Definition of "Regulatory Decision-making":

Exercising a statute-authorized discretion to determine the policy criteria, and specify the policy rules, that are to govern economic or social activities within a tribunal's statutory jurisdiction. By way of clarification, regulatory decision-making is understood not to include the adjudicative function of deciding a dispute between a government and private, corporate or individual parties, or between private parties, about legal rights or obligations that depend on the determination of the relevance, meaning and affect of published policy-rules or criteria in a particular case.

24. (i) Strongly Agree _____; (ii) Agree _____; (iii) Unsure _____; (iv) Disagree _____; or (v) Strongly Disagree _____

25. If you are unsure or disagree or strongly disagree, identify the problem and/or state how the definition might be changed or clarified:

_____

Definition of "Independent Decision-making":

Decision-making by an adjudicator or regulator who has no reason — and is perceived to have no reason — to be apprehensive about possible, negative, personal or professional repercussions if the decision he or she makes should prove unpopular with a government of the day or other powerful interests.

***308** 26. (i) Strongly Agree _____; (ii) Agree _____; (iii) Unsure _____; (iv) Disagree _____; or (v) Strongly Disagree _____

27. If you are unsure or disagree or strongly disagree, identify the problem and/or state how the definition might be changed or clarified:

_____

Definition of "Impartial decision-making":

Decision-making by an adjudicator who has not closed his or her mind on any of the issues, and has no personal or professional interest in having the adjudication reach any particular conclusion, but is prepared to listen actively to competing arguments and is fully open to being persuaded by the superior argument. In short, decision-making by adjudicators who are prepared to go wherever an objective view of the law and the evidence will fairly take them.

28. (i) Strongly Agree _____; (ii) Agree _____; (iii) Unsure _____; (iv) Disagree _____; or (v) Strongly Disagree _____

29. If you are unsure, disagree, or strongly disagree, identify the problem and/or state how the definition should be changed or clarified?

_____

30. Using the above concept definitions, and ignoring for purposes of this question any changes or clarification you may have proposed, give us your impression of the proportion of their working time experienced members of this tribunal typically spent on the following activities:
a. Activities directly related to adjudicative decision-making in individual cases: _____%

b. Activities directly related to regulatory decision-making: ___%

c. Activities related only to the administration of the agency: ___%

***309** d. Activities related to the training of less-experienced members: _____%

e. If your proposed changes to the definitions were accepted, how would those proportions then read? a. _____%; b. _____%; c. _____%; and d. _____%

31. Again, in answering this question 31 please accept the above definitions, and ignore for purposes of this question the changes or clarification you may have proposed. Below you will find a set of statements describing a tribunal member's sense of his or her personal status vis-à-vis the concept of *impartiality*. We will also be conducting a survey of tribunal members in which members will be asked to choose which of these statements best reflects their own sense of their impartiality and that of their colleagues when they were engaged in an adjudicative function.
The goal of this question 31 is to provide information that will allow us to eventually compare the adjudicative members' perception of their and their colleague's impartiality with the perception of those who appeared as counsel in those members' adjudicative proceedings. Accordingly, we are asking you to indicate which of the following statements you would anticipate that the majority of members of this tribunal, if they were speaking frankly and confidentially, would have personally chosen during the survey period as best exemplifying their understanding of the quality of their impartiality and that of their colleagues. Circle the appropriate number: **(1), (2), (3), (4)**

The statements from which the choice is to be made are as follows:

(1) In my adjudicative decision-making, I am always impartial.

(2) In my adjudicative decision-making, I am not impartial in any objective sense. I believe adjudication is at bottom inherently ideological and my decision-making is, I believe, properly influenced by my perception of the government's inclinations and attitudes concerning the issues that come before me. I believe that I am supposed to be biased in favour of decisions that support the government's interests.

***310 (3) In my adjudicative decision-making, I try to be conscious of my personal predilections and biases on the issues that come before me and to put them to one side as I address the issues. I believe it would be wrong to allow myself to be influenced by my informal perception of the government of the day's inclinations and attitudes concerning the issues that come before me or to be influenced by any *bias* in favour of government policy goals. I strive to be impartial and I believe that I usually succeed**.

(4) In my adjudicative decision-making, I subscribe to the position described in (3), and I try to be impartial, but I am not sure how often I really succeed.

32. In your own opinion, which of the above statements is the *most* appropriate statement concerning the desirable degree of impartiality for adjudicative members of this tribunal? (Circle your choice.) **(1), (2), (3), (4)**

33. Again, in answering this question 33 please accept the above definitions, and ignore for purposes of this question the changes or clarification you may have proposed.

Below you will find a set of statements describing a tribunal member's sense of his or her personal status vis-à-vis the concept of adjudicative *independence*.

When the members are surveyed, they will be asked to choose which of these statements best reflects their own sense of their independence and that of their colleagues when they were engaged in an adjudicative function. The goal of this question 33 is to provide information that will allow us to compare the members' perception of their and their colleague's independence with the perception of those who appeared as counsel in their adjudicative proceedings.

Accordingly, we are asking you to indicate which of the following statements you would anticipate that the majority of members of this tribunal, speaking frankly and confidentially, would typically have personally chosen as best exemplifying their understanding of the quality of their independence and that of their colleagues during the survey period. Circle the appropriate number: **(1), (2), (3), (4), (5)**

***311** The adjudicator statements from which your choice is to be made are as follows:

(1) In my adjudicative decision-making I do not perceive myself to be actually independent in the sense of the above definition. However, I understand it is my duty to act as though I am independent and, when I am faced with making potentially unpopular decisions in high-profile cases, I believe I am able to prevent my personal concerns about possible professional repercussions from influencing my decisions.

(2) In my adjudicative decision-making, I am always confident about my independence and never concerned about possible repercussions from controversial decisions.

(3) I have always understood that adjudicative decisions in cases of a high-profile and controversial nature present personal career risks, and it would be naïve for anyone to believe that that understanding has no influence on my decision-making in such cases, even if only subconscious.

(4) I subscribe to the statement in (3) but I would add that I believe that that consciousness of potential personal consequences is a legitimate and desirable restraint on the decision-making of government-appointed tribunal members.

(5) In the work I perform as a tribunal member, there is never any occasion to make controversial decisions in high-profile cases, so the issue of independence never comes up.

34. In your own opinion, which of the above statements is the most appropriate expression of the nature and degree of independence that members of this tribunal should feel in their adjudicative decision-making? (Circle your choice.) **(1), (2), (3), (4), (5)**

35. If, in question 33, you selected either statement (1), or statements (3), or (4), please briefly explain in generic terms the reasons why, in your understanding, the members of this tribunal would have been conscious of possible repercussions from unpopular decisions during the survey period:

_____

***312** 36. In what proportion of the matters in which you acted was the government ministry that was responsible for the administration of this tribunal, or an arm or representative of that ministry, a party to the hearing? _____%

The Potential Importance of this Tribunal's Decisions

37. What in your estimation is generally the potential importance of this tribunal's decisions? (There may be some overlap, so the percentages may add to over 100%.)
1. Significant but not serious: _____%

2. Highly significant: _____%

3. An individual's liberty is at stake: _____%

4. Profits or lost business opportunities in values potentially exceeding $200,000: _____%

5. Profits or lost business opportunities in values potentially exceeding $500,000:_____%

6. Potentially, dramatic negative or positive impact on an individual's future quality of life, not involving issues of loss of liberty: _____%

7. Potential threat to life or safety of a party or others: _____%

8. Precedential value of very serious societal or commercial import: _____%

9. Other (please specify) _____: _____%

Process

38. How would you characterize the typical nature of the hearings of this tribunal? (Indicate the proportion of cases that best fit any of the following categories. There may be some overlap so the percentages may not add to 100%.)
1. highly adversarial: _____%

2. extremely fractious: _____%

***313** 3. adversarial at a technical level (rules of evidence and procedure to be complied with in a serious way) _____%

4. adversarial but within reason:_____%

5. relatively informal:_____%

6. informal and relaxed:_____%

39. In what percentage of this tribunal's decisions are written reasons provided that explain to the parties exactly why the tribunal has decided the way it has? _____%

40. Does this tribunal make the reasoned decisions of its members readily accessible to the general public in a searchable format? Yes: _____; No: _____; N/A, written reasons were not provided: ___

41. In your view, how important was it for this tribunal to provide written reasons for its decisions? Very important _____; Important _____; Not very important _____; Not important at all ___

42. If such reasons were provided, how important would it be that they were accessible in searchable format? Very important _____; Important _____; Not very important _____; Not important at all ___

43. Are you familiar with the *Consolidated Bathurst* line of cases? Yes _____ No _____

44. If yes, from what you can see, does this tribunal engage in internal decision-making processes of the kind that were in issue in the *Consolidated Bathurst* line of cases? Yes _____ No _____

45. If Yes, how confident are you that this tribunal complies with the rules established in the *Consolidated Bathurst* decision? Very Confident _____; Confident _____; Not very confident _____; Not confident at all _____

This Tribunal's History of Performance

46. If your practice experience with this tribunal goes back before January 1, 2001, approximately when did it commence? _____

***314** 47. At any time in that previous experience, would your views concerning the performance of this tribunal have been significantly different from what you have indicated in this questionnaire?

48. Yes _____ No _____

49. If yes, please elaborate, and indicate the approximate time when your impression of the tribunal's performance experienced a change.

_____

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