18 Can. J. Admin. L. & Prac. 189

Canadian Journal of Administrative Law & Practice
June, 2005

Article

Misconceiving Tribunal Members: Memorandum to Québec

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The author sees Québec's plan for lifetime appointments of adjudicative tribunal members as an historic error based on an archaic and misconceived comparison of adjudicative members with trial court judges. He argues that, as the sole rights-determining element of a particular statutory enterprise, a tribunal has corporate functions and responsibilities that transcend the personal adjudicative responsibilities of individual judges - functions and responsibilities that can only be met through institutional decision-making, and through holding tribunal members personally accountable for meeting tribunal-determined standards and complying with tribunal-determined strategies. Referencing examples from his own experience as a tribunal chair, the author argues that the concept of tenure is alien to an administrative tribunal's essential nature.

*190 1. INTRODUCTION

At the CCAT1 [1] annual Conference in Gatineau, Québec, in June 2003, Québec's Minister of Justice told the Conference that tenured appointments for tribunal members were part of his government's plans for administrative justice reform in Québec. [2] It is, I believe, the first time in Canadian history that a government in power had endorsed life-time appointments for tribunal members. [3]

I was on the Conference platform as one of the participants in a program on administrative justice tribunal reform when the Minister made that statement and I should have been delighted. I have long been an advocate of fundamental, structural reform of Canadian administrative justice systems and one of my particular concerns has been the distressing lack of independence of Canadian administrative justice adjudicators. Here, finally, a government was planning to address this issue in a serious way - really in the ultimate way. It was surely time to celebrate. But, instead, as I sat and listened, I found my intuition putting up big red flags and after due consideration I have come to the view that a regime of tenured appointments for administrative justice tribunal members would be an historic mistake.

I am sure that this would be true in Ontario, but, as a unilingual English-speaking, Ontario lawyer, with no ready access to the nuances of Québec's administrative justice system, I, naturally, cannot be as sure that it would also be true in Québec. However, from what I do know of the Québec system, I strongly suspect that the same considerations would apply, and I am writing this memorandum because, in the interest of Ontario's administrative justice system as well as that of Québec's, I feel a compelling need to say to Québec: “Please, think again”.

***191** In recent years, Québec has led the way in the field of administrative justice reform in Canada. Québec's Bill 130, enacted in 1996, which created the *tribunal administratif du Québec* (TAQ), constituted a revolution in administrative justice structures that, for many of us, has set the Canadian standard. And, my concern is that, if Québec's proposal for tenured appointments is implemented, not only may Québec's system of administrative justice be undermined to the detriment of Québec, but the obvious incompatibility of a life-time appointments regime with the fundamental nature of administrative justice tribunals as understood in the rest of the country will render the Québec reforms of no further relevance to non-Québecers.

It is my hope that the inherent presumption in this memorandum will be forgiven in Québec because the memorandum reflects the strong convictions of a person who has long been a fan of Québec's modern administrative law regime, who brings to the debate substantial experience as chair of a major administrative tribunal, albeit an Ontario tribunal, and who, by definition, has no political or personal axe to grind. I write because, as I have said, I have come to believe strongly that tenured appointments would be a seminal mistake that will redound to the serious disadvantage not only of Québec but of the rest of us as well.

My submission, in a nutshell, is that tenured appointments would wreak havoc with the tribunal culture of institutionalized decision-making on which the optimum performance of administrative justice tribunals must, in my opinion, rely.

I am told that in Québec the concept of *institutionalized* tribunal decisions as approved by the Supreme Court of Canada in *Consolidated-Bathurst*[4] has not been viewed with the sense of full legitimacy that now prevails in Ontario - and, I believe, elsewhere in Canada. Presumably, *Tremblay*,[5] having originated in Québec, will have had a more chilling effect on the concept there than elsewhere. I appreciate, therefore, that I have two mountains to climb: first, to make the case for the fundamental importance and inherent legitimacy of institutionalized decision-making in administrative justice tribunals, and, then, to demonstrate why tenured appointments are incompatible with that concept.

***192 2. INSTITUTIONALIZED DECISION-MAKING - LEGITIMATE AND NECESSARY**

In what follows, I am conscious of making a particular point about various aspects of administrative justice tribunals with which Québec's administrative law lawyers will be entirely familiar. However, I address these things, not from the perspective of counsel, but from the perspective provided by a chair's inside experience of managing a tribunal's operational reality. It is in the light of that operational reality - a reality that is, I expect, no different for a Québec tribunal than it is for an Ontario tribunal - that this memorandum is written.

The important idea behind the creation of administrative justice tribunals is that one should take *all* the rights disputes arising in one particular "statutory enterprise" and assign them for *final* resolution to one adjudicative body designed for the purpose.

Thus, tribunals combine a single focus on one statutory enterprise with a monopoly on the business of giving a final resolution to all the rights disputes that arise in that enterprise. In my submission, that combination of a single focus - specialization, if you will - and a monopoly on final decisions gives administrative justice tribunals unique responsibilities and, as well, special advantages and opportunities.

We have been prone to see specialization as the most fundamental feature of administrative justice tribunals, but I would argue that in point of fact it is their monopoly - a related but different thing - that is probably the more significant aspect of the administrative justice tribunal concept.

It is true that, in Québec, one now finds the TAQ performing the tribunal function for a large number of statutory enterprises. However, the essentials are the same: a monopoly over the final disposition of rights disputes, and specialization. The TAQ is, as I understand it, the exclusive final adjudicator for all the rights disputes arising in each of the statutory enterprises within its jurisdiction, and it has been structured and organized to retain the advantages of specialization in the resolution of disputes in each of those enterprises.

What I intend by the reference in the foregoing to "statutory enterprises" is, I would hope, self-evident. However, perhaps a word of explanation would be advisable. I use the "statutory enterprise" label to characterize the institutional arrangements through which particular statutory rights are delivered. The workers' compensation system is one example. It is the statutory enterprise that is dedicated to the delivery of workers' compensation benefits to injured workers. But such enterprises abound. There are statutory enterprises dedicated to the delivery of social ***193** welfare benefits, to the delivery of statutory licences of all kinds, to the protection of tenants - and landlords *etc*. Indeed, wherever one finds an administrative justice tribunal one finds a statutory enterprise.

Each statutory enterprise is defined by its statute and is typically comprised of a host ministry (and Minister) responsible for the overall administration of the enterprise, a "front-line" decision-making institution responsible for making the first-stage rights decisions that generate the enterprise's rights disputes, and an administrative justice tribunal responsible for resolving those

disputes in a final way. The front-line institution is sometimes the host ministry itself - indeed, sometimes the minister him or herself. And, sometimes, as in the workers' compensation enterprise, the front-line decision-maker is also a specialized administrative tribunal. In the latter case, the front-line tribunal's monopoly over rights determination in the enterprise is confined to the first-stage rights determinations and, typically, of course, does not involve final determinations.

It is important to take particular note of the final nature of a tribunal's determination of rights disputes. Of course, tribunals do not make final decisions in an absolute sense. Parties always have the possibility of a judicial review. But, within the limits of a tribunal's freedom of decision as defined by the degree of deference assigned to it by review courts, a tribunal's adjudicative decisions are, indeed, final. They are final in a way that is not true, for example, of adjudicative decisions of trial court judges.

A telling illustration of the latter difference between tribunal members and trial court judges may be seen in the courts' toleration of conflicting decisions by tribunal members on identical facts and law. Provided there is nothing patently unreasonable involved in any of the conflicting decisions, the courts will not intervene.[6] A court of appeal, on the other hand, would make short work of conflicting decisions of trial court judges. The different approach arises, of course, from the court of appeal's different standard of review applied to decisions of tribunal members as compared to that applied to decisions of judges.

This comparison of tribunal members with trial court judges will not be the last to be discussed here. In analyzing the appropriateness of a tenured appointments regime in a tribunal context, one is inevitably drawn to comparisons between tribunal members and trial court judges. Those who favour tenured appointments obviously see little difference ***194** in principle between the inherent status of the two. However, for reasons that will appear in what follows, it is my submission that, from a systemic perspective, the status of individual tribunal members is inherently different from that of trial court judges. Tribunal members have to possess a degree of accountability to their tribunal that is not to be found in the relationship between judges and their courts. And, in my respectful submission, those who do not see that difference are failing to appreciate the unique nature of an administrative justice tribunal's mandate as compared to that of a trial court's mandate.

Along with a tribunal's narrow specialization and its monopoly, there is another feature of the administrative justice tribunal context that is particularly significant in this analysis. That feature is the large volume of claims, applications and rights decisions for which a tribunal's statutory enterprise will be characteristically responsible. In Ontario, during my term as WCAT chair, the workers' compensation enterprise handled some 400,000 workers' compensation claims a year. Although most of those claims were not contentious, all had to be adjudicated - at least in the sense of deciding whether there was any reason to doubt the merits of the claim. And, the claims in which an adjudicative issue, in the normal sense, would arise numbered in the order of 50,000 each year. Fortunately, because of the three-level adjudicative process at the board level at that

time, this number translated into about 1,500 to 2,000 appeals at the tribunal level - much better, but still a significant caseload for an appeals tribunal.

Workers' compensation statutory enterprises are no doubt located at the high end of the caseload spectrum. However, high volumes of claims or applications, and correspondingly high volumes of appeals, are characteristic of most of our statutory enterprises.

Of course, trial courts also deal with large caseloads, but not of the same order of magnitude as the caseload of statutory enterprises. Moreover, the unique aspect of a tribunal's caseload as compared to that of a court's is its single-focus monopoly, resulting in the tribunal's caseload being comprised solely of cases arising in one statutory enterprise. Moreover, unlike the caseload of trial courts, the cases the tribunal sees are not typically the pathology of failed relationships but cases that arise in the ordinary course of the administration of the statutory enterprise. I will return to this thought in more detail below.

In summary then, the merits of a policy of tenured appointments for administrative justice tribunal members must be assessed in light of the seminal circumstance that those appointments are appointments to institutions with statute-mandated *monopolies* over the final resolution of ***195** all of the rights disputes arising from the typically high-volume caseload of a particular statutory enterprise.

Let me then turn to my first mountain: making the case for the legitimacy and fundamental importance of institutionalized decisionmaking in that context.

My first point is that it is in the nature of the special responsibilities, opportunities and advantages that flow from a tribunal's mandated, specialized monopoly that they are the responsibilities, opportunities and advantages of the corporate entity that is called “the tribunal”, much more than they are the responsibilities, opportunities and advantages of the tribunal's individual members. For example, it hardly needs saying that the monopoly itself is the *tribunal's*. While each of a tribunal's members will specialize in the law and science of the enterprise, he or she will see only a small percentage of the enterprise's total number of rights disputes. Thus, the responsibility for the fair, competent and principled exercise of that monopoly across the breadth of all the rights disputes that reach the tribunal - a responsibility that arises implicitly from the fact of the monopoly, and the finality of the decisions - lies principally with the tribunal, and only collaterally with the tribunal's members.

In the course of drafting this memorandum, I was prompted to revisit an article on the institutionalizing issue that I wrote for the Law Society of Upper Canada's 1992 Special Lectures on Administrative Law.[7] At that time, I was still the chair of WCAT (and President of SOAR), and in that article I defended institutionalizing processes in tribunal decision-making against criticism of the *Consolidated-Bathurst* decision that were emanating at the time from the Ontario litigation

bar. As I come back to that article now - some 13-years later - I find arguments in support of the legitimacy and importance of institutionalized decision-making in an administrative justice tribunal context that, to my eye, remain persuasive, and for purposes of this memorandum, I am taking the liberty of incorporating here much of the actual text of that earlier argument.

In my role as the first and continuing chair of a new - and, by 1992, a seasoned -adjudicative tribunal, I had developed a strong belief in the importance and in the legitimacy of an adjudicative tribunal having a strong corporate role and presence in the decision-making of its members. I was delighted to find in the Supreme Court of Canada's decision ***196** in *Consolidated-Bathurst,* [8] and later in *Tremblay,* [9] authoritative recognition not only of the fact that the law's procedural fairness expectations have room for such a corporate role, but also of the fact that such a role is important, indeed necessary.

Of the two decisions, *Consolidated-Bathurst* is, as we know, the seminal and definitive decision. *Tremblay*, released some two years later, is confirmative of the *Consolidated-Bathurst* analysis and is important, in my opinion, primarily for the illustration it provides of the limits *Consolidated-Bathurst* set for that corporate role.

From a tribunal chair's perspective, the key advances to be found in *Consolidated-Bathurst* and *Tremblay* lie in the authoritative recognition they give to the following propositions:

> 1. The rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. [10]
>
> 2. With respect to important generic issues there is a “necessity” to maintain “a high degree of quality and coherence” in a tribunal's decisions. [11]
>
> 3. The coherence and quality of the decisions of a tribunal's decision-makers must be “fostered by the tribunal”. [12]
>
> 4. The importance of adjudicative coherence amongst tribunal decisions is a relevant criterion for individual tribunal adjudicators even when they are not bound

by any *stare decisis* rule, and adjudicators may properly allow themselves to be influenced by the opinion of colleagues in the interest of such coherence. [13]

5. A situation in which the outcome of an appeal or application will be different depending only on which members of the tribunal happen to be assigned to the case "will be difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible. [14]

***197** 6. Consistency of decisions is not, however, always to be expected. The Court recognizes that "ordinarily, precedent is developed by the actual decision-makers over a series of decisions" and that "a tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges". [15]

7. The "institutionalizing" of decisions exists in our law. The problem is not whether such decisions should be sanctioned, but to organize the process in such a way as to limit its dangers. [16]

8. A tribunal's institutional processes for fostering coherence may include processes to which the parties or their representatives do not have access and which are openly designed to influence - but not constrain - individual adjudicators' decision-making on generic questions of law or policy. [17]

9. "... the relevant issue ... is not whether [the institutionalizing process] can cause panel members to change their minds but whether [it] impinges on the ability of panel members to decide according to their opinions." [18]

> 10. “Institutionalizing [the decision-making of an adjudicative tribunal] tends to promote the equal treatment of individuals in similar circumstances, increases the likelihood of better quality decisions and leads to a better allocation of resources. These are important advantages and the threat to the independence of individual decision-makers inherent in institutionalizing processes must be weighed in light of these advantages.” [19]

Despite reports one heard to the contrary at the time, in my opinion - an opinion that is, I believe, generally accepted in Ontario - *Tremblay* did not represent any drawing back from the commitment to the realistic view of the role and needs of tribunals that had been found in *Consolidated-Bathurst. Tremblay* is an instance of the court embracing and applying the *Consolidated-Bathurst* principles while finding on the facts of the case that those principles required the Court in that instance ***198** to intervene in the tribunal's decision. To the Court's eye, the institutionalizing processes of the *Commission des Affaires Sociales* as applied in the *Tremblay* case did give at least the appearance of real constraints on the individual decision-maker's freedom to decide in accordance with his or her own conscience and judgment. And, on the facts as reported, who could really disagree?

It is also important to note that a significant, distinguishing feature of the facts in *Tremblay* is that the tribunal's institutionalizing processes were applied in that case to a decision of first impression on what seemed a relatively narrow point of statutory interpretation in respect of which no question of decision *quality* appears to have arisen. Since it was a decision of first impression, consistency or coherency could not, for example, have been issues.

The institutional concern driving the institutionalizing processes in *Tremblay* appears merely to have been the tribunal chair's view that the original draft decision was wrong on the merits. In my view, these were circumstances that were particularly likely to minimize the Supreme Court's intuitive concern with the tribunal's corporate interests.

It is, I think, also reasonable to perceive in the *Tremblay* facts that the tribunal chair's activities in that case were responsive to the pressures all chairs naturally feel to have “their” tribunal not produce what they personally see to be “incorrect” decisions on new issues. But, as indicated by the Supreme Court in its *Tremblay* decision, precedent is ordinarily developed over a series of decisions and a tribunal addressing a new question may thus render “a number of contradictory judgments before a consensus naturally emerges”. [20] Acceptance of that “common law” approach -- of allowing an institutional consensus on a new issue to emerge over time at the cost of some interim inconsistency -- would eliminate a chair's strong inclination to in fact “constrain” his or her colleagues' decision-making so that they “get it right” the first time and, thus, dramatically improve

the chances that a tribunal's institutionalizing processes will be understood as truly processes of influence and not of constraint.

In Ontario, the 1992 Ontario Court of Appeal decision in *Khan v. College of Physicians & Surgeons (Ontario)* [21] followed *Tremblay*. And, in *Khan*, Ontario tribunal chairs found even more reason for reassurance. In reliance on principles set out in *Consolidated-Bathurst* and *Tremblay*, ***199** the Ontario Court of Appeal approved in *Khan* a tribunal's institutionalizing process that involved an overt review of draft decisions by tribunal staff lawyers.

At the time, my own perspective on this new jurisprudence on the institutionalizing of tribunal decisions was, naturally, that of a tribunal chair, which I then was, rather than that of counsel, which I had once been. I have no doubt that in my former role as a management labour counsel I would have taken a different view of these developments. In that role, I would have shared the outrage of *Consolidated-Bathurst*'s counsel, the late Michael Gordon, upon discovering that his influence over the hearing panel - an influence which in Mr. Gordon's case would have been the product of experienced forensic skills, thorough preparation, and intelligent insights - had possibly been fatally dissipated by the influence of the Labour Board Chair and other Board members in a full-Board review process in which he, Gordon, had no part, and in which his client's interests could count on no comparable, partisan champion.

I had the pleasure of enlisting Mr. Gordon's participation in a panel discussion of the potential implications of *Consolidated-Bathurst* at the CCAT Conference in Ottawa in the spring of 1989, as we all awaited the Supreme Court of Canada's decision in the case. And I remember his impassioned frustration with a Labour Board process that, at the point of *dénouement* in the decision-making process, left him -- and all counsel -- out of the loop.

I empathized with his view. I knew what he was saying. But, as the Chair of the Ontario Workers' Compensation Appeals Tribunal, I was very concerned that he might be proved right - that the Supreme Court might issue as its majority view what thankfully turned out be only Mr. Justice Sopinka's learned but, with great respect, archaic dissent. [22] For I had no idea how one would run a modern-day tribunal under the administrative law regime contemplated by the Ontario Divisional Court's majority decision in *Consolidated-Bathurst* or by the Sopinka dissent. And I knew of no tribunal chair who did not share that view.

The fundamental disagreement that Mr. Gordon and I experienced on this question of the institutionalizing of tribunal decisions is, of course, indicative of a general failure of counsel to see eye-to-eye with tribunal administrators on this issue. I characterize it as a failure on the part of counsel because, in my view, it reflects a lack of insight by counsel ***200** into the administrative justice system circumstances that make the institutionalizing of tribunal decisions both legitimate and essential.

All lawyers understand implicitly the basis of any counsel's intuitive concern with institutionalizing processes. Mr. Justice Sopinka's *Consolidated-Bathurst* dissent is an eloquent expression of those concerns.[23] But the concerns that inevitably drive tribunals to adopt institutionalizing processes have not had the same analysis, and are not fully understood - perhaps not even within the tribunal community.

The particular concern that received most of the attention in *Consolidated-Bathurst* and in *Tremblay* is the importance of consistency or coherency (the Court used both words) in the light of the high volume of decisions characteristic of the work of most administrative justice tribunals.

But consistency and coherency are attributes of decisions that become important only when we stop assessing decisions as individual events and begin judging them instead, or as well, as components of a body of work. And that is surely the important point.

For, as I mentioned above, unlike trial court adjudication of only the pathology of failed, individual relationships, a final-stage tribunal's adjudication is an integral and everyday part of the process of administering a particular statutory enterprise. The tribunal is an administrative component of that enterprise and its individual decisions are elements of an ongoing administrative process in which not only the interests of individual parties but also the corporate interests of the tribunal - and of the enterprise - must be served.

In these enterprises, in pursuit of other systemic goals, the front-line - or first-stage decision-making will often sacrifice or put at risk justice principles that would usually be considered an essential part of adjudicative proceedings. Such other goals may include such things as the timely and efficient handling of a very large volume of cases or, perhaps, the facilitating of lay or citizen participation as first-instance ***201** decision-makers. (The *Ontario Planning Act* provisions for planning approval decisions to be made originally by municipalities and then appealed to the Municipal Board appear to provide an example of the latter strategy.) And, it is the availability of subsequent reviews by administrative justice tribunals that makes these special arrangements in the first stage acceptable from a justice perspective. The designed dependency of the first-stage process - and sometimes of second-stage processes - on the justice safeguards provided by the final-stage process is what makes final-stage review tribunals an integral part of their statutory enterprise's day-to-day administration.

The need for a statutory enterprise's corporate interests being accepted as legitimate interests of concern to its adjudicative processes is especially evident in first-stage adjudicative processes. Thus, no one would quarrel with a workers' compensation board's insistence that its front-line decision-makers not grant hearings to a claimant even in circumstances where the principles of natural justice would call for one. No one would quarrel with that corporate intervention in the decision-making process because of the enterprise's overriding requirement for highly efficient

front-line claims procedures when it is grappling with claim volumes in the order of 400,000 per year - and because there is a right of appeal to a final-stage tribunal. But that need for corporate interests being recognized as legitimate in an adjudicative process also exists for tribunals with review or appellate functions.

Thus, for example, the consistency of a final-stage review tribunal's decisions from one individual adjudicator to another is not only important because principles of fairness entitle parties in like situations to like results. Consistency is also important because the tribunal's corporate credibility, its influence over the enterprise's front-line decisionmakers, its own self-confidence - and, therefore, its effectiveness as the enterprise's final "court" - all are undermined by inconsistent decisions.

Another example of a tribunal's legitimate corporate interests in its members' adjudicative work is its interest in ensuring that the procedures the tribunal devises for making its hearing processes fair, efficient and effective are applied in the hearings chaired by each of its members. While having those procedures applied in a reasonably uniform way in all hearings is important in terms of fairness to individual parties and their counsel, there are also tribunal corporate interests at stake. These include the tribunal's interest in ensuring, that the tribunal's own, corporate reputation for fair and competent hearings is not undermined and, as well that the tribunal's limited corporate resources are used both effectively and efficiently.

***202** The fact that an administrative justice tribunal is an agent of a statutory enterprise, and is perceived to be so, accounts, in my view, for the public's innate understanding that tribunals have a corporate responsibility for the quality of decisions made by individual tribunal members. This may be contrasted with the absence of any sense of a court's corporate responsibility for the trial-level decisions of its individual judges.

Thus, if trial court judges in Toronto were to issue, over the course of a few months, numerous decisions that were inconsistent, badly written, late or widely regarded as poorly reasoned, it is clear that we would all think: "ah, the government has appointed some bad judges". But if the members of a tribunal were to do the same thing, we would all think: "ah, here is an incompetent and badly run tribunal".

As mentioned previously, the comparison of members of tribunals to individual trial court judges comes naturally to mind and is the comparison that has always influenced the courts' views as to what is appropriate tribunal process. The Sopinka dissent in *Consolidated-Bathurst* is, for instance, implicitly premised on the validity of that comparison. But, in my respectful view, the more appropriate comparison is with judges of a court of appeal - not, naturally, in terms of the relative significance of the two roles, but in terms of the nature of the two roles.

Like a tribunal, and not like a trial court, a court of appeal may be seen to be effectively an agent of a statutory - really a constitutional - enterprise. The court of appeal's enterprise is the

maintenance of the consistency, coherency and integrity of the law and the facilitation of the law's constructive development in response to changing societal perspectives. A court of appeal manages that enterprise through the decisions of members of the court sitting in panels, and the success of the enterprise depends on the consistency, coherency and wisdom of the court's decisions. If a court of appeal were frequently to issue overdue, conflicting, poorly reasoned, and ill-advised decisions, can there be any doubt that we would all be saying that there was a problem with that court of appeal *qua* institution?

There are a number of strategies through which a court of appeal controls the consistency, coherence, and general quality of its decisions. It is, for example, the beneficiary of a tradition of superior appointments. Its members are bound by the principle of *stare decisis* that holds that only in very exceptional circumstances may a court of appeal panel depart from one of the court's previous decisions. It is often free to select the cases it hears and may therefore choose cases calculated to serve its institutional purposes. The Chief Justice has a respected privilege of assigning panels of his or her choice to particular cases and may increase ***203** the size of panels considering any particular issue. And, finally, the number of the court's members will have been held within small limits - in modern times, until recently, only nine judges sat on the Ontario Court of Appeal. The size of the court is considered of critical importance because of the significance ascribed to the role of collegial discussion in the court's internal decision-making process.

In its statutory enterprise, a final-stage, administrative justice tribunal has the same systemic role as a court of appeal has in the justice system in general. The tribunal has other responsibilities as well, but, because it has a monopoly on the enterprise's final decisions, it is responsible for the consistency and coherence of the enterprise's law, for the facilitation of that law's constructive development, and for the integrity of its application. However, it has none of a court of appeal's inherent advantages.

Contemplation of the difficulties a court of appeal would be in - and of the institutionalizing strategies to which it might have to resort - were it given a tribunal's structure should help everyone to a better understanding of a final-stage tribunal's need for effective institutionalizing processes. Imagine a court of appeal with 40 or 50 average jurists not bound by any principle of *stare decisis* and with no tradition of loyalty to the institutional mission, with the concept of deference to the Chief Justice abandoned, and, each year, having to release an uncontrollable number of decisions in several narrow subject areas,

The particular significance of a tribunal having to release large numbers of decisions in narrow subject areas also warrants closer attention. One of the matters that I believe makes a tribunal's credibility particularly vulnerable to inconsistent decision-making is the *pace* of its decision output on any particular, generic issue.

In the judicial justice system, on any currently contentious issue one would expect no more than one or two judicial decisions a year. At that pace, the judicial justice system has time to absorb and deal with conflicts in decisions and to accept them as a normal part of the process.

But a tribunal might issue four decisions on the same issue within, say, a three or four-week period. And if each presented different conclusions for reasons that could not be reconciled, it would be difficult for even an informed public not to see this as evidence of something seriously wrong with the tribunal.

For all of these reasons, I believe a tribunal's need for effective processes for institutionalizing its decisions is a pressing one to which the courts must continue to respond respectfully and progressively. It is a need which calls into play principles of our law that are at least as ***204** legitimate and as deserving of support as any of the more familiar principles of natural justice invoked by Mr. Justice Sopinka's dissent.

Now for some particulars. As we know, in the *Consolidated-Bathurst* and *Tremblay* cases, the Supreme Court justified institutionalizing processes largely on the basis of the need for consistency and coherency in a tribunal's decisions.

The two words -- “consistency” and “coherency” -- seem to be used interchangeably by the Court, but it is worth noting that they do not mean exactly the same thing and in the work of a tribunal, as in the work of the courts, the difference is important.

Consistency is achieved when decision-makers faced with like facts make like decisions. Coherency is achieved when decision-makers making subsequent decisions on unlike facts build intelligently on prior decisions - discerning and defining reconciling themes and underlying principles.

The distinction is important because the institutionalizing processes that will be effective in pursuit of institutional coherency (which *Consolidated-Bathurst* acknowledges will be legitimate -- if they are not constraining) will be inherently more sophisticated and potentially more intrusive than those devoted only to consistency.

Furthermore, when one talks about a tribunal's decisions as a body of work, it is apparent that consistency and coherency are only two elements in the broader notion of decision quality. Other important elements in the concept of decision quality must also be considered.

Since anyone's views as to the acceptability of institutional processes designed to foster decision quality are bound to be influenced by consideration of the details of the goals of such processes (the devil being notoriously in the details), I thought it would be helpful to provide at least one concrete bill of particulars. At an early stage of its life, WCAT had identified the elements of decision quality

that it regarded as important. It called them the “hallmarks” of decision quality. These hallmarks will be found listed in the Tribunal's 1988 *Statement of Mission, Goals and Commitments*. [24]

HALLMARKS OF DECISION QUALITY

The Tribunal is committed to devoting its best efforts to having Tribunal decisions comply reasonably with the following hallmarks of a good-quality adjudicative decision:

***205** a. It does not ignore or overlook relevant issues fairly raised by the facts.

b. It makes the evidence base for the panel's decisions clear.

c. On issues of law or on generic medical issues, it does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.

d. It makes the panel's reasoning clear and understandable.

e. It meets reasonable standards of readability.

f. It conforms reasonably with Tribunal standard decision formats.

g. From decision to decision the technical and legal terminology is consistent.

h. It contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.

i. It does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribunal's body of decisions over the long term.

j. It conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.

k. It forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with the issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.

3. TENURED APPOINTMENTS AND INSTITUTIONALIZED DECISION-MAKING

I am hopeful that the foregoing may have persuaded Québec readers to a more sanguine view of the legitimacy and importance of an administrative tribunal's genuine corporate interest in the performance of its members and, therefore, of the legitimate and essential nature of reasonable institutionalizing processes. In any event, I now turn to the second mountain I must climb - making the case that, in a regime of institutionalized decision-making, tenured appointments is an unworkable, indeed, an alien concept.

In my submission, the second point inevitably follows from the first. For a tribunal to meet its institutional responsibilities effectively and appropriately, and for the statutory enterprise to

receive the maximum benefit of the advantages and opportunities implicit in its tribunal's special mandate, the tribunal must be able to devise and implement appropriate ***206** institutional strategies and to set and apply institutional standards of quality and performance. A tribunal's adjudicative members are the principal means through which the tribunal meets its responsibilities and makes use of its opportunities and advantages. Accordingly, if a tribunal is to be effective in pursuit of its corporate mandate, it must be able to hold its members accountable for complying with the tribunal's strategies and for respecting and meeting the tribunal's standards. This is a requirement, it may be noted, that finds no comparable parallel at the trial court level of the judicial system of justice.

Let me be clear, however, that I do not intend to minimize the importance of having structural protections around a tribunal member's tenure sufficient to ensure his or her intellectual independence and autonomy. As *Consolidated-Bathurst* makes clear, the principle that he or she who hears must decide, remains paramount. But that need may be legitimately met with a regime of term appointments coupled with a re-appointments process that is transparent and objective. In most of Canada's administrative justice systems, the independence problem does not arise necessarily from the fact that appointments are term appointments. It arises principally from the absence of a principled re-appointments process - the kind of process that is already in place for TAQ members.

A life-time appointments regime is not consistent with a tribunal's legitimate need to insist that its members co-operate fully in its institutional strategies and accept and meet its institutional standards. In a term appointment regime, provided the re-appointments process is objective and independent, one can make co-operation with a tribunal's corporate strategies and compliance with its performance standards a principled condition of re-appointment. Moreover, the mere existence of such conditions for re-appointment will promote an institutional culture of collegiality in which such co-operation and performance becomes an integral and natural feature of the tribunal's environment.

However, if tribunal members are protected by tenured appointments, the tribunal culture will be dramatically different. The autonomy of individual members will become the dominant theme, and the tribunals' corporate role will be correspondingly diminished, if not emasculated.

Moreover, if the tribunal is unable to hold members ultimately accountable to it, whom will they be accountable to? Unless, the courts were to move to a “correctness” standard of review for decisions of all tribunal members - a move that would weaken the concept of administrative tribunals generally - the autonomy of tenured tribunal members, unaccountable for compliance with the standards and policies of their ***207** own tribunal, would significantly exceed that traditionally accorded to trial court judges.

In considering the implications for a tribunal and its chair to deal with tribunal members enjoying the independence of tenured appointments, I have done so with a number of concrete situations I experienced as chair of the Ontario WCAT. I found that asking myself how the tribunal would have fared had those situations occurred under a regime of tenured appointments was a great help in clarifying the issues. I propose, therefore, to present for the reader's considerations a series of "situations" that are hypothetical in their detail but which are reflective of my own experiences over 12 years as chair at WCAT.

For the implications of these situations to be clear, however, the reader will need to have some understanding of the WCAT context from which they are derived.

First, the appointment and re-appointments processes. During my term as WCAT's chair, I had the good fortune of effectively having the final say both on the appointments and re-appointments of the tribunal's vice-chairs. (It may be noted that "vice-chair" was the label applied in WCAT's tripartite adjudicative structure to all the tribunal's neutral adjudicators.)

All the vice-chairs who served on the tribunal during my tenure were effectively recruited and selected pursuant to an internal, merit-based, tribunal process for developing appointment recommendations. It was a process that I chaired. The government had the final say, but as a matter of practice no one was appointed who had not been selected through that process. We, therefore, had particular reasons to be confident in the qualifications and competence of our vice-chairs at the time of their appointment.

The appointments and re-appointments were for three-year terms, but there was no limit on the number of re-appointments that an individual vice-chair might receive.

The re-appointment decisions were effectively within the chair's sole discretion. I made re-appointment recommendations to the Minister of Labour and those recommendations were always accepted. The relationship between the chair and the government at that time was such that we would both have perceived any rejection of a re-appointment recommendation of mine as raising a question of confidence.

I would concede, in passing,that leaving the re-appointment decision solely in the discretion of the chair is not from a member's point of view an ideal arrangement. It leaves members vulnerable to abuse from biased and unprofessional chairs. Nevertheless, I am also convinced that ***208** a tribunal's institutional interests require that a chair have a dominant role in the re-appointment decisions. However, in a system in which the chair has the final say, I would recommend giving members recourse as of right to an independent "grievance" procedure. On one occasion at WCAT, an unhappy employer member surprisingly complained to Ontario's provincial Ombudsman that, in refusing to recommend the member's re-appointment, the chair was acting on the basis of personal bias. The Ombudsman accepted jurisdiction, and after an investigation, found no merit

in the complaint. However, that experience convinced me of the generally constructive nature of a member having recourse to an outside authority.

WCAT was an administrative tribunal that was committed from the beginning to a culture of institutionalized decisions. We did not use that terminology at the outset, but our intuitive response to the tribunal's needs, given its particular mandate, was to adopt corporate strategies and corporate standards of performance and to define corporate expectations for members that all clearly added up to a regime of what the Supreme Court of Canada referred to in *Consolidated-Bathurst* as institutionalized decision-making.

The corporate strategies may be seen in WCAT's *Statement of Mission, Goals and Commitments* referred to earlier and in its *Members Code of Professional Responsibility*, first published in 1993. They included in particular:

> 1. The adoption of the corporate standards of decision quality set out in the *Hallmarks of Decision Quality* quoted above.

In addition to being incorporated in the mission statement, the *Hallmarks* were also made part of the *Code of Professional Responsibility*. Article 21 of the *Code* provides that "members shall accept responsibility for seeing that decisions of panels of which they are a member comply with the Tribunal's *Hallmarks of Decision Quality*". A copy of the *Hallmarks* was attached as an Appendix to the *Code*.

> 2. A corporate procedure for the reviewing of draft adjudicative decisions by tribunal legal staff.

The members' responsibility *vis-à-vis* this procedure was also made part of the *Code*. Article 22 provided that members were to "respect" those procedures and "participate" in them "in good faith". The "Guidelines" for the draft decision review process were attached as an Appendix to the *Code*. These Guidelines suggested to new vice-chairs that they submit their first 20 decisions in entitlement cases to the review, and, to experienced members, that the submission of a draft decision to the review ***209** process "would seem particularly indicated" where the decision addresses a "new issue"; or is of "particular current, Tribunal-wide interest"; or where it is likely to attract "media attention, a judicial review application, an Ombudsman complaint, or a reconsideration request"; or where it "departs from previous tribunal decisions"; or where it will "affect Board policy or practice"; or involves a "dissent on a significant issue". The Guidelines

acknowledge that the review process “must be fully respectful of Hearing Panels' independence and autonomy”, and they specify that the tribunal chair not be involved in the process.

> 3. The fostering of what has subsequently been referred to as a “collegial” tripartite environment “characterized by mutual respect and by free and frank discussions based on non-partisan, personal best judgements from all panel members”.

This is Commitment No. 4 in the *Mission Statement*. The commitment we asked of the members representative of workers and employers was that at the point of decision they take their partisan hat off and make a genuine decision, and the commitment we asked of vice-chairs was that they respect the role of the representative members in the panel decision-making process. The latter environment was a dramatic change from the “adversarial” tripartite environment that had traditionally prevailed at the Ontario Labour Relations Board and in Ontario grievance arbitrations.

> 4. The establishment of a Tribunal Counsel Office (TCO).

Prior to a hearing, TCO staff members would monitor the sufficiency of evidence - typically medical evidence - and ensure that the parties were focused on an appropriate issue agenda. They were also authorized by the tribunal to appear in hearings representing the tribunal's corporate interests - making non-partisan submissions to the hearing panel on procedural and legal issues, and sometimes presenting medical evidence, or cross-questioning parties' witnesses. The frequency with which TCO staff appeared in hearings gradually diminished as the tribunal matured.

> 5. A periodic - monthly as a regular thing, but more frequent as needed - “Tribunal Assembly” meeting.

The Assembly was comprised of all of the full-time and part-time tribunal members plus senior staff members. At these meetings administrative policy initiatives were approved, and substantive legal issues currently arising in the caseload were discussed. No conclusions on the ***210** legal issues were reached and on legal issues no votes - not even straw votes - were taken. The discussion was viewed as an educational exercise that served to enhance everyone's understanding of current issues and of the various possible ways of addressing them.

> 6. A commitment to fully reasoned decisions, and to providing reports of those reasons that were readily accessible to the public.

A weekly summary of decisions was distributed to all members and, in the interests of keeping members aware of what their colleagues were doing it was expected that they would be read.

> 7. Periodic continuing education workshops which members were expected to attend.

> 8. An interactive, computer conferencing system which allowed members to readily canvass the opinion of other members - and of the chair - on issues with which they were having difficulty, or to apprise their colleagues of developments of potential tribunal-wide interest.

It is in the tribunal context characterized by the latter strategies and standards that the following hypothetical situations are to be understood. (The names, of course, are also fictional.) And, it is my respectful suggestion that one might usefully test the appropriateness of a tenured appointments regime in an administrative justice tribunal context by considering how such a regime would have impacted on the following concrete instances of life as it happens in an administrative justice tribunal - instances that one expects would not be uncharacteristic of the problems a tribunal chair would encounter in any tribunal.

Hypothetical Situation No. 1

> Vice-Chair Taskill is highly productive in terms of the number of hearings she can handle and the speed with which she issues her decisions. Moreover, her written reasons are very readable and give the appearance of a good quality decision. However, the tribunal begins to encounter a disproportionate number of applications for reconsideration from losing parties in her cases. (The tribunal has the power to reconsider and will re-open a decision if certain specified criteria are met, including clear errors on the face of the decision.) Moreover, when these reconsideration applications are sent to a reconsideration panel (different from the original panel, as was the tribunal's usual practice), there turn out to be a

disproportionate ***211** number of instances where the new panel decides that Taskill's decision should, indeed, be re-opened.

After this has happened on three occasions, the chair initiates his own review of the files in those cases and in a number of other cases in which Taskill had been the panel chair. The chair concludes that Taskill's analysis of evidence and law generally lacks rigour. She is, to put it in the vernacular, skating across the surface of her cases and failing to discover the issues lurking beneath. She is also disdainful of the decision review process and has never submitted a draft for review. The chair concludes that Taskill is achieving her remarkable production levels and delivery times by failing to meet the tribunal's standards of decision quality except on a superficial basis.

This is not only hurtful - sometimes devastating - to the losing parties in her cases, but it also presents a morale problem within the tribunal. Other vice-chairs who are doing the job expected of them, thus working harder than Taskill while falling behind her in production, are resentful. The chair is also worried about the impact this vice-chair's decision-making will have over time on the tribunal's reputation.

The chair brings his concerns to Taskill's attention on three occasions over a two-year period, but no improvement follows. Finally, a few months before the date of her next re-appointment, the chair advises Taskill that he will not be recommending her re-appointment. A month before the expiration of her term, Taskill finds other employment and resigns, apparently in the ordinary course of a normal career change. The chair and his colleagues welcome the resignation and important tribunal interests are served.

Hypothetical Situation No. 2

Vice-Chair Appledore's decisions are always exceptionally good. In intellectual terms, he is one of the tribunal's leading members. However, he cannot or will not produce decisions in a timely manner. On two occasions over the course of a two-

year period the chair has had to take him off the hearing schedule altogether for months at a time so that he could rid himself of his writing backlog. The chair is reluctant to lose him, but he is falling so far behind the vice-chairs' average production, that he is becoming a point of contention with other members. The exceptionally long delays in the release of a large number of his decisions are also having a noticeable impact on the tribunal's own overall performance data. It is not ***212** irrelevant to note that, during the chair's annual appearances before the Ontario Legislature's Standing Committee on Agencies Boards and Commissions, the chair commonly finds himself having to defend that data to a Committee that is always impatient with the number of overdue decisions at the tribunal. In that venue, it is not only Appledore's reputation, or the interests of the parties, that is at stake.

So, the chair makes Appledore an offer. The chair will recommend his re-appointment if he will sign an agreement with the chair that if, by the end of the second year of his upcoming term, he has not met certain writing production standards specified in the agreement, then he will resign his appointment without further discussion. Appledore accepts the offer and on the chair's recommendation he is re-appointed. The looming deadline in that agreement proves to be the burr under his saddle that moves him to bring the situation sufficiently under control to warrant his continued service with the tribunal. Whether such an agreement would be enforceable is, of course, a considerable issue, but, having served the tactical purpose for which it was designed, its enforceability proves to be a moot point.

Hypothetical Situation No. 3

Vice-Chair Dungleman's decisions cannot be faulted in terms of either quality or quantity, but his performance in chairing hearings and in the tripartite decision-making process that follows the hearings is not compatible with either the hearing culture or the decisionmaking culture to which the tribunal aspires. He is arrogant, self-opinionated, gives the impression of not listening to counsel's submissions, is stridently impatient with witnesses, and is disrespectful of the views of his worker and employer side members when they seek to exercise their right to participate in the decision-making process. In short, he is suffering from a severe case of “judgeitis”.

The disrespect this vice-chair shows for counsel, parties and witnesses, is seriously inconsistent with the public face of fairness and respect to which the tribunal is committed and he represents an anomaly in that respect that his colleagues and the tribunal's chair are not prepared to have continued. Moreover, his disrespect of the worker and employer members' role and status is particularly significant from an institutional perspective.

The tribunal's *collegial tripartite* decision-making concept has been highly successful. All three members of panels typically ***213** participate as equals in the post-hearing discussions, and over 95% of all decisions are unanimous. There is a widespread consensus within the tribunal that this is a valuable approach that has contributed significantly to both the quality and the acceptability of the tribunal's decisions. But, in the field of industrial relations in Ontario, the collegial tripartism concept is novel, and at the tribunal it is always fragile. Each new worker and employer member has to be weaned from the practices of partisan tripartism that prevail in other labour relations institutions. A vice-chair who openly disrespects that aspect of the tribunal's tripartite culture is, therefore, a danger to that culture.

In the second year of Dungleman's first term, the chair finds an occasion to make it clear to him that his performance presents a problem for the tribunal that the chair cannot continue to tolerate. He suggests that Dungleman sit in on the hearings of some of the other vice-chairs whom Dungleman respects with a view to comparing his conduct of a hearing with theirs. Dungleman takes that advice to heart, reforms his approach, and becomes a valued and respected vice-chair whose further re-appointments the chair is always pleased to recommend.

Hypothetical Situation No. 4

Ann Squaremore is a newly appointed vice-chair. She is very confident in her abilities and comes with extensive advocacy experience in the workers' compensation field. The chair notes that she seems very impressed with her new status as an adjudicator. As she begins her work, it soon becomes apparent that she

> is undervaluing or resisting the tribunal's decision-institutionalizing processes. She feels instinctively that it is inappropriate to be sending her draft decisions to the tribunal's draft review process, she frequently absents herself from the Assembly meetings, and, impressed with the fact tribunal adjudicators are not technically bound by the principle of *stare decisis* - the statute makes that clear - she is also rather prone to give the prior decisions of her colleagues less attention than the tribunal's interest requires. After six months of reading her decisions, the chair asks her to meet with him. He spends a good part of an afternoon explaining the importance and legitimacy of the draft-decision review process, and of the tribunal's need for consistency and congruency from decision to decision.
>
> Following that meeting, Squaremore embraces the tribunal's decision-institutionalizing culture, and finds that, in practice, the institutionalizing ***214** processes do not threaten her intellectual independence and actually help her to write better decisions.

One could describe numerous other situations in which a tribunal chair's lurking power to influence a re-appointment decision every three years will have had a subtle - or not so subtle - influence in sustaining or bolstering a tribunal's culture of institutionalized decision-making, but these four examples will suffice to make the point.

Of course, assuming that there is an effective and appropriate selection procedure for new appointees in the first place, the power to recommend against a re-appointment is not one that will often have to be exercised. In my 12 years at WCAT, on only one occasion was it necessary to actually recommend to the Minister of Labour that a member should not be re-appointed. On perhaps, two or three other occasions, members left the tribunal in the middle of their current term because they had been advised, or could see, that the chair would probably not be recommending a further re-appointment. But it is the existence of a chair's power to influence re-appointment decisions that is, in my view, one of the indispensable foundations of his or her management and leadership role. If the chair is doing the job properly, it will certainly be rare that the power will have to be exercised. However, without that power I cannot imagine how a tribunal's culture of institutionalized decision-making could be sustained or the tribunal's corporate interests in the decision-makings of its members effectively protected.

Finally, my ruminations on the possible impact of lifetime appointments in a tribunal context led me to recall the adjudicative culture of an out-of-Ontario administrative tribunal that I witnessed on a visit while I was Chair of the Ontario WCAT. Let me call it the AB Appeals Tribunal (ABAT).

I had been invited to visit by the ABAT's chair for the purpose of sharing with ABAT's members WCAT's strategies for institutionalizing its decisions. Some of these strategies were relatively novel - perhaps, for the time, even radical - and the ABAT chair was apparently interested in promoting some changes in ABAT's own strategies.

The visit, however, was not a success. For reasons lost in ABAT's early history, ABAT's members saw themselves as tantamount to trial court judges. The highest priority in their institutional culture was, therefore, each member's individual independence and autonomy. Their perception of their role and status reminded me of the attitude which I sometimes temporarily encountered with new WCAT vice-chairs and which is reflected in hypothetical situation No. 4 above. In ABAT's case, ***215** however, this was an entrenched view that dominated the tribunal's culture.

In this environment, my account of WCAT's institutionalizing strategies was not well received. The strategies were considered by the ABAT members to be incompatible with the degree of individual member autonomy which they considered it their duty to uphold.

Most striking to me was that the ABAT members did not share my concern for the consistency of tribunal decisions. They did not consider that concern to be legitimate. (This was before the *Consolidated-Bathurst* decision). In their view, inconsistencies in ABAT decisions provided satisfying evidence of the autonomy of its members.

The inconsistency in ABAT's decision-making did not, however, serve the AB statutory enterprise well. In a system where ABAT members regarded inconsistency in their review decisions as almost a positive virtue, any particular ABAT decision carried little or no weight as a reconciling precedent within the enterprise. And, with no basis for predicting with any assurance the result of an appeal to ABAT in any particular case, there was little incentive for parties to accept a negative result from the AB enterprise's front-line decision-makers. Moreover, as *Consolidated-Bathurst* subsequently made clear, the pervasive inconsistency in ABAT's final decisions was not compatible with rule-of-law principles.

For me, the ABAT adjudicative culture presents a tangible vision of the danger the future holds for tribunals should a tenured appointments regime be implemented.

Footnotes

a1 Mr. Ellis is an Ontario administrative law lawyer with a long-standing interest in the reform of administrative justice systems in Canada. His qualifications for commenting on the issue of tenured appointments for members of administrative tribunals include a 17-year career as an administrative law counsel, and 12 years, from 1985 to 1997, as the inaugural chair and CEO of Ontario's Workers' Compensation Appeals Tribunal (WCAT). He was also the first president of the Ontario Society of Ontario Adjudicators and Regulators (SOAR) (1992-1996), and for a number of years a member of the CCAT Board of Directors.

1 Council of Canadian Administrative Tribunals, 19th Annual Conference “The Future of Canadian Administrative Tribunals in Canadian Society and the Guarantees of Independence and Impartiality”, Gatineau, Québec, June 3, 2003.

2 That plan was subsequently reflected in Bill 35, being *An act to amend the Act respecting administrative justice and other legislative provisions,* tabled in the 37th Legislature, of the Québec National Assembly on November 13, 2003. The Bill was reported out of the Institutions Committee on March 9, 2004 and referred back to that Committee for detailed study on the same day. [At the time of preparing this paper for publication, in March, 2005, Bill 35 was still in Committee.] Amongst a number of other things, the Bill proposes that s. 38 of the *Administrative Justice Act*, (R.S.Q., c. J-3) be amended to provide for the Québec *Administrative Tribunal* (now to be renamed the *Administrative Review Tribunal of Québec)* "to be composed of members appointed ... *to hold office during good behaviour*."

3 For a non-government recommendation for the tenured appointment of full-time adjudicative tribunal members, see Ed Ratushny, *Canadian Bar Association* "Report on The Independence of Federal Administrative Tribunals and Agencies", Recommendation No. 34, September 1990.

4 *I.W.A. Local 2-69 v. Consolidated-Bathurst Packaging Ltd.,* [1990] 1 S.C.R. 282, 1990 CarswellOnt 2515, 42 Admin. L.R. 1, 68 D.L.R. (4th) 524 (S.C.C.) [*Consolidated-Bathurst* cited to S.C.R.].

5 *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952, 1992 CarswellQue 108, 3 Admin. L.R. (2d) 173, 90 D.L.R. (4th) 609 (S.C.C.) [*Tremblay* cited to S.C.R.].

6 See, for example, *Essex County Roman Catholic School Board v. O.E.C.T.A.* (2001), 56 O.R. (3d) 85, 205 D.L.R. (4th) 700, 38 Admin. L.R. (3d) 166, 2001 CarswellOnt 3116 (Ont. C.A.) at 94 [O.R.].

7 Ron Ellis, "Principles, Practices and Pluralism" in *L.S.U.C. Special Lectures, 1992, Administrative Law,* (Toronto: Carswell, 1992) at 357.

8 *Consolidated-Bathurst, supra* note 4.

9 *Tremblay, supra* note 5.

10 *Consolidated-Bathurst, supra*, note 4 at 323.

11 *Ibid*. at 324.

12 *Ibid*. at 327.

13 *Ibid*. at 333.

14 Yves-Marie Morissette, "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986) 16 R.D.U.S. 591, cited with evident approval in *Consolidated-Bathurst*, *supra* note 4 at 327.

15 *Tremblay*, *supra* note 5 at 974.

16 *Consolidated-Bathurst*, *supra* note 4 at 340.

17 *Ibid*.

18 From the majority judgment in *Consolidated-Bathurst*, quoted with approval in *Tremblay*, *supra* note 5 at 970.

19 *Consolidated-Bathurst*, *supra* note 4 at 328.

20 *Tremblay*, *supra* note 5 at 974.

21 (1992), 9 O.R. (3d) 641, 1992 CarswellOnt 914, 94 D.L.R. (4th) 193, 11 Admin. L.R. (2d) 147 (Ont. C.A.).

22 I use the word "archaic" respectfully but advisedly in the *Oxford Dictionary* sense of the word - thus, a dissent "marked by the characteristics of an earlier period".

23 I would note, however, that private-bar administrative law lawyers are prone to want restrictions on the consultative activities in the decision-making of administrative justice tribunal members that are more restrictive than has traditionally been imposed on the consultative activities engaged in by judges in the course of their decision-making. In 1995, I had an occasion to compare the traditional consultative activities of judges with the tribunal-member activities being impugned by the bar. See, Ronald Ellis, "Institutional Decision-making: Findings and Opinions - the Agencies' Only Stock in Trade, in Philip Anisman & Robert Reid, eds. *Administrative Law Issues and Practice*, (Toronto: Carswell, 1995) at 167.

24 See WCAT *Third* [Annual] *Report*, 1987-88, Appendix A, "Commitment" No. 8.

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