Legislative Sovereignty and the Rule of Law

McKenzie v. *Minister of Public Safety and Solicitor General*[1]

By

S. Ronald Ellis, Q.C.[2]

This is a comment on the *McKenzie* case – the case in which the BC Supreme Court recently reinstated an experienced BC Residential Tenancy Arbitrator, Mary McKenzie, after the BC government had rescinded her current five-year appointment in mid term without cause. The government had rescinded Ms. McKenzie's appointment in reliance on a 2003 statutory provision that it argued gave it the power to rescind the appointment of any member of virtually any BC administrative tribunal without cause at any time.

The writer of this comment is a part of Mary McKenzie's legal team[3] and, accordingly, the focus of this comment cannot appropriately be on the merits of the Court's decision in *McKenzie* nor on the chances of that decision surviving the appeal the government has now launched. The comment focuses instead on the constitutional issue the case presents, which is the applicability of the unwritten constitutional requirement of judicial independence to administrative tribunals and their members, and on the implications for the world of administrative justice if it should prove that, on that issue in particular, Mr. Justice McEwan, who wrote the judgment in McKenzie, in fact got it right.[4]

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[1] 2006 BCSC 1372. The judgment, dated September 8, 2006, was written by The Honourable Mr. Justice McEwan.

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[3] The Petitioner's legal team was comprised of counsel, Paul J. Pearlman, Q.C., of the Victoria firm of Fuller, Pearlman, McNeil, Barristers; Mary McKenzie, the Petitioner, an experienced lawyer in her own right; and, as mentioned, the author. BCCAT who intervened in the public interest was represented by Frank A. V. Falzon Law Corporation of Victoria, B.C. The government was represented by Attorney General counsel Nerys Poole and Richard Butler.

[4] The other legal issue with which the decision itself is principally concerned is the interpretation of the statutory provision on which the government relied for its purported power to dismiss

The facts of the case provide important context for appreciation of the constitutional issue because they happen to present that issue in as clear a light as it is ever likely to be presented. It is not the writer's place in a comment such as this, and as a member of the Mckenzie legal team, to add any interpretive gloss to the Court's factual findings. However, since the Court has stated its findings in particularly unambiguous language, and since the government's appeal does not challenge any of those findings in any way[5], in the interests of putting the constitutional issue in context the writer is taking the liberty of setting out the facts of the case as found by the Court.

BC Residential Tenancy Arbitrators adjudicate and make final determinations of disputes between BC residential tenants and their landlords, and their jurisdiction in landlord and tenant matters includes virtually all the jurisdiction historically exercised by the superior courts, including, for example, the jurisdiction to order evictions or the payment of damages.[6]

The Petitioner was a senior Residential Tenancy Arbitrator with "an unblemished service record"[7]. She had been selected for re-appointment on January 1, 2004, pursuant to the Residential Tenancy Act, to a five-year term. On April 14, 2005, 15 months into that five-year term, the Minister, in purported exercise of his section 14.9(3) powers (of which more later), rescinded her appointment without cause or any stated reasons, thus bringing, as the Court said, "a sudden and unexpected end to a career that had begun on December

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tribunal members without cause. The Court concluded that the Legislature's intention to bestow such a power on the government was not clear enough from the wording of the provision to meet the common law requirement that for legislation to be effective in overriding a principle of natural justice, the legislature's intent to do so must be clear and unequivocal.

[5] The government has also conceded that in its exercise of the alleged statutory power of dismissal it failed to comport with the principles of procedural fairness and on the basis of that concession it is not challenging the quashing of the Minister's order or the attendant reinstatement of Ms McKenzie as a Residential Tenancy Arbitrator.

[6] *McKenzie*, Para. 11.

[7] Id., Para. 40.

16, 1994, when Ms. McKenzie was first appointed as a result of a merit based competition"[8].

Prior to her dismissal, the Petitioner's arbitration hearing schedule involved two days a week of hearings in Burnaby – to which she commuted from her home in Nanaimo – and one day a week in Nanaimo. Residential Tenancy Arbitrators were paid on a per case basis, and the Nanaimo work represented effectively one third of the Petitioner's arbitration income. In December 2004, the Petitioner was advised by the manager of the Nanaimo office that the Director of the Residential Tenancy Office had instructed her to remove the Petitioner from the Nanaimo hearings schedule. The manager did not know the reason for this decision. After repeated failures to reach the Director to discuss the matter, the Petitioner wrote to the Director objecting to the cancellation of her Nanaimo work. That letter was dated January 31, 2005.[9]

Two weeks later, and absent any communication with the Petitioner in the meantime, the Director summoned the Petitioner to a meeting with her and the Assistant Deputy Minister in charge of the Ministry's Residential Tenancy Branch. At that meeting, without any attempt to justify or explain the cancellation of the Petitioner's participation in Nanaimo hearings, the Director advised the Petitioner that her services as an arbitrator were no longer required and that the Minister – the Solicitor General – had accepted the Director's recommendation that her appointment be rescinded.[10] When the Petitioner in the meeting asked for reasons for her dismissal both the Director and the ADM explicitly refused to give any[11]. On April 14, 2005, the Solicitor General issued his order rescinding the

[8] Id., Para. 1

[9] For the text of the letter, see *McKenzie*, Para. 42.

[10] Ibid., Para. 45.

[11] Id., Para 46.

Petitioner's appointment.[12] It was, in Justice McEwan's words, "a vivid factual example of a purely arbitrary dismissal".[13]

Once it was clear that the Petitioner would not allow the decision to go unchallenged, the Attorney General's lawyers began to make allegations in support of the Minister's decision. No evidence in support of any of those allegations was filed. Justice McEwan concluded as follows:

> Para. 60. … it is manifest that the Petitioner was terminated simply for having the temerity to stand up for herself. …. The Respondents simply had no regard for the Petitioner or her concerns and perceived her to be an obstacle to the implementation of their plans. These included an unilateral alteration of her terms of employment within her five-year term that, in an employment context, might well have amounted to constructive dismissal.
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> Para. 61. When the Respondents were "called" on this treatment, they embarked on a relentless and disgracefully specious personal attack on the Petitioner.
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> Para 62. It is important to appreciate that ultimately, despite the multiple aspersions cast against the Petitioner in various communications from the Respondents and regrettably, their lawyers, there was <u>nothing to</u> their assertions that she had ever behaved inappropriately in any context. … [The emphasis is the Court's.]
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> Para. 63. It is more than regrettable that servants of the public could behave so badly in their treatment of anyone.

Justice McEwan concluded his description of the facts with the following observation.

> Para. 64. I have taken some time to trace what happened to illustrate how utterly vulnerable a person in the Petitioner's position is to arbitrary or whimsical removal if the Respondent's view of their powers is correct. As we turn to the statutory interpretation and constitutional issues it is important to remember that the Respondents' position is, to this day, that they were absolutely entitled to do what they did … ."

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[12] BC Ministerial Order M109, dated April 14, 2005.

[13] *McKenzie*, Para. 105.

Such were the facts.

In mega terms, the constitutional question the case presents is whether, in a constitutional democracy, legislative sovereignty trumps even the foundational elements of the rule of law. The particular form the question takes in *McKenzie* is whether in Canada's constitutional democracy a legislature is free to eliminate judicial independence as one of the norms of a justice system. The BC's Attorney General's position in *McKenzie*, as described by the Court, is, effectively, that that is what the BC legislature intended to do with respect to the BC administrative justice system when in 2003 it enacted section 14.9(3) of the Public Sector's Employers Act[14]. If tribunal members may be dismissed at any time without cause, it is self-evident that judicial independence, as defined by Valente[15], is no longer an element of the system.

Section 14.9(3) of the *Public Sector Employers Act* reads as follows:

> "The appointment of a person referred to in subsection (1)[16] may be terminated without notice before the end of the term of their appointment on payment of the lesser of (a) 12 month's compensation, or (b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term."

The government's position in *McKenzie* is that, by this section, the Legislature intended to empower the government to terminate any BC tribunal member's appointment at any time during the term of their appointment for "mere displeasure" or, as Mr. Justice McEwan puts it in his decision, for "arbitrary or whimsical reasons"[17].

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[14] S.B.C. 1996, c. 384, as amended by s. 54 of the *Administrative Tribunals Appointment and Administration Act*, S.B.C 2003, c. 47, effective May 28, 2003.

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

[16] The persons referred to in subsection (1) includes "an arbitrator under the Residential Tenancy Act " or … "a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal". The Schedule will be seen to list virtually all of BC's Administrative Tribunals.

[17] McKenzie, Para. 64.

What makes the McKenzie decision of surpassing interest, not only in BC but nationally, is that, in finding for the Petitioner on the constitutional issue, the Court distinguished the Supreme Court of Canada's famous decision in *Ocean Port*[18] insofar as that ruling might be said to apply to Residential Tenancy Arbitrators. The Court held that the unwritten constitutional requirement of judicial independence first identified by the Supreme Court of Canada in *PEI Provincial Court Judges Reference*[19] did apply to give constitutional protection to the independence of BC Residential Tenancy arbitrators, and that section 14.9(3) as interpreted by the government would be incompatible with that requirement.[20]

The *McKenzie* decision's principal importance from the perspective of the administrative justice system is, therefore, that, for the first time, the unwritten constitutional requirement of judicial independence – a requirement that has been found to protect the judicial independence of judges of the provincial civil law courts such as family court judges[21], justices of the peace[22], or part-time, fixed term deputy small claims court judges[23] – has now, for the first time, been extended to administrative justice tribunals.

It was widely believed that *Ocean Port* had erected an insurmountable barrier to the extension of that constitutional protection of judicial independence to any administrative tribunals.[24] *McKenzie* has knocked that barrier down – at least as far as tribunals at the "high end" of the *Bell Canada* spectrum of tribunals

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[18] *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch),* [2001] 2 S.C.R. 781.

[19] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island et al., [1997] 3 S.C.R. 3*

[20] *McKenzie*, Paras. 142 to 153.

[21] *PEI Provincial Court Judges Reference*, supra, note ??

[22] *Ell* v. *Alberta*, [2003] 1 S.C.R. 857

[23] *Ontario Deputy Judges Assn*. v. *Ontario (Attorney General)*, [2006] O.J. No. 2057 (C.A.)

[24] And there is, indeed, language in *Ocean Port* (at paras. 20-24) that at first blush would appear to amply justify that view. In distinguishing *Ocean Port*, Justice McEwan first quoted that language *in extenso*. See *McKenzie*, paras. 127-129.

are concerned[25] – and that is why, whichever way the appeal may go, *McKenzie* must be seen as the most important administrative law case in years.[26] Either *Ocean Port* will be reinstated and the legislature's dominance over the rule of law as it pertains to quasi-judicial tribunals confirmed, or not. Either way, it is difficult to imagine a case of more intrinsic importance to the future of our administrative justice system.

That, then, is the nuts and bolts of the BC Supreme Court's decision in *McKenzie*. The writer now proposes to address the two most important legal questions the *McKenzie* decision, taken at face value, obviously presents. First, in light of *McKenzie*, what now is the law of judicial independence of administrative tribunals in British Columbia and what BC tribunals, apart from Residential Tenancy Arbitrators, might now be said to be subject to a constitutional requirement of judicial independence? Second, what are the implications of that law for those tribunals?

Of course, since the government has appealed, the constitutional law on this issue could soon look very different. However, as indicated previously, the writer does not propose to defend the Court's decision, or to *argue* the constitutional issue. The intention is, rather, to proceed here on the basis that on the constitutional issue the law is currently as the BC Supreme Court in *McKenzie* has found it to be and the writer further supposes that that law will be upheld on appeal.

In reliance upon the unwritten constitutional requirement of judicial independence first identified by the Supreme Court in the *PEI Provincial Court Judges Reference*[27], the Court in *McKenzie* elevated to constitutional status the common law principle of judicial independence, at least as that principle applies

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[25] *Bell Canada* v. *Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, para. 21.

[26] In his oral argument before Mr. Justice McEwan, Frank Falzon, counsel for BCCAT, opened his argument with that very assertion.

[27] Supra, note 24.

to BC Residential Tenancy Arbitrators. To do this, the Court had no option, of course, than to distinguish *Ocean Port*, where an attempt to elevate the same common-law principle to constitutional status in its application to the members of the BC Liquor Appeal Board had failed.[28]

In both *McKenzie* and *Ocean Port*, the object of the court's inquiry was the constitutional status of the common-law principle of judicial independence in its application to administrative tribunals and their members. Accordingly, to understand either *McKenzie* or *Ocean Port* from a constitutional law perspective, one must begin by understanding what the *common-law* itself has to say about "judicial independence".

In modern judicial parlance, the phrase "judicial independence" is used in reference to the independence of either provincial inferior court judges or of adjudicative tribunal members. (The writer refers in this context only to provincial inferior court judges because the judicial independence of superior court judges is defined and guaranteed explicitly in the BNA Act, and so the common law principle is not pertinent to them.) However, while the phrase has come to be used generically in referring to the independence of any adjudicator, be they provincial court judges or tribunal members, the *content* of the common law concept of "judicial independence" is different as between judges and tribunals and their members.

As applied to tribunals and tribunal members, the content of the judicial independence concept is variable depending on the status and nature of the tribunal to which it is being applied. In the Supreme Court's decision in *Bell* – one of the decisions relied on in *McKenzie* to distinguish *Ocean Port* – the Court held that tribunals at the "high end" of the spectrum, such as the Canadian Human Rights Tribunal – and, now, as found by the BC Court, BC's Residential Tenancy Arbitrators – require a "high" level of independence, but not so high as

[28] Supra, note 23.

that required by superior court judges[29]; which is, presumably, to say, as a practical matter, not so high as to require life-tenure appointments.

The Supreme Court in *Bell* also confirmed that the level of judicial independence the common law requires varies from tribunal to tribunal depending on the tribunal's functions and the interests affected by its decisions.[30] Of course, there is bound to be a minimum, foundational level of protection. For example, it would be difficult to envisage an adjudicative tribunal, held to be subject to the requirement of judicial independence, being found to meet that requirement were its members open to dismissal by the government at any time for mere displeasure. But other aspects of a tribunal's structural relationship to the government might be compatible with a requirement of judicial independence or not, depending on that tribunal's role, functions and circumstances.

Therefore, in extending the constitutional requirement of judicial independence into the realm of quasi-judicial tribunals, *McKenzie* should not be seen as putting the design of those tribunals into a constitutional straight-jacket. There will continue to be flexibility in tribunal design, subject only to the design not embracing structures that conflict with the common law's foundational imperatives of judicial independence.

There is also no reason to fear that the recognition of a constitutional requirement of judicial independence for tribunals will lead to the judicialization of tribunals. The *Consolidated-Bathurst* line of cases authorizing flexible internal structures devoted to institutionalizing the decision-making of administrative tribunals[31] would not be affected. The *Consolidated-Bathurst* jurisprudence proceeded on the premise that the tribunals in question in those cases were,

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[29] *Bell*, supra, note 30, paras 21 and 29.

[30] Id., para 21 and 24.

[31] *International Woodworkers of America, Local 2-69* v. *Consolidated-Bathurst Packaging Ltd*., [1990] 1 S.C.R. 282. See, as well: *Quebec (Commission des affaires sociales)* c. *Tremblay*, [1992] 1 S.C.R. 952, and *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board),* [2001] 1 S.C.R. 221.

indeed, subject to the *common law* requirements of judicial independence. The fact that those requirements are now constitutionally mandated will change nothing in that jurisprudence.

An important, but little recognized, fact about the Canadian common law of judicial independence is that its principal feature -- the requirement of objective structural guarantees of independence -- is almost brand new. Prior to 1985, we were a nation content to take the existence of judicial independence on trust, even with respect to provincial court judges, and even where it was an explicit constitutional requirement. And the applicability of the requirement of *objective guarantees* of independence to members of adjudicative tribunals has only been an acknowledged part of our common law for the past 11 years – since the 1995 decision of the Supreme Court in *Matsqui*[32].

The law's historic view was that judicial independence was sufficiently assured on the basis of merely trusting adjudicators to act independently and governments to act responsibly. That view pertained not only to tribunal members but also to provincial court judges and was deeply rooted in the Canadian legal culture. This "trust doctrine" of judicial independence, if one may call it that, was effectively dislodged by *Valente* and by the independence jurisprudence that followed *Valente*.[33]

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[32] *Canadian Pacific Ltd*. v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3.

[33] The "trust" doctrine of judicial independence is a label coined by the author. It may be seen at play in the decision of the Supreme Court of Canada in *R.* v. *MacKay*, [1980] 2 S.C.R. 370, dealing with the independence of a Court Martial Tribunal and in the decision of the Ontario Court of Appeal in *R.* v. *Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, dealing with the independence of a provincial court judge. Its rejection as an acceptable doctrine may be seen in the Supreme Court's 1985 decision in *Valente* v. *The Queen*, supra, note ??, in which the Ontario Court of Appeal's reliance on the trust doctrine in *Valente (No. 2)* was overturned in favour of the doctrine of objective structural guarantees of independence, and in *R.* v. *Généreux*, [1992] 1 S.C.R. 259, in which, on the issue of the independence of Court Martial Tribunals, the Supreme Court, relying on the new doctrine of structural guarantees of independence, overruled its own decision in *MacKay*.

But that historic trust doctrine remains part of the context of the independence debate. Only eleven years ago, and a mere six years before *Ocean Port*, it was still credible to argue, and to believe, that a tribunal member's vulnerability to dismissal at any time for mere displeasure had no rule-of-law implications. The law at that time considered it appropriate and necessary for the courts to trust tribunal members' integrity for the assurance of independent decisions regardless of the members' actual structural vulnerability to reprisals, and for the courts to assume that governments would not use their power to dismiss tribunal members for purposes of reprisal or redress.

Given that history, it is necessary in considering the judicial independence issue to be consciously sensitive to the magnitude and implications of the veritable sea change in the law of judicial independence ushered in by the Supreme Court in *Valente*. Since *Valente* – and *Matsqui* – it is no longer consistent with the common law of judicial independence for courts to find any residual comfort in the thought that tribunal members might well be trusted not to allow any actual structural vulnerability to reprisals to influence their decision-making, or that governments can be relied upon not to take advantage of that vulnerability.

In summary, then, after *McKenzie*, the common law of judicial independence, as now defined by the *Valente* principles, has been raised to the status of a constitutional requirement as far as BC Residential Tenancy Arbitrators, as they existed at the time of the *McKenzie* hearing, are concerned. The next question is: what are the other BC tribunals that are likely to now fall within the protection of that constitutional requirement as defined by *McKenzie*?

Consider the particular criteria that may be seen to have persuaded Mr. Justice McEwan that that requirement applied to BC Residential Tenancy Arbitrators:[34]

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[34] *McKenzie*, paras. 131-152.

1. The Residential Tenancy arbitrators are at the "high end" of the Bell spectrum of tribunals, which is to say they are adjudicators of legal rights who are not involved in crafting policy;
2. Their sole mandate is to exercise the judicial function of adjudicating justiciable rights disputes between private parties; and
3. Their jurisdiction was not distinguishable on any constitutionally relevant grounds from the civil jurisdiction exercised by the provincial family law courts, or by Alberta's justices of the peace, or by Ontario's fixed-term, small claims court deputy judges, all of whom have recently been held to fall within the protection of the unwritten constitutional requirement of judicial independence.

Which of BC's current tribunals meet those criteria beyond reasonable argument? The writer would suggest that, among the best known, would presumably be the Workers Compensation Appeals Tribunal, the Labour Relations Board and the Human Rights Tribunal.

In addition, there is another group of tribunals that would meet the criteria except that the disputes they adjudicate are not disputes between private parties. In the writer's view, whether adjudication between private parties is an *essential* criterion, as McKenzie might be seen to have suggested, will inevitably be the focus of some future case.[35] A future court will be sure to be asked what is the constitutionally relevant distinction between a mandate to adjudicate a justiciable dispute about legislated private rights between two private parties and a mandate to adjudicate a justiciable dispute about legislated private rights between a private party and a government party? It is difficult to see the distinction. In point of fact, from a rule-of-law policy perspective, the argument in favour of constitutionally protected judicial independence would appear to be stronger where the government is one of the parties than otherwise.

And so it seems possible that tribunals that hear appeals from decisions of Ministry staff will also, in due course, be seen to qualify. And the writer thinks here, in his own provincial context, of Ontario's Social Benefits Tribunal that

[35] In fact, in *McKenzie*, the Court did appear to attach significance to the fact that Residential Tenancy Arbitrators sometimes arbitrated disputes in which the government itself was a party to the dispute. See *McKenzie*, para. 147

hears appeals from welfare decisions of the staff of the Ministry of Community and Social services.

Then there is the *McKenzie* criterion that the tribunal must be exercising a jurisdiction that is constitutionally indistinguishable from the civil jurisdiction of a court. No doubt this is a criterion that will also be thought to eliminate some tribunals and presumably that issue will be another focus of future litigation. It is a question that engages the problem of distinguishing between a tribunal that is a regulatory agency, or a "licensing body", as the Liquor Appeal Board was characterized in *Ocean Port*, and a tribunal that is a "quasi-judicial" tribunal as defined in *Bell*.

While, in *Bell*, the Supreme Court did not use the "constitutionally indistinguishable" phraseology in its description of the functions of a quasi-judicial tribunal, it is easily argued from the words it did use in that description – a description of the functions of the Canadian Human Rights Tribunal, the tribunal which the Court situated as the prototypical model of a quasi-judicial tribunal – that the Court surely had in mind a tribunal whose jurisdiction could be properly characterized as indistinguishable on constitutionally relevant grounds from the civil jurisdiction of a provincial court.

It seems currently clear from *Ocean Port* that the judicial independence of regulatory agencies and licensing bodies and their members does not attract constitutional protection. But it seems to follow logically from *McKenzie* that, if on the constitutional issue the *McKenzie* decision is upheld on appeal, the independence of all "quasi-judicial tribunals" as defined by *Bell* will eventually be held to enjoy that protection.

In short, we can see that the constitutional requirement of judicial independence as defined by *McKenzie* will logically extend to a number of other BC tribunals. How many, and which, is debatable, but there will be a number,

and indeed, if the law as found in *McKenzie* survives the appeal process, then over time a high proportion of BC tribunals will surely be found to be subject to that requirement. For convenience of reference the writer will label the tribunals to which the requirement will, in his view, be found to apply as "quasi-judicial tribunals" – the label applied by the SCC in *Bell* to tribunals at the high end of the tribunal spectrum.

So what are the implications for those tribunals? What things that we now live with will not survive the constitutionalizing of the judicial independence of quasi-judicial tribunals?

From *McKenzie* we can be sure that one of those things is a government's power to dismiss quasi-judicial tribunal members mid-term for mere displeasure. That is self-evidently incompatible with any reasonable notion of judicial independence. The more interesting question at this juncture is what other things are likely to be found to be incompatible with the constitutional requirement of independence?

My own list of unconstitutional things would include:

1. The assignment of quasi-judicial adjudicative functions to government employees.
2. The arbitrary, unfair, and secret, member-reappointment process.
3. Line-ministry hosting of quasi-judicial tribunals.
4. Egregiously non-competitive compensation levels for tribunal members.

1. <u>The assignment of quasi-judicial functions to government employees</u>

The assignment of quasi-judicial functions to government employees must surely be incompatible with any constitutional requirement of judicial independence. Consider a government's power to train, supervise and instruct its employees, its control over an employee's career prospects, and its legal right

to terminate an employee's employment at any time, without cause, on reasonable notice – or upon payment in lieu of notice. As the Ontario Court of Appeal in *Hewat* agreed, with respect to the common law issue of judicial independence: "[this court] should not countenance the government … treating public [adjudicative] officers [such as members of the Labour Relations Board] as employees who can be dismissed [merely] with compensation".[36]

That takes one inexorably to Bill 27.[37] The *McKenzie* decision would appear to present an issue as to whether the design and architecture of BC's new residential tenant /landlord dispute resolution regime established by the enactment of Bill 27 would survive a constitutional challenge. That legislation assigns the adjudicative function previously exercised by Residential Tenancy Arbitrators to a "Director", an employee of the government appointed pursuant to the Public Service Act, and that Director has been empowered to delegate his or her adjudicative powers to a series of other "employees".[38]

The government's confidence that there is no independence issue in the latter arrangements seems evident obvious from their introduction and enactment of Bill 27 while *McKenzie* was still pending, but it is difficult to see, for instance, how putting the power to make a final eviction order exclusively in the hands of the housing ministry's employees could be thought to conform with any likely formulation of a constitutional requirement of judicial independence for residential tenant/landlord adjudicators.

2. <u>Arbitrary re-appointment powers</u> [39]

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[36] *Hewat* v. *Ontario*, [1998] O.J. No. 802 (C.A.), at paras. 16 and 17.

[37] At the BCCAT Conference, one of the writer's assignment as a member of the panel on Tribunal Independence was to consider the independence issue as it applied to the new regime of residential tenancy/landlord dispute-resolution introduced by Bill 27 and enacted as *Residential Tenancy Act*, SBC 2006, c. 35.

[38] Ibid., section 8 and 9.

[39] The following analyses concerning the unconstitutionality of arbitrary re-appointment powers, of line-ministry hosting, and of inadequate compensation levels, will appear in a more expanded version in Part II of the author's article: "The Justicizing of Quasi-Judicial Tribunal" which will be

It is well known that, outside of Quebec, Canadian governments see themselves as having an untrammeled discretion to re-appoint or not to re-appoint any administrative-tribunal member at the end of his or her fixed term without reasons or notice.

And we know that a government's unexpected refusal to re-appoint a tribunal member is particularly devastating to that member in personal terms because governments also hold fast to the belief that there is no right to compensation for a member whose re-appointment is refused. Since there is seen to be no right to notice, there is also seen to be no right to payment in lieu of notice.

It is apparent that, in a real-world context, where tribunal members must petition a government for re-appointment in circumstances where re-appointment decisions are known to be entirely discretionary and typically made in camera in an arbitrary manner, the independence of such members is in fact entirely illusory. It is, with respect, disingenuous to say otherwise. And the length of the term in question does not alter the argument. Time passes, and, eventually, a five-year term becomes a five-month, a five-week, and then a five-day term, with the member still hearing cases and making decisions having the potential to alienate the government – or friends of the government – to which he or she must immediately look for the "gift" of another appointment.

One must, of course, advance this latter point with considerable diffidence since the Supreme Court of Canada appears to have found to the contrary. First in *Valente* and later, and more particularly, in *Regie*[40], the Court has said that, as far as tribunal members are concerned, a short, fixed-term appointment fully satisfies the security-of-tenure component of a constitutional requirement of

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published in volume 20.1 of the *Canadian Journal of Administrative Law and Practice* due in the winter of 2007. Part I of that article may be found in volume 19 of that journal at page 303.

[40] *2747-3174 Quebec Inc*. v. *Regie des permis d'alcool du Quebec*, [1996] 3 S.C.R. 919.

judicial independence. All that is apparently necessary is that a member's appointment not be open to arbitrary termination during the fixed term.

However, this conclusion has not been reached in cases that actually dealt with an arbitrary denial of an expected re-appointment, and it seems, with respect, doubtful that it can long survive the growing acknowledgement that these are tribunals that are instruments of justice and integral parts of our justice system[41]. And, in point of fact, the first substantial judicial move towards the correction of that position has already occurred.

In its 2001 decision in *Barreau*[42], the Quebec Court of Appeal held, in a unanimous decision written by Justice René Dussault, one of the most highly esteemed administrative law lawyers of our time, that, if the tribunal administratif du Québec (TAQ) were to satisfy the Quebec Provincial Charter's explicit constitutional requirement that quasi-judicial tribunals be independent, it was not sufficient that its members have security of tenure during their terms of appointment. They must also be the beneficiaries of a fair, objective, and independent process for determining whether or not their terms of appointment are to be renewed.

On this point, the Court distinguished the Supreme Court's decision in *Regie*[43] on the basis that, in *Regie*, the Court was dealing with a "multi-functional and essentially regulatory agency", not one that (like TAQ) "exercises a purely adjudicative function"[44] – not one that is, the writer would add, a quasi-judicial tribunal as defined in *Bell*.

It is important to note that, in *Barreau,* the Court's resolution of the independence problem inherent in a fixed-term, renewable appointment was not

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[41] See, for example, *Paul v. British Columbia (Forest Appeals Commission),* [2003] 2 S.C.R. 585, at Para. 22, and *Christie v. British Columbia*, [2005] BCCA 631
[42] *The Attorney General of Québec* v. *Barreau du Montréal*, [2001] J.Q. No. 3882 (C.A.), leave to appeal refused (2002), 2002 CarswellQue 2078 (S.C.C.).
[43] Supra, note 43.
[44] *Barreau*, supra, note 40, at para. 174

to require tribunal members to be appointed to "life-time" positions – an outcome that would indeed have taken administrative justice tribunals a long way down the judicialization road. Rather, the Court's solution was simply to require that the renewal decision be made by means of a merit-based, transparent, fair and independent process; a process that in Quebec involved the recourse to an independent appointments renewal committee over which the government was allowed no influence.[45]

This is a precedent the Supreme Court might well eventually embrace. One can surmise that at a time when the security-of-tenure issue for quasi-judicial tribunal members must have been perceived by the courts as presenting them with the Hobson's choice of, on the one hand, security of tenure only during a short, fixed term or, on the other, a life-tenure appointment, the courts, not wanting to be accused of judicializing tribunals, would have felt compelled to opt for security only during the fixed term.

But *Barreau* has now presented a third option, and, when the opportunity arises for the Supreme Court to consider afresh the independence implications of fixed-terms of quasi-judicial tribunal members subject to arbitrary and secret re-appointment processes, it will find an acceptable model of an objective, independent and fair, re-appointment process ready at hand in section 49 of the post-*Barreau* version of Quebec's *Administrative Justice Act*.[46]

The Court's adoption of the latter process as an independence prerequisite would, of course, require the mandating of *ad hoc*, independent re-appointment committees that would have the responsibility for making the re-

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[45] *An Act Respecting Administrative Justice*, R.S.Q., chapter J-3, as amended to May 13, 2003, contains the applicable, post-*Barreau* provision. See section 49 dealing with appointment renewals. It may be noted, however, that, subsequent to that legislation, the Quebec legislature itself did opt for lifetime appointments for TAQ members. See *An Act to Amend the Act Respecting Administrative Justice*, S.Q. 2005, c.17, s. 2. The amended Act now provides for TAQ members "to hold office during good behavior".

[46] Id.

appointment decisions pursuant to fair procedures. This is what the Quebec legislature created after the *Barreau* decision. Fortunately, a precedent for the Supreme Court taking a pro-active role in structuring government-justice system relationships was set when, in its *PEI Provincial Court Judges Reference* decision, in support of the independence of judges the Court mandated "independent remuneration commissions". Thus, to mandate "independent re-appointment commissions" in support of the judicial independence of members of quasi-judicial tribunals should prove to be a reasonably digestible comparable step

3. Line-ministry hosting of quasi-judicial tribunals.

The third possible implication of compelling interest is the implications of *McKenzie* for the traditional line-ministry hosting of quasi-judicial tribunals. The reference here is to situations where tribunals are dependent for their budget, their administrative support, their appointments and re-appointments, on a host line-ministry whose policy, legislation, regulations, or operational decisions are directly impacted by the tribunal's adjudicative decisions.

In the writer's view, the dependency on line-ministries and the egregious conflicts of interests inherent in that dependency could not have survived judicial review of the common law requirement of judicial independence and impartiality were it not for the fact that the relationship between the ministries and tribunals was typically structured by explicit legislation. As we know, the *common law* of independence and impartiality is, of course, trumped by overriding legislative provisions.

But once the constitutional nature of the requirement of judicial independence is recognized, that trump card disappears, and the abject dependency of quasi-judicial tribunals on their line-ministry hosts could not, in

this writer's view, possibly survive a constitutional challenge of their independence – nor should it.

4. Inadequate compensation levels

And then there is the compensation issue. Once the judicial independence of a tribunal is recognized as constitutionally mandated, then the jurisprudence concerning the need for independent remuneration commissions for provincial court judges, first established in the *PEI Provincial Court Judges Reference*, would, in my opinion, be found to apply to that tribunal's members.

As noted previously, that jurisprudence has recently been found by the Ontario Court of Appeal to apply to part-time, fixed, renewable-term, deputy small claims court judges[47], and there is no discernable relevant point of distinction between those judges and quasi-judicial tribunal members. Indeed, with respect to most quasi-judicial tribunal members, the argument is even more persuasive.

For quasi-judicial tribunal members and their tribunals, *McKenzie* should mean that the days of the disrespectful and dysfunctional compensation levels that have subverted the the quality of our administrative justice system for decades are over.

Conclusion

One can see, therefore, that if, on appeal, *McKenzie* is upheld on the constitutional issue, there will be interesting times ahead for tribunal designers and administrators and, from a justice perspective, there will be, for the first time, some real chance at fundamental reform in a number of critical areas.

[47] *Ontario Deputy Judges Assn*. v. *Ontario (Attorney General)*, supra, note 28.

It is impossible in light of these issues and possibilities to overstate the importance of *McKenzie* and its significance for the future viability, and rule-of-law integrity, of our administrative justice system.