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Article

The Justicizing of Quasi-Judicial Tribunals
Part I

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In Part I of this paper, the author traces the emerging recognition of the justice system/judicial branch status of quasi-judicial tribunals; examines the validity of that recognition particularly in light of the historic reasons for understanding administrative tribunals to be, inherently, executive branch; and concludes that, in terms of both principle and policy, acknowledgement of the justice system/judicial branch status of quasi-judicial tribunals is valid and overdue. The author then argues that that acknowledgement requires the "justicizing" of those tribunals. He uses "justicizing", a word he adapts from the field of legal philosophy, to mean "making the tribunals just" in the sense of making them compatible with the structural imperatives of a valid justice system.

In Part II, to be published in the next issue of this Journal, the author posits that the "structural imperatives of a valid justice system" consist principally of 1. structures that guarantee independence and impartiality; and 2. structural arrangements that ensure the optimization of adjudicative competence. His prescriptions for meeting the independence and impartiality structural imperatives are: the essential prerequisite of constitutionalizing the judicial independence of quasi-judicial tribunals and their members; eliminating line ministry hosting; and implementing objective, fair, transparent and independent re-appointment processes. For all of this, he says, we must look to the courts and he outlines the arguments that will take us there. Finally, the author specifies the structures required for optimizing tribunal adjudicative competence, and suggests how the installation of those structures might be achieved. The author acknowledges that justicized tribunals are already a reality in Québec, which he characterizes as the administrative justice exception that in the rest of Canada proves the rule.

*304 1. INTRODUCTION: "EVERYDAY JUSTICE" [2]

This paper is about quasi-judicial administrative tribunals -- the face of the law Canadians most often encounter when they look for vindication of their "everyday" statutory legal rights -- and

about a trend in administrative law that seems to offer new promise for a long-overdue *justicizing* of these tribunals.

In Canadian quasi-judicial tribunals, any casual admirer of Canadian justice would expect to find a strong tradition of independence, impartiality, and competence. But, instead, the typical reality is an intransigent culture of dependency and bias, and a level of adjudicative competence that is often far less than optimum.[3] However, a new age may be ***305** dawning. There is, finally, an increasingly explicit acknowledgement at the highest levels of the legal system that "quasi-judicial" tribunals are an integral component of Canada's "justice system".[4] It is this acknowledgement that gives tangible hope for meaningful change, even radical reform.

Part I of this paper traces the evolution of the recognition of the justice system status of quasi-judicial administrative tribunals, examines the validity of this concept, particularly in the light of past perceptions to the contrary, and argues that the reasons for recognizing justice system status for at least quasi-judicial tribunals are valid and compelling. In Part II, to be published in the next issue of this Journal, the paper examines the "justicizing" implications of acknowledging this justice system status for quasi-judicial tribunals, identifies the reforms that will be required, and explores how those reforms could be accomplished.

(a) "Justicize" Defined

Although "justicize" is not a word that one will find in standard dictionaries, it has an acknowledged place in the literature of legal philosophy where it means "to make just" in the technically nuanced sense of making something congruent with the principles of a theory of justice that one accepts as valid.[5] In adapting the word in this paper for application to quasi-judicial tribunals, the author uses it to mean to make tribunals ***306** "just" in the sense of making them *congruent with the structural imperatives of a justice system that one accepts as valid*.

(b) The "Quasi-Judicial" Label

"Quasi-judicial" was the label chosen by the Supreme Court of Canada in *Bell Canada*[6] to describe administrative tribunals whose functions are predominantly or solely adjudicative, and who, unlike regulatory agencies or licensing bodies, are, as the Court said, "not involved in crafting policy". Although other labels are used in the literature to refer to this group of tribunals, including "adjudicative tribunals" and "judicial tribunals",[7] in this paper the author has adopted the Supreme Court's terminology.

2. THE TRANSFORMATION OF QUASI-JUDICIAL TRIBUNALS: FROM THE EXECUTIVE BRANCH TO THE JUDICIAL BRANCH

(a) *Paul* and *Christie*

The most authoritative affirmation of justice system status for administrative tribunals is found in the 2003 Supreme Court of Canada decision in the *Paul* case. [8] There, in the course of re-affirming the inherent jurisdiction of administrative tribunals to decide *Charter* issues, and speaking for a unanimous Court, Mr. Justice Bastarache stated:

> While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts *and administrative tribunals*. [9]

***307** Both the *Paul* and *Martin* decisions [10] (issued at the same time), represent the culminating point in the courts' extended consideration of the tribunal *Charter* jurisdiction issue, and it is, therefore, fitting, and not unexpected, to find the first explicit judicial acknowledgement of the justice system status of tribunals appearing in this, the final denouement in that line of cases. For, it was the advent of the *Charter* in 1982 -- and the ensuing controversy surrounding the tribunals' jurisdiction to apply it -- that is arguably the event that finally brought the issue of the justice system role of tribunals out of the shadows and onto the main stage.

Then, in 2005, in a majority judgment in *Christie v. British Columbia*, [11] the British Columbia Court of Appeal, citing *Paul*, and noting that administrative tribunals have become "important arbiters of legal rights and obligations in our society *in substitution for courts of law*", held that, for purposes of "access to justice", tribunals are to be included "in the category of the judiciary". [12]

Is recognition of a justice system status for quasi-judicial tribunals is synonymous with recognition of their "judicial branch" status? The author argues yes. If one defines the judicial branch as the part of the governance structure entrusted with the final, authoritative determination of justiciable disputes over legal rights and obligations, quasi-judicial tribunals must surely qualify. They are indistinguishable on any relevant grounds in that respect from, provincial inferior courts. [13] Moreover, to say that any component of the justice system is part of the executive branch of government offends the principle of the separation of powers. [14]

The fact that functions assigned to administrative tribunals typically include *judicial* functions has, of course, always been well understood. It was the acknowledged judicial nature of such functions that led the courts to require tribunals to perform those functions in fair hearings ***308** governed by principles of natural justice. However, in the design of tribunal structures, the *justice system*

structural implications of assigning judicial functions to tribunals have rarely been influential. [15] Until very recently, all administrative tribunals were considered by the governments that created them, and by the bureaucracies that administered them, to be regulatory agencies and an integral part of the executive branch of government. Within that conceptual framework, an agency's judicial function was perceived to be no more than an adjunct function, secondary to the agency's core regulatory mission. [16]

While *Paul* provided the first, explicit judicial acknowledgement of the *justice system* status of Canadian administrative tribunals, [17] that ***309** acknowledgment had been preceded by a number of unofficial pronouncements by senior members of the judiciary and by other legal system officials.

(b) Lamer, McMurtry, McLachlin, *et al*: Tribunals as Part of the Justice System

The point of departure for this emerging recognition of the "justice system" status of quasi-judicial administrative tribunals at the highest levels of the legal system may well have been the address by the then Chief Justice of Canada, the Honourable Antonio Lamer, to the Annual Conference of the Council of Canadian Administrative Tribunals (CCAT) in 1991. [18] In his keynote speech to that Conference, the Chief Justice noted the difference between "regulatory agencies" and quasi-judicial tribunals. He did not use the "quasi-judicial" label but it was that category of tribunal to which he was clearly referring. He described them as: "tribunals ... created to operate essentially as adjudicators ... in a manner that is similar to the function of the judiciary ... [and] *expected to dispense justice in the same sense as the courts of law*". The Chief Justice's conclusion was that "as a result [of the proliferation of this type of administrative tribunal], the term '*administrative justice' has become relevant*". [19]

The Chief Justice's address to the 1991 CCAT Conference marked a major departure, in two significant respects. First, it was a public acknowledgement by the then most senior member of the Canadian judiciary that there were, indeed, administrative tribunals that had been ***310** created to operate not as regulatory agencies but as adjudicators and "expected to dispense justice in the same sense as the courts". Equally important, it constituted a public recognition by Canada's Chief Justice of the *justice system* relevance of the existence of this adjudicative category of tribunals.

The explicit, jurisprudential conclusions in *Paul*, in 2003, and in *Christie*, in 2005, that administrative tribunals are an integral part of the justice *system* were also foreshadowed by an important public statement by Ontario's Chief Justice, the Honourable Roy McMurtry, in November 1997. In an address to the annual Conference of Ontario Boards and Agencies, he said that the time had come to recognize that the justice system was comprised of two parts: a "judicial justice system" and an "administrative justice system". [20]

In that same year, the Law Reform Commission of Nova Scotia released its final report on Nova Scotia's administrative tribunals and it was entitled "Reform of the Administrative Justice System". [Emphasis added].

A year later, in 1998, in an address to the B.C. Council of Administrative Tribunals (BCCAT), Supreme Court of Canada Justice Beverley McLachlin added another senior judicial voice to this emerging recognition of the justice system attributes of quasi-judicial tribunals. The title of her address was "*The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law*". After noting that administrative tribunals are "of two types: 1. regulatory or licensing bodies, and 2. dispute resolving bodies [that] seem to be doing what the courts have traditionally done", she made the cogent point that "... a theory of the Rule of Law that cannot account for [the latter] bodies will have a very short life". [21]

After Chief Justice McMurtry's reference to the existence of an administrative justice *system* in 1997, the idea that administrative tribunals must be seen as instruments of justice quickly became commonplace in Ontario. A year later, as we have seen, Ontario's Agency Reform Commission gave its final Report on Ontario's "agency" sector the telltale title ***311** of "*Everyday Justice*." It also led off that Report with the keynote observation that "Regulatory and adjudicative agencies are an important part of the justice system". [22]

In 2001, when the B.C. government embarked on a major project to reform its system of administrative tribunals, it labeled that project: "The Administrative Justice Project". Thereafter, in 2003, the newly elected Ontario Liberal government joined the bandwagon when, in an address to the Society of Ontario Adjudicators and Regulator's annual Medal Award dinner, the Attorney General, the Honourable Michael Bryant, told the assembled audience of tribunal members that it was time to acknowledge the existence of three justice systems: "a criminal justice system, a civil justice system and an administrative justice system". [23]

(c) *Ocean Port* and *Bell*: Revisiting the Roles of Tribunals

The rule of law concern that Justice McLachlin had noted in her 1997 BCCAT speech was subsequently the backdrop for two notable Supreme Court of Canada decisions in which she played a leading role. In 2001, in *Ocean Port*, [24] McLachlin, who was by then the Chief Justice, speaking for a unanimous Court, appeared to characterize administrative tribunals, generically, as having a "primary policy-making function"; as having been "created precisely for the purpose of implementing government policy"; and as "ultimately [operating] as part of the executive branch of government". [25] For those tribunal reformers who had been encouraged by the emerging recognition of justice system status for Canadian quasi-judicial administrative tribunals (as suggested by Chief Justice Lamer in 1991, by Ontario Chief Justice McMurtry in 1997, and by Justice McLachlin herself in her 1998 address to the BCCAT Conference), the judgment of the

Supreme Court in *Ocean Port* seemed not just a set back but an 180 degree turn. Yet, only two-years later, in its unanimous judgment in *Bell*, [26] the Supreme Court took a major step away from the stand it appeared to have taken in *Ocean Port*. Called upon to characterize the nature of the *Canadian Human Rights Tribunal* (CHRT) for the purpose of assessing that tribunal's required degree of "independence", it ***312** described the CHRT's "main function" as "adjudicative" and, as mentioned above, recognized explicitly that it was not involved "*in crafting policy*". [27] It also, for the first time, recognized a "spectrum" [28] of tribunal types ranging from those whose functions were closest to that of the executive branch of government ("quasi-*executive* tribunals"), to those, like the CHRT, whose functions most closely resembled the functions of a court ("quasi-judicial tribunals"). [29]

Viewed from the vantage point of *Bell*, it seems evident that *Ocean Port*'s characterization of administrative tribunals as institutions of the executive branch, with functions that are primarily policy-making, cannot have been intended to apply generically to all administrative tribunals, but must have been intended to apply only to a limited category of tribunals -- arguably, perhaps only to those which, in her 1998 speech to the BCCAT Conference, Justice McLachlin had described as "regulatory agencies and licensing bodies". [30] Although the Court in *Bell* did not use "justice system" language to describe the status of quasi-judicial tribunals, it is plainly evident from the Court's description of the role and functions of the CHRT -- the tribunal which it effectively positioned as the prototypical example of a "quasi-judicial" tribunal -- that it viewed tribunals that fall within that category to be, in fact, instruments of justice. [31]

Relative to traditional administrative law analysis in Canada, the idea that there are some administrative tribunals that are as much a part of the judicial branch of government as the provincial courts is both novel and radical. And, in evaluating this new thought, it is important to examine the validity of the reasons for the historical perception that all administrative tribunals are executive branch.

*313 3. IS THE JUDICIAL BRANCH CONCEPT VALID?

(a) "Tribunals" vs. "Courts" -- How Relevant Are the Differences?

For purposes of considering whether, in light of the traditional view that the status of all administrative tribunals is exclusively executive branch, a judicial branch status for some administrative tribunals can be valid, it is important to examine the concept that administrative tribunals are instruments of justice, part of our justice system, yet nevertheless "not courts". What *is* the quintessential difference between *courts*, on the one hand, and "quasi-judicial tribunals", on the other? And is this difference in fact compatible with a justice system status for the latter?

As we have seen, references to the "*administrative* justice system" are now commonplace in Canadian administrative law, connoting a justice system comprised of "administrative tribunals". But, what is meant by the adjective "administrative" when applied to "tribunals"? And, indeed, what is meant by the word "tribunal" itself? The *Shorter Oxford English Dictionary* defines "tribunal" as "a court of justice; a judicial assembly". Thus, as the definition indicates, and our jurisprudence confirms, even courts may be correctly described as "tribunals". [32] So what do we intend when we add the adjective "administrative"? What is the content contemplated by that adjective?

In the administrative law literature, one finds little in the way of considered analysis. As far as one can see, when we insert the adjective "administrative" before "tribunal", the main thing we seem to be signaling is that this is a tribunal that is not a "court" in the common understanding of the latter term. In short, the adjective "administrative" seems to be generally used simply to signify "non-court" -- thus, an administrative tribunal is a non-court tribunal.

In distinguishing between non-court tribunals and court tribunals, commentators have inevitably been focused on the special attributes of the former. Typically, the question is: what are the special advantages or attributes of a non-court tribunal -- a quasi-judicial administrative tribunal -- that justifies the assignment of a particular rights-determining function to it rather than to a tribunal that is in fact a court? That is: what makes a quasi-judicial administrative tribunal not a court in the ordinary sense of ***314** the term? And, for the purposes of this paper, there is the obvious further question: is there anything in those distinctions that might prevent quasi-judicial administrative tribunals from being seen to be appropriate and effective components of a justice system?

Historically, in Canada, both the bar and the courts had good reason for distinguishing tribunals from courts rather than the other way around. This was not only natural because of the courts pre-eminent status but it was also necessary because, in the early development of tribunals, their constitutional legitimacy depended (if they were provincial tribunals) on their being seen *not to be courts*, at least not superior courts of the kind contemplated by s. 96 of the *BNA Act*. [33] However, to understand the relationships between quasi-judicial administrative tribunals and court tribunals, it is equally important to ask the reverse question: what distinguishes a court tribunal from an administrative tribunal? What is it that prevents courts from adopting the attributes and delivering the advantages of an adjudicative administrative tribunal? What is it about our ordinary courts that makes it inappropriate, or ineffective, or inefficient, to assign to them the adjudication of, say, welfare claims?

Tribunal-focused literature sometimes leaves one with the impression that the problem is simply that courts (and the judges who populate them) cannot bring themselves to condescend to the pragmatic, adjudicative processes which a high volume of highly technical, rights disputes in a specialized area typically require. But no one would seriously argue that the actual obstacle to

more efficient adjudication by the courts could be merely a refusal of courts and judges to stoop to the kind of practicable adjudication that government statutory enterprises need and quasi-judicial tribunals provide. And, in point of fact, the problem is not attitudinal it is structural. It is rooted in the courts' central role in our constitutional arrangements and in what is required for the courts to play that role.

The core societal role of our ordinary courts is to be the supervisors and guarantors of the rule of law, the interpreters of the constitution, the maintainers of society's ultimate standards of law and procedure, the ***315** trustees of the common law, the ultimate vindicators of individual rights and enforcers of individual obligations, and the final guardians of individual liberties. To be credible in those august, magisterial roles -- to be effective in doing all of that -- the courts must have, and must project, an appropriate *gravitas*. [34]

In order for courts to possess and project that essential *magisterial gravitas*, a number of basic institutional characteristics are implicitly required. The physical environment and regalia of their workplace must be dignified and impressive -- properly reflective of the seriousness and high purpose of the courts' role. Their procedure and process must be formal, carefully defined, and uniformly applied. They must also be the beneficiaries of a high standard of judicial qualifications and must cherish and defend an autonomous, and yes, even a lofty status, for each judge. It is the need to maintain those essential ingredients of a magisterial *gravitas*, the projection of which is indispensable to the courts' core societal role, that, for economic and other pressing reasons, effectively prevents courts from adapting themselves to the efficient, even expedient, high volume dispute resolution required by the specialized statutory enterprises that deliver such things as welfare benefits.

Nonetheless, the fact that high volume, dispute resolution in a specialized statutory enterprise does not require an adjudicative institution with the magisterial *gravitas* -- or the budget -- of a court does not mean that such institutions cannot be an integral part of the justice system. Like the courts, quasi-judicial tribunals determine citizens' legal rights and obligations through the authoritative adjudication of justiciable disputes, and this has always been the core component of a justice system's role. Thus, the administrative justice system is a *gravitas*-free adaptation of the traditional, magisterial justice system, but it is a justice system nonetheless -- a “no-frills” version, if you will, but, at its core, the same thing. [35]

***316 (b) The Historic Reasons for the Failure to Recognize the Justice System Status of Quasi-Judicial Tribunals**

(i) Introduction

In the minds of Canadian lawyers and academics, not to mention governments and bureaucrats, the idea that administrative tribunals, or at least some of them, are instruments of justice and

part of our justice system was a remarkably slow starter. Québec was something of an exception, as administrative *justice* became part of the currency of academic thought in Québec at least by 1971.[36] But, in the rest of Canada, even in 2006, we continue to find the attribution of justice system status for administrative tribunals by the Chief Justice of Ontario, by two Chief Justices of Canada, by the Supreme Court of Canada in *Paul*, and by the B.C. Court of Appeal in *Christie* to be -- what can one say -- a bit unexpected? And, in examining the validity of the view that at least some administrative tribunals are, indeed, part of the justice system, it is important to understand why it has taken until the 21st century in Canada for what seems a perfectly obvious perception to surface.

(ii) The contrast with the U.S. and the U.K.

The different experience in the United States, where some Americans understood the point very early, provides an illuminating contrast. The Roosevelt administration's policy of assigning adjudicative powers to political appointees in its "New Deal" agencies was strongly resisted during the 1930s and early 40s by the forces of civil libertarianism, as well as by the Republicans.[37] The outcome of that resistance can be seen in the 1946 Federal *Administrative Procedures Act* (*APA*) which established that the adjudicators of justiciable issues in Federal Agencies must be fully tenured "Administrative Law Judges", selected by an independent ***317** body through a rigorous and competitive selection process, and appointed, effectively, for life.[38]

In the U.K., the administrative justice system issue appears to have been first confronted circa 1973. Twenty-seven years after the enactment of the American *APA*, but still 18 years before Chief Justice Lamer's careful suggestion to his CCAT audience that the concept of "administrative justice" should be considered to be at least relevant, the venerated, English administrative law professor, W.A. Robson, addressed the issue. He pointed out that while the number of administrative tribunals in the U.K. was "growing apace", there had still been no discussion of the "principles that should inform a system of administrative justice", that "neither Parliament nor the government had felt able to rise to the height of a general proposition on this vital subject" and so had "failed to evolve a coherent system of administrative justice".[39]

Notwithstanding these developments in the U.S. and the U.K, the idea of a *system* of administrative *justice*, coherent or otherwise, had not taken hold in Canada (other than in Québec),[40] even within the ranks of ***318** academe. And, now, in 2006, it remains true -- to adapt the words of Professor Robson's description of the situation in the U.K. in 1973 -- that no Canadian government (with, as the author has said, the singular exception of the Québec government),[41] has ever felt able "to rise to the height of any general proposition concerning the principles that should inform a system of administrative justice".[42]

The reasons for this failure are to be found in at least four historic, seminal features of the Canadian administrative law landscape.

(iii) The reasons

A. The Diceyan distraction

Prominent amongst the reasons for delayed recognition of the justice system status of quasi-judicial tribunals is what one might call the "Diceyan distraction". Within the ranks of Canadian administrative law academics and the Canadian judiciary, the focus of interest concerning administrative tribunals has been principally the arguments between progressive proponents of modern administrative tribunals in their regulatory agency guise, on the one hand, and the conservative adherents to the iconic Professor Dicey's late-19th century rule of law questioning of the *legitimacy* of such tribunals, [43] on the other.

***319** The Diceyan argument was particularly distracting because, during the formative period of Canadian administrative law, [44] its adherents included the Canadian courts. As a result, it has been the relationship between courts and tribunals -- the degree of deference owed by the courts to these upstart tribunals, and the tribunals' degree of independence from the self-absorbed courts -- that was long the issue of overriding interest for Canadian administrative law scholars, tribunals and courts. With that issue at the forefront, and with the emphasis which that issue placed on the distinctions between tribunals and courts, there was little occasion or desire to take notice of the awkward fact that a significant proportion of such tribunals had been assigned a purely adjudicative, justice system function that was, in point of fact, effectively indistinguishable from the adjudicative function of the courts. [45]

For purposes of this paper, the question then presents itself as to whether recognition of a justice system/judicial branch status for quasi-judicial tribunals can be reconciled with Dicey's classic, rule of law theory about their inherent illegitimacy in justice system terms. In the author's view, the answer is clear. It can be so reconciled *if* the recognition of justice system status is followed by an appropriate justicizing of the tribunals' structures. For, it is the assignment of *de facto* justice system roles to organizations that are not structurally *justicized* that may be seen to be at the bottom of Dicey's rejection of the rule of law legitimacy of administrative tribunals.

B. Section 96

A second major reason for the delayed recognition of the quasi-judicial tribunals' justice system role is uniquely Canadian: the influence of the constitutional division of powers in the *BNA Act* and the fact that the constitutional validity of provincial administrative tribunals depends on establishing that they are not s. 96 courts. In that context, particularly ***320** in the early stages

of tribunal development when tribunals were novel and in many quarters controversial, the idea that a tribunal was an instrument of justice and part of the justice system was the last thing that its proponents would want to suggest. If the provincial tribunals were to survive and to flourish, it was the *difference* between tribunals and courts that, as a tactical matter, counsel -- and the courts -- had to emphasize and perhaps even embellish.

The s. 96 issue is no longer a practicable concern for tribunal proponents. Recent decisions of the Supreme Court of Canada, in which the constitutionality of the assignment of judicial functions to administrative tribunals in light of s. 96 has been considered from a modern perspective, have embraced a wide margin of flexibility in the analysis respecting the relationship between the assigned functions and s. 96 courts. [46] These decisions may be seen to make ample constitutional room for most of the justice system adjudicative tribunals now in place, and for any that one could reasonably contemplate being established in the future. [47]

C. Canada's long-standing acceptance of tradition and duty as sufficient guarantors of judicial independence

A third reason for the delay in the recognition of the justice system status of quasi-judicial tribunals is the fact, surprising to the modern eye, ***321** that it was not until the Supreme Court's 1985 decision in *Valente* [48] that the nature of the *structural* relationships between "independent" adjudicators and governments were seen by Canadian lawyers or courts to be even relevant to the independence issue. In the pre-*Valente* era, while specific provisions in the *BNA Act* [49] protected the independence of superior court judges, the independence of provincial court judges and tribunal adjudicators depended entirely on two, common law guarantors of independence, neither of which was structural. One was *tradition* -- the Anglo-Canadian tradition of governments voluntarily staying their hands when it came to interference with adjudicators -- and the other, *duty* -- the professional and ethical personal duty of individual adjudicators to make independent decisions without regard for their personal, structural dependency. Thus, prior to *Valente*, Canadian lawyers, academics and judges would not have seen the executive branch *locus* of quasi-judicial adjudicators, or their dependency on the line ministries in whose bosoms they reside, as presenting justice system issues. At that time, whether tribunals were perceived to be part of the judicial branch or the executive branch would have made no practical difference, as, in either case, their judicial independence would have been considered secure. At the time of writing this paper, in the year 2006 - 21 years after *Valente* -- the latter statement seems barely credible, but the historical evidence that structural safeguards for the independence and impartiality of provincial court judges or adjudicative tribunals were, until 1985, uniformly considered to be unnecessary, is clear.

To fully understand the seminal impact on the concept of judicial independence in Canada of Mr. Justice LeDain's judgment in *Valente*, [50] one must first examine the decision in the lower court -- the decision of the Ontario Court of Appeal (*Valente (No. 2)*). [51] On the question of what ***322**

constitutes judicial independence, the Le Dain judgment flatly disagreed with the unanimous view of a five-member panel of the Ontario Court that arguably comprised the most prestigious group of Ontario justices ever assembled on one judicial panel. [52]

The resort to a five-member panel and the recruitment to it of the Court's most distinguished members reflected the seriousness with which the Ontario Chief Justice viewed the *Valente* issue. For the first time in the history of the Province, the independence of Ontario provincial court judges had been put in question. The accused, Valente, was asking the Court of Appeal to find that, for a number of reasons, Ontario's provincial court judges failed to meet the independence requirement under s. 11(d) of the then newly minted *Canadian Charter of Rights and Freedoms*.

The Ontario Court's unanimous judgment rejecting that argument was written by the Chief Justice. It begins by making it abundantly clear that there is no question in the Court's mind as to the *importance* of judicial independence. "Judicial independence", Chief Justice Howland wrote, "is, like the rule of law, one of the cornerstones of our legal system". [53] The judgment then traces the history of the concept of judicial independence in Ontario (a history that one assumes will have been largely replicated in the rest of the country). [54]

Judicial independence, even of judges -- in England, first established by the *Act of Settlement* in 1701 was a relatively late blooming ***323** concept in Canada. It was not until the 1840s, that all superior court judges in Upper Canada held their offices during good behaviour, [55] and the independence of provincial court judges was truly late in arriving. In Ontario, for example, provincial court appointments continued to be explicitly "at pleasure" until 1952, and, after 1952, newly appointed judges served a two-year probation period that was not eliminated until 1968. Moreover, in 1982, at the time that Mr. Valente was first charged and convicted of a Highway Traffic offence, it was still true that provincial court judges, whose tenured term ended at age 65, could be appointed, at the discretion of the Attorney General, to serve *at pleasure* for another ten years. [56] The availability of these discretionary, at-pleasure appointments was one of the principle grounds for Mr. Valente's challenge of the independence of Ontario judges.

Valente (No. 2) is of particular historical interest. It was the first Canadian case in which the common law content of the concept of judicial independence was explicitly considered as it applied to judges. [57] And it affirmed the non-structural, duty-based, tradition-reliant concept of judicial independence that the Supreme Court of Canada had applied to administrative tribunals in its 1980 decision in *MacKay*. [58] In *Valente (No.* ***324** *2)*, the Ontario Court of Appeal officially recognized tradition and duty as sufficient guarantors of judicial independence even for actual judges, [59] and even when that requirement was clearly a constitutional requirement, as it had not been in *MacKay*. [60]

More significantly, however, the Court of Appeal's unanimous and unblinking acceptance in *Valente (No. 2)* of that non-structural view of the guarantors of independence was the provoking catalyst for Mr. Justice LeDain's seminal, contrary analysis two-years later. That analysis led a unanimous Supreme Court to finally found a concept of judicial independence for courts and tribunals that is grounded not in judicial duty and systemic tradition but in objective, structural guarantees.

One can safely assume from the distinguished and lengthy private-practice provenance of the five judges who joined in the Court of Appeal's judgment in *Valente (No. 2)*,[61] that the judgment will have faithfully reflected the concept of judicial independence implicitly understood ***325** by at least the Ontario bar through the long years of their respective careers. It was a judgment that was entirely congruent with Justice Ritchie's largely duty-based concept of independence for administrative tribunals in *MacKay*,[62] and one that relied extensively on the importance of *tradition* as the other guarantor of independence. Because the judgment makes the nature of the Canadian, pre-*Valente*, mainstream legal culture's understanding of the non-structural nature of the guarantors of judicial independence so clear -- an understanding that, even from this short distance, only 21-years later, seems archaic, arguably to the point of being quaint -- and also because it is an almost unique record of that understanding, a number of passages will be quoted *in extenso*.[63]

> ... Having considered the historical development of judicial independence in England and in Canada, *it is necessary to refer to the importance of traditions*. Quite apart from the Constitution or any statutory provisions, tradition has been an important factor in preserving judicial independence both in England and in Canada. In England, a majority of the judges can be removed by the Lord Chancellor, who is an active member of the Government. However, the high tradition of the office of Lord Chancellor has resulted in very few abuses of this power. As Hogg states in his text Constitutional Law of Canada (1977) at 120:
>
> The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.
>
> ...

The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background *and the traditions surrounding them*, after viewing the matter realistically and practically would conclude that a provincial court judge sitting as Judge Sharpe was to hear the appeal in this case was a tribunal *which could make an independent and impartial adjudication* ....

... Appointments at pleasure are a matter of concern where independence is concerned. However, as already noted, a tradition has been established by the present Attorney-General over the last seven years only to make such reappointments on the recommendation of the chief judge of the appropriate provincial court. I do not consider this provision as to reappointments at pleasure to be of sufficient gravity as to lead a reasonable man to conclude that the tribunal was not independent and impartial, particularly in the light of the tradition which has been established by the Attorney-General ....

***326** ... In my opinion, none of the powers above referred to ... would be viewed by the reasonable man as being of sufficient importance as to impair the independent adjudication of a provincial court judge ....

... On the hearing of this appeal, no submission was made that the Attorney General in his role as prosecutor interfered in any way with the sittings of the court, its lists, or the process of adjudication ....

... I have reached the conclusion that the concerns raised by the counsel for the respondent neither singly nor collectively would result in a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication. In my opinion, the provincial court in this province is as a matter of law an independent tribunal. Judge Sharpe sitting as a member of the court was independent, and as has been noted earlier, he was

> impartial. Therefore, the respondent appeared before an independent and impartial tribunal within the Charter.

Given the understanding of the duty-based, tradition reliant nature of independence guarantees so clearly reflected in these passages, and considering the illustrious reputation of the five Ontario judges who endorsed that understanding, it is apparent that the Supreme Court of Canada's considered rejection of that understanding on the appeal of Chief Justice Howland's decision marked an historic and abrupt sea change in one of the foundational principles of Canadian justice. For there is no mistaking the fact that LeDain J. (also from Ontario but from an academic rather than a practice background), and his Supreme Court colleagues, were fully aware that they were staking out a major point of departure from the traditional understanding of the concept of judicial independence in Canadian law. After quoting from the passages in Chief Justice Howland's judgment that identified tradition as the principle support of judicial independence, Justice LeDain emphasized his understanding of that point by his own additional reference [64] to the following statement to the same effect from Lord Denning's book, *The Road to Justice:* [65]

> The County Court judges have some measure of protection but the stipendiary magistrates and the justices of the peace have no security of tenure at all. They hold office during pleasure ....
>
> Nevertheless, although these lesser judges can theoretically be dismissed at pleasure, the great principle that judges should be independent has become so ingrained in us that it extends in practice to them also. They do in fact hold office during good behaviour and they are in fact only dismissed for misconduct. If any Minister or Government Department should attempt to ***327** influence the decision of any one of them, there would be such an outcry that no Government could stand against it.

It is apparent, therefore, that Justice LeDain understood the point very well. He understood it, but he wasn't buying it. The new constitution had opened a modern constitutional era in Canada in which it was no longer acceptable to leave a foundational constitutional imperative like the independence of the judiciary ultimately dependent on mere tradition. While tradition might restrain interference with judicial independence, it could not, Justice LeDain said, “supply the essential conditions of independence”. For that, “specific provisions of law” were necessary. [66]

And it is that understanding of judicial independence, as articulated by LeDain in *Valente*, that now prevails: an independence that must be assured by objective, structural guarantees of the three "conditions" of independence: security of tenure, financial security and administrative control.

Of course, LeDain's decision in *Valente* dealt only with the concept of tribunal independence as that concept was constitutionally mandated by s. 11(d) of the *Charter*. The *Valente* decision could not be seen as necessarily changing the *common law* of judicial independence applicable in the absence of any explicit constitutional or quasi-constitutional requirement. It particularly could not be seen to be doing so for *administrative* tribunals because, while it was addressing language in s. 11(d) that encompassed tribunals that were not necessarily courts, nevertheless the issue the Court actually had before it in *Valente* was the independence of a provincial court judge.

However, subsequent decisions of the Supreme Court -- *Généreux*[67] overruling *MacKay*[68] with respect to court martial tribunals; *Matsqui* ***328** [69] extending the *Valente* principles to tribunals not protected by constitutional independence requirements; and others -- have eventually entrenched the *Valente* principles of structural guarantees of judicial independence as applicable to both provincial court judges and quasi-judicial tribunals and their members, whether or not there is any constitutional or quasi-constitutional independence requirement. *Matsqui*, a decision that is now only 11-years old, marked the beginning of the modern common law of judicial independence of quasi-judicial tribunals in which objective structural guarantees are now understood to be the fundamental, independence prerequisites.

Thus, prior to *Valente* there was no basis in our law nor, as the reaction of the prestigious panel of former practitioners in *Valente (No. 2)* makes clear, any disposition within our legal culture, for being at all concerned with the dependent structural relationships between quasi-judicial tribunals and governments inherent in a tribunal's executive branch status. But, after *Valente*, and certainly after *Généreux* and *Matsqui*, that issue can no longer be ignored.

D. The entrenched countervailing interests of the executive branch

The fourth reason the Canadian administrative law system ignored the inherent, justice system status of quasi-judicial tribunals for so long is the fact that continuing to characterize tribunals as regulatory agencies and part of the executive branch (and *not* as instruments of justice) serves fundamental and deeply entrenched interests of the executive ***329** branch of government in maintaining *de facto* control of such tribunals.

Historically, of course, there has never been any shortage of government and ministry *claims* that tribunals are independent. The *rhetoric* of tribunal independence is in fact ubiquitous. The *perception* that tribunals operate at arms length from government -- and the government's public promise that they will be allowed to do so -- is what makes tribunal decision-making as acceptable

as it is to the people who win or lose by their decisions. It is also what insulates the politicians and the bureaucrats from political or professional responsibility for those decisions. It is the public perception of independence that makes tribunals so attractive to governments and bureaucrats of all stripes. And so, politicians and bureaucrats have to *talk* about, and give assurances of, independence.

However, underneath that talk and below those surface assurances will be found a strongly felt need for political accountability -- and for the control that is the handmaiden of that need. *Administrative* accountability is, of course, not an issue. That is a goal that governments openly espouse; it is seen to be the other side of the independence coin. A tribunal's independence, it is typically said, cannot be achieved at the cost of its accountability. And, it is obviously true that tribunals must, as a practical matter, be both independent from government and *accountable* to government. However, it is essential to distinguish between administrative accountability for the quality of a tribunal's performance, and *political* accountability for what it decides.

The instruments of tribunal administrative accountability are numerous. They typically include:

1. the obvious overt control over the quality of tribunal decision-making provided by the usual court supervision of decisions through appeals or judicial review proceedings;

2. the review of the tribunal Chair's performance at the time of his or her re-appointment;

3. the routine auditing of a tribunal's financial administration;

4. annual reports to the Legislature;

5. case hearings that are public;

6. full and published reasons for decisions;

7. periodic value-for-money audits; and so on.

Administrative accountability is not, in principle at least, incompatible with judicial independence.

***330** *Political* accountability is a different thing. It is tribunal accountability to government for *what* the tribunal decides. And, therefore, if there is effective political accountability, there is effective government control or major influence over what is decided. Political accountability is plainly incompatible with any concept of judicial independence. But, with respect to administrative tribunals, even quasi-judicial tribunals, there is nonetheless a not un-principled argument that can be made for maintaining political accountability.

Putting aside the politicians' and bureaucrats' famous venal motives for maintaining control of tribunals, for instance -- the patronage interests of government, and the self-serving concern of bureaucrats that their decisions and policies not be held up in public view to truly independent criticism -- there are legitimate grounds for a government to be concerned about *what* a tribunal is deciding.

Every quasi-judicial tribunal is typically the exclusive adjudicative arm of a statutory enterprise the government has established for the implementation and delivery of a particular policy. In exercising its monopoly on the determination of every rights dispute arising from the application of that policy -- in its role as the specialized, exclusive interpreter of the statute drafted to reflect that policy -- a quasi-judicial tribunal's decision-making is the thing that puts the flesh on that policy's bones and eventually determines in many important respects its ultimate shape and direction.

Naturally, a government has an interest. The Minister responsible to Cabinet and the Legislature for that policy, and the senior bureaucrats who were responsible for drafting the legislation to serve the policy goals specified by the Minister and Cabinet, will be understandably concerned if the shape or direction of the policy emerging from a tribunal's adjudicative decisions is not what they had intended when they conceived the policy initiative in the first place.

In short, the history of tribunal/government relationships is, most fundamentally, the history of how governments have accommodated themselves to this conflict between what politicians and bureaucrats must *say* about independence and what they understand they must *have* in the way of control. And it is the perceived need for that accommodation that is the motivating factor in the

refusal of governments and bureaucrats to accord quasi-judicial tribunals the structural guarantees of independence appropriate to an instrument of justice.

A tribunal that is truly a regulatory agency, one that does "craft policy", to use the language of the Supreme Court in *Bell*, is a tribunal that many people will acknowledge should be staffed by members who ***331** share the government's ideological stance respecting the subject matters within its jurisdiction. Thus political patronage appointments to such tribunals and the use of the re-appointment power to filter out members whose decision-making proves to be incompatible with the government's own policy perspectives seem fairly defensible. [70] So too does the practice of assigning the responsibilities of a tribunal's "host" ministry -- the responsibilities for the tribunal's budget, administrative support, appointments, *etc*. -- to the line ministry that is ultimately responsible for the policy that such a tribunal will be implementing.

Short-term political appointments and discretionary re-appointments, and keeping tribunals reliant for budget, administrative support, and appointments on the line ministries responsible for the policy on which the tribunal's decision-making impacts, are, historically, the strategies of choice for maximizing the actual political accountability of tribunals. From the perspective of the politicians, the executive branch ministers and the bureaucrats, these are strategies with the important advantage of being operationally largely covert in their influence. They combine to produce tribunal environments that are innately attuned to the needs and expectations of government. Rarely will the need arise for a government to make any explicit demands of such a tribunal, nor from such a tribunal's decision-making will a government often find itself fielding any major surprises. For the truth is that governments are dealing with organizations that have been created, as it were, in their own image. In this way, political appointment processes and line ministry hosting largely resolve, by covert means, the government's perceived need for political accountability of both regulatory agencies and quasi-judicial tribunals alike.

***332** Unfortunately, these are strategies that are self-evidently not congruent with the structural imperatives of a justice system, particularly not with the requirements of judicial independence and impartiality. Tribunals that are subjected to these strategies are not independent and impartial, as those concepts were defined by *Valente*; they are structurally dependent and inherently biased, at the very least in the legal sense of giving cause for a reasonable apprehension of bias. Thus, recognition of a justice system status for quasi-judicial tribunals presents a serious, long term problem for governments and their bureaucracies. Once that status becomes the orthodox view, governments must anticipate that, for those tribunals, both of these major, covert control strategies will, in the long run, cease to be viable.

This anticipation is, by itself, an exigent reason for governments to resist the characterization of quasi-judicial tribunals as instruments of justice and components of the justice system. But it is not, of course, the only reason. The interests of ruling political parties in maintaining their inventories of patronage positions, and bureaucrats' reluctance to subject themselves to public criticism by

truly independent tribunals, are two other factors that seem likely to have been just as influential. The latter are not, however, considerations that can legitimately weigh against the demands of a principled justice policy; by contrast, the threat that justicizing presents to the *de facto* political accountability of quasi-judicial tribunals is a concern that can be seen to be, at least arguably, grounded in principle -- the constitutional principle of ministerial accountability to the Legislature for the implementation and administration of its legislated policy.

Is, then, the executive branch's interest in political accountability an interest that might provide a sufficient, principled reason for rejecting justice system status of quasi-judicial tribunals and the structural justicizing that that status will necessarily entail? Or, to put the question another way, does a quasi-judicial tribunal's monopoly on the dispute resolution function for a particular statutory enterprise, and the attendant, perhaps disproportionate, impact which that tribunal's decisions have on the development of that enterprise's policy, justify retaining the covert strategies of political influence at the cost of exempting quasi-judicial tribunals from membership in the justice system?

Underlying this question is an unstated, *a priori* premise that is in the nature of the, by now trite, elephant-in-the-corner-of-the-room of which no one cares or dares to take notice. The ignored, elephantine premise here is that the decision-making of structurally independent justice system adjudicators is itself free of political influence. And, of course, ***333** this is a premise that is not universally accepted, and particularly, perhaps, not with respect to the decision-making of quasi-judicial tribunals.

The countervailing view is that most justice system adjudicators, if not all, consciously or unconsciously pursue in their decision-making their own personal, ideological agendas. In its extreme version, that theory goes to the extent of claiming that adjudicators only pretend to be objectively applying the law; that, in point of fact, the impartiality of adjudicators is typically, deliberately feigned. [71] If one accepts that, either consciously or unconsciously, adjudicators craft their decisions to promote their own ideological or political agendas, then one must also accept -- as one of the critics of that theory has said -- that so-called independent adjudication amounts to nothing more than “an empty facade of *false legality* ... the enforcement of politics in the thin disguise of the law”. [72]

Space does not permit a full exploration here of the respective merits of the varying characterizations that one finds in the literature of legal philosophy of what judges are doing when they adjudicate. [73] But, if one is to address the justicizing of adjudicative tribunals, as this paper does, one must be clear where one stands on that issue. And this author stands on the side of those who believe that a concept of adjudication that positions judges and other adjudicators as manipulators of the law in the service of personal ideological or political agendas is one that is deeply incompatible with any principled, liberal theory of justice, including the traditional Canadian theory of justice.

There is also a strong constitutional law case to be made against basing the design of tribunals on the premise that ideological judging is the norm. In Canada, absent constitutional protection of tribunal independence and impartiality, the administration of quasi-judicial tribunals at the strategic level is, as a practical matter, within the exclusive purview of the executive branch. Accordingly, absent such protection, it is open to the executive branch to adopt an administrative justice strategy based ***334** on the concept of ideological judging. Such a strategy would then dictate appointment processes that ensure that, in tribunal decision-making, the adjudicative ideology will be responsive to the executive branch's ideology -- that, on important issues, the tribunals and their members may be relied upon to be "safe and tender guardians of the regal rights". [74]

But such a strategy is plainly incompatible with the constitutional principle of the separation of powers. By adopting ideological judging as the norm for quasi-judicial tribunals and their members (thereby justifying the filling of quasi-judicial tribunal vacancies with political appointees), and then, by legislation enacted by executive-dominated legislatures, transferring judicial functions from the courts to those tribunals, the executive effectively expropriates the judicial power and transfers it from the judicial branch -- from the justice system -- to what Dicey would characterize dismissively -- and rightly -- as the executive branch's own "official courts". [75]

The theory that all judging is political is not, therefore, a view of quasi-judicial tribunal adjudication that our courts can be expected to endorse.

Regrettably, though, everything points to Canadian politicians and bureaucrats typically sharing the belief that political judging is, indeed, what even quasi-judicial tribunals and their members typically do. [76] ***335** For them, it is a convenient belief because it is only on the basis of accepting, as the unavoidable reality -- or, indeed, as the preferred reality -- that tribunal adjudication is no more than a thinly disguised enforcement of politics, that line ministry control of quasi-judicial tribunals, and political appointments to adjudicative positions (and incoming governments' frequent replacement in those positions of "their neutrals with our neutrals") can hope to find any legitimacy or theoretical justification.

It follows, therefore, that for the justicizing of quasi-judicial tribunal structures we will have to begin with the courts -- and, in particular, initially to the extension to members of quasi-judicial tribunals of the unwritten constitutional protection of judicial independence that is now accorded to provincial, civil law court judges, justices of the peace, and small claims court deputy judges. [77] Governments cannot be relied upon ***336** to volunteer for this assignment. To be sure of that fact, one need only look at the abysmal record of Canadian governments in steadfastly refusing to implement virtually any of a constant parade of major tribunal reform recommendations from a multiplicity of official commissions and studies.

So, then, to revert to the question under consideration before the issue of ideological judging raised its contentious head. Does a quasi-judicial tribunal's monopoly on the dispute resolution function for a particular statutory enterprise, and the attendant pervasive impact which that tribunal's decisions will have on the ultimate shape and direction of that enterprise's policy, justify retaining the traditional, covert political accountability of quasi-judicial tribunals at the cost of exempting them from membership in the justice system and all that goes with that membership?

Obviously, how one answers that question depends on one's view of the ideological judging issue. The author's answer is predicated on the view that non-ideological judging, which is to say judging by adjudicators professionally dedicated to "going where the evidence and the law fairly takes them", [78] to deciding on the basis of the rules laid down rather than on the basis of their own political preferences - and who see objective decision-making to be a matter of personal integrity, does exist; that it can, through non-political, merit-based appointment and re-appointment processes, and through structural guarantees of independence, be generally assured; and that it is one of the structural imperatives of any justice system worthy of the name. On that footing, the answer is clearly no, and for the following reasons.

First, from the perspective of the parties who are required by law to look to a quasi-judicial tribunal for the authoritative resolution of disputes about their legal rights and obligations, that tribunal will be seen to be, and, in point of fact will be, as much an instrument of justice as a court. The adjudicative function of quasi-judicial tribunals is identical to the adjudicative function of the courts, and their hearing procedures are, at bottom, in all essential respects, the same. The tribunals' remedial ***337** powers are different, and their adjudicative jurisdiction is obviously much narrower, but the impact of their hearing processes and of their decision-making on legal rights, and their potential for authoritatively dispensing justice to, or inflicting injustice and harm on, the parties who come before them, are virtually identical.

Any carefully considered contemplation of the potential for the infliction of life-altering harm and grave injustice by the rights decisions of immigration and refugee tribunals, social benefits tribunals, workers' compensation tribunals, human rights tribunals, labour relations tribunals, and landlord and tenant tribunals, to mention only a few obvious categories, will confirm that the justice dispensed by these tribunals is manifestly of no less significance than the justice dispensed by the provincial courts.

A justice system that fails to embrace such tribunals is not only deficient in principle, it is also a justice system whose own societal reputation stands to be fundamentally undermined by that failure. The injustices inflicted by a dependent, biased and only marginally competent quasi-judicial tribunal will be inevitably chalked up to a failure of the justice system. Thus, in terms both of the interests of individual citizens and of a tenable, overall societal justice policy, leaving

the quasi-judicial tribunals out of the justice equation is not defensible -- not on principle and not from a policy perspective.

Second, it is deeply destructive of the integrity of our political processes to have public, government representations of tribunal independence and impartiality being routinely undermined by government back-channel strategies that disrespect those representations -- that are, indeed, designed to subvert those representations. The latter concern was, it may be noted, one of the "basic premises" of the Ratushny Report. "Canadians should be told by Parliament", Professor Ratushny said:

> whether or not a tribunal or agency is independent of government, and they should be entitled to rely on what they have been told .... It is facile to give a tribunal the appearance of independence without the reality. ... It is essential to continued public confidence in the administration of justice that those tribunals which appear to the public to be independent are in fact independent .... When the government creates a body which is intended to exercise functions 'independent' of that government, such independence should be real and not a sham. [79]

And, finally, even from a *realpolitik* perspective, covert and unprincipled means of ensuring political accountability cannot be justified ***338** for they are not essential to that purpose. Political accountability of tribunals can be readily effectuated through overt, principled means. Ministerial policy directions, policy guidelines, appeals to cabinet, and legislated amendments to regulations or statutes are all principled and transparent means readily available to line ministries for correcting a policy direction that has been deflected by unforeseen adjudicative decisions of an independent quasi-judicial tribunal. Moreover, it is not difficult to envisage other "correcting" strategies and tactics that would not offend any principle of justice.

In short, there are no executive branch considerations that can be validly said to justify exempting quasi-judicial administrative tribunals from their *de facto* justice system judicial branch status.

4. CONCLUSION

Thus, it seems clear that, among the factors that one can identify as accounting for Canadian's historic failure to recognize the justice system status of quasi-judicial tribunals, there is no convincing reason to question the validity of that status, and much that explains that failure. In the author's view, it is, in the end, really self-evident that quasi-judicial tribunals are inherently a part of our justice system and a *de facto* component of the judicial branch of government. What remains to be seen is whether Canadian courts and governments are prepared to deal in a principled way with the necessary implications of the emerging recognition of that status.

PART II

In Part II of the paper, which is to be published in the next issue of the Journal, the author proceeds on the basis of asking: when the orthodox view of quasi-judicial administrative tribunals comes to be that they are not regulatory agencies but rather instruments of justice comprising an integral part of our justice system and, therefore, like the provincial inferior courts, a part of the judicial branch of government, what then?

The author's answer is that, then, it will be necessary as a matter of both principle and policy to identify and implement the steps required to justicize those tribunals -- to make them, that is, congruent with the structural imperatives of a valid justice system. The author argues that those imperatives consist, first, of constitutionally protected structural ***339** *independence and impartiality, and, second, of the structural optimizing of tribunal adjudicative competence. What it will take to make quasi-judicial tribunals congruent with those imperatives, and how it is to be done, are the issues addressed in Part II.*

Footnotes

1 D.Jur candidate, Osgoode Hall Law School's graduate student program; former, inaugural Chair and CEO of Ontario's Workers' Compensation Appeals Tribunal (now WSIAT); and former, inaugural President of the Ontario Society of Ontario Adjudicators and Regulators (SOAR). The author acknowledges the valuable assistance of Mary E. McKenzie, LL.B., MPA, member of the Law Society of B.C. The paper was originally presented at the Osgoode Hall Law School, Graduate Law Students Association's 2006 Conference "*Scholars and Advocates: Driving the Changing Face(s) of the Law*".

2 This heading is intended to echo the title "Everyday Justice" which, after a lengthy examination of Ontario's administrative tribunals, the Ontario Reform Commission on Ontario's Regulatory and Adjudicative Agencies saw fit to give to its 1998 Report.

3 Space does not permit a chapter-and-verse support for this negative characterization of Canadian quasi-judicial administrative tribunals. However, no one intimately familiar with the administration of tribunals in Canadian jurisdictions (with the exception, one must be careful to emphasize, of the Province of Québec, of which more later) can dispute the fact that patronage considerations are still a common determinant in appointments of tribunal members; that member qualifications often do not reflect the qualifications a competent adjudicator actually requires; that appointments are typically for fixed terms of short duration and subject to arbitrary, and unexplained re-appointment decisions; that compensation levels are typically non-competitive, often to the point of embarrassment; and that governments continue to see as unexceptional the ubiquitous and often egregious conflicts of interest and dependency between "host" line ministries and their "independent" tribunals.

4 It is not technically correct to speak of *a* Canadian justice system except in the most general sense. Each province and territory has its own justice systems -- civil and criminal as well as administrative, and in addition there is the Federal justice system. I use the singular "justice *system"* label to refer to the accumulated notional fact of a Canadian justice system encompassing all of its myriad components.

5 See, for example, Joel Feinberg, *Social Philosophy*, (Englewood Cliffs, N.J.: Prentice Hall, 1973) at 99; and "Justice, Fairness and Rationality" (1971-72) 81 Yale L. J. 1004 at 1005.

6 *Bell Canada v. Canadian Telephone Employees Assn*. (2003), [2003] 1 S.C.R. 884, 2003 CarswellNat 2427, 3 Admin. L.R. (4th) 163, 227 D.L.R. (4th) 193 (S.C.C.) [*Bell*].

7 "Judicial tribunal" was the label chosen by the McRuer Report. See McRuer, James Chalmers (1968), *Royal Commission Inquiry into Civil Rights* [McRuer Report], Report No. 1, Vol.1 at 120-23.

8 *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 CarswellBC 2432, 5 Admin. L.R. (4th) 161, 231 D.L.R. (4th) 449 (S.C.C.) [*Paul*].

9 *Ibid*. at para. 22 [S.C.R.] [Emphasis added].

10 *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 CarswellNS 360, 4 Admin. L.R. (4th) 1, 231 D.L.R. (4th) 385 (S.C.C.) [*Martin*].

11 2005 BCCA 631, 2005 CarswellBC 3040, 262 D.L.R. (4th) 51 (B.C. C.A.), additional reasons at 2006 CarswellBC 286 (B.C. C.A.), leave to appeal allowed (2006), [2006] S.C.C.A. No. 59, 2006 CarswellBC 1245 [*Christie*].

12 *Ibid*. majority judgment of Newbury JA., at para. 75 [BCCA] [Emphasis added].

13 It is, of course, accepted that provincial courts are part of the judicial branch. See, for example, *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 CarswellBC 1877, 204 D.L.R. (4th) 33, 34 Admin. L.R. (3d) 1 (S.C.C.) at para. 30. [S.C.R.] [*Ocean Port* cited to S.C.R.].

14 It is of interest that neither *Paul* nor *Christie* make any distinction between different categories of "administrative tribunals". Thus, there may be a case for assigning justice system status to the judicial functions of all types of administrative tribunals. However, that is not a subject that I will explore in this paper.

15 The procedural reforms that appeared in the Ontario *Statutory Powers Procedures Act* in 1971, following the recommendations of the McRuer Report, might be thought an exception to this general statement. They have often been criticized for forcing tribunal hearings too much into the mold of court hearings and for pandering to the Diceyan distrust of tribunals. But these reforms did not in fact confront the *structural* implications of assigning a justice system role to tribunals.

16 For example, the Ontario Management Board's *1992/93 Guide to Agencies, Boards and Commissions* placed the "functions" of Ontario's "agencies" into three categories: 1. *Advisory Agencies*, 2. *Operational Agencies*, and 3. *Regulatory Agencies*, with quasi-judicial agencies included within the regulatory agencies category. By 1996, the Ontario terminology had changed. The government-appointed agency reform commission that produced what is now known as the Guzzo Report was called the "Reform Commission on Ontario's Regulatory *and Adjudicative* Agencies" [Emphasis added]. However, in fact, the Report's recommendations made no distinction between regulatory and adjudicative agencies, and neither did the subsequent, so-called Guzzo Report implementation documents issued in binder format in November 2000. Currently, the Ontario government classifies each of its "agencies" in one of three categories: "advisory", "regulatory" or "adjudicative". This change first appeared in the Ontario Management Board Secretariat's "Agency Establishment & Accountability Directive" issued in February 2000. (See the Ontario's Ministry of Government Services Web site at: http:// www.ppitpb.gov.on.ca/mbs/psb/psb.nsf/english/agency_class.html).

17 It *is* true that, in 1979, the Supreme Court had ruled (in *Blaikie v. Québec (Attorney General)*, [1979] 2 S.C.R. 1016, 1979 CarswellQue 156, 101 D.L.R. (3d) 394 (S.C.C.)), that the adjudicative tribunals of Québec must be considered "courts". But this was for the purposes of the constitutional guarantee of the use of either French or English "in ... all or any of the *Courts* of Québec" (in s. 133 of the *BNA Act*), and the justice *system* connection was not made. Moreover, the *Blaikie* decision proved to have no jurisprudential legs. In the *Provincial Court Judges Reference, Ocean Port*, and *Bell* (*supra*) -- three subsequent, prominent cases in which the Supreme Court of Canada had occasion to squarely address the similarities between tribunals and courts (and which will be referred to later) -- *Blaikie*, unaccountably, attracts no mention.

18 Subsequently published under the title: "Administrative Tribunals - Future Prospects and Possibilities" 5 C.J.A.L.P. 107. This was a point of departure for all Canadian jurisdictions except, again, for Québec. The Ouellette Report's stated preference in 1987 for calling members of Québec's "adjudicative" tribunals "Administrative Law *Judges*" was an earlier indication of non-traditional thinking in Québec about the relationship between Canadian administrative tribunals and the justice system.

19 *Ibid*. at 109. (The emphasis throughout this paragraph has been added.) Acknowledgement that there were administrative tribunals whose judicial function was so integral a part of their inherent nature as to require them to be categorized separately from run-of-the-mill regulatory agencies was, of course, not new. As noted in note 7, the McRuer Report had referred in 1968 to such tribunals as "judicial tribunals". And, as a further example, in 1990 the Ratushny Report had recommended that the label "tribunal" be reserved for what it called "adjudicative tribunals". Edward Ratushny, Canadian Bar Association Report on the Independence of Federal Administrative Tribunals and Agencies, (Ottawa: University of Ottawa, 1990) at 31 [Ratushny Report].

20 Unpublished address to the Conference of Ontario Boards and Agencies in November 1997. Justice Bastarache's identification, in *Paul*, of administrative tribunals as being part of "the justice system" seems to refer to the justice system writ large, as it were. Chief Justice McMurtry's concept of a two-tier justice system is a more nuanced concept, and one that is potentially less radical and perhaps, in the long run, more useful.

21 Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 C.J.A.L.P. 171 at 176. [Emphasis added].

22 *Everyday Justice* -- Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies, April 1998, Introduction, at 1.

23 Unpublished address, November 6, 2003.

24 *Ocean Port Hotel, supra* note 13.

25 *Ibid*. at paras. 24, 32.

26 See *Bell, supra* note 6.

27 *Ibid*. para. 23 [S.C.R.] [Emphasis added].

28 The concept of a "spectrum" of administrative tribunals may have originated with Professor David Mullan. See D.J. Mullan, *Administrative Tribunals: Their Evolution in Canada from 1945 to 1984* in I. Bernier & A. Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 155 at 159, which is cited in the Ratushny Report, *supra* note 19 at 29.

29 *Bell, supra* note 6 at para. 21 [S.C.R.].

30 It may be noted that in her judgment in *Ocean Port*, McLachlin C.J. was careful to characterize the tribunal whose independence was at issue in *Ocean Port* as a "licensing body". See *supra* note 24 at para 33.

31 See *Bell*, supra note 29.

32 The SCC has, for instance, taken it for granted that the word "tribunal" in s. 11(d) of the *Charter* encompasses provincial courts and provincial court judges. See *R. v. Valente*, [1985] 2 S.C.R. 673, 1985 CarswellOnt 948, 24 D.L.R. (4th) 161, 49 C.R. (3d) 97 (S.C.C.) [*Valente* cited to S.C.R.].

33 See, for example, the jurisprudential references and analysis by the Privy Council in *Saskatchewan (Labour Relations Board) v. John East Iron Works Ltd*. (1948), [1948] 4 D.L.R. 673, 1948 CarswellSask 64 (Saskatchewan P.C.). The fact that provincial tribunals cannot be courts in the sense contemplated by s. 96 does not mean that they cannot be part of the justice system. For example, provincial courts are not courts in the s. 96 sense of the term but are nevertheless accepted as part of the judicial branch of government. (See *Ocean Port, supra* note 13 at para 30.)

34 *Dictionary.com*: "Gravitas" -- noun: High seriousness (as in a person's bearing or in the treatment of a subject).

35 Particularly indicative in this respect is the Supreme Court of Canada's 2003 confirmation (in *Paul, supra* note 8; and in *Martin, supra* note 10), that the jurisdiction of administrative tribunals implicitly includes the interpretation and application of the Constitution, and its even more recent confirmation in *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, [2006] S.C.J. No. 14, 2006 CarswellOnt 2350, that administrative tribunals have a mandatory jurisdiction to rule on whether their constituent statutes are congruent with the provisions of applicable human rights codes.

36 In Québec, the seminal point of departure in this respect seems to have been the publication of the 1971 "Dussault Report" - *Les tribunaux administratifs au Québec: rapport du Groupe de travail sur les tribunaux administratifs* (René Dussault, as he then was, Chair). Dussault is now a member of the Québec Court of Appeal.

37 Ann Marshall Young, "Judicial Independence in Administrative Adjudication: Past, Present and Future", (1999) 38:3 Judges' Journal 16.

38 See the 1989 *Program Handbook for Administrative Law Judges*, published by the United States Office of Personnel Management, and, more currently, the Federal Employment Info Line (Fact Sheets): Administrative Law Judges, EI-28, 1999, on-line at: www.usajobs.opm.gov/EI28.asp. See also the current description of federal administrative law judges on the Web site of the *Federal Administrative Law Judges Conference* at: http:// 005754d.netsolhost.com/faljcl.html, and the U.S. *Administrative Procedure Act*, 5 U.S.C., ss. 3105, and 4301(2)(D).

39 W. A. Robson [essays] in R. E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (London: George Allen & Unwin, 1973) at 197, and referred to in Frans Slatter, *Parliament and Administrative Agencies in Law Reform* (Ottawa: Minister of Supply & Services, 1982), Administrative Law Series 1982.

40 I have now more than once mentioned that the Province of Québec is a singular exception to the generally poor administrative justice record in other Canadian jurisdictions. The reference is to that Province's 1996 radical reform of its administrative justice system (following the 1971 Dussault Report [*supra* note 35] and the 1989 Ouellete Report) when, in "*An Act Respecting Administrative Justice*" (Bill 130, enacted December 1996), it created TAQ -- the *tribunal administratif du Québec* -- and its supervising council, *the Conseil de la justice administrative*, and assigned to the new tribunal the adjudicative responsibilities of a high proportion of Québec tribunals. The tribunals whose adjudicative functions were moved to TAQ were those operating in four major areas: 1. social affairs; 2. immovable property; 3. territory and environment; and 4. economic affairs. Québec's 1996 legislative reforms effectively created a professional administrative justice system devoted to merit-based competitive appointments processes, open and merit-based re-appointment processes, and institutional independence and competence. For an authoritative description of TAQ, see the Québec Court of Appeal's judgment in *Barreau de Montréal c. Québec (Procureur général)*, [2001] Q.J. No. 3882, 2001 CarswellQue 1950, 48 Admin. L.R. (3d) 82 (Qué. C.A.), leave to appeal refused (2002), 2002 CarswellQue 2078 (S.C.C.), reconsideration refused (2002), 2002 CarswellQue 2683 (S.C.C.) [*Barreau de Montréal*]. The focus of this paper is the rest of Canada where, so far, the Québec reforms appear to have had zero impact.

41 The reader is asked to note that, hereafter, references to "Canada" should be deemed to contain an implied Québec qualifier. In Canadian administrativejustice matters, Québec is the exception that proves the rule.

42 Of course, the Province of British Columbia did have its *Administrative Justice Project*, which, in 2003, led to a set of legislative reforms. However, even after that Project's long and thorough study of the subject, the B.C. Legislature was not, in the end, prepared in fact to "rise to the height of a general proposition" concerning "the principles which should inform a system of administrative justice". Consider, for instance, the failure to subject the tribunal member *re*-appointment process to the merit principle, or to resolve the egregious conflicts of interest inherent in line ministry hosting of quasi-judicial tribunals.

43 Albert Venn Dicey, *Lectures Introductory to the Study of Law of the Constitution*, 1st ed. (London: Macmillan, 1885).

44 Arguably, from the formation of the first "tribunal" (the Federal Board of Railway Commissioners) in 1903, to Chief Justice Dickson's seminal judgment in *C.U.P.E. v. New Brunswick*, in 1979.

45 For an especially telling example of the lack of empathy amongst Canadian administrative law scholars for the rule of law, justice role of administrative tribunals, see the late Professor John Willis's published account of his personal, covert collaboration with

prosecuting counsel when Willis was a part-time member of the Ontario Securities Commission and chairing disciplinary hearings at which those counsel were appearing. John Willis, "Canadian Administrative Law in Retrospect" (1974) 24 U.T.L.J. 225 at 241-42.

46 See *Reference re Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31* (sub nom. *Reference re Amendments to the Residential Tenancies Act*) [1996] 1 S.C.R. 186, 1996 CarswellNS 166, 35 Admin. L.R. (2d) 169, 131 D.L.R. (4th) 609, in which the SCC found that it was constitutionally valid to grant jurisdiction to a tribunal where that jurisdiction was either "novel"--unknown at the time of Confederation--or where at the time of Confederation that jurisdiction was shared between the superior and inferior courts. See also: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 1995 CarswellBC 974, 130 D.L.R. (4th) 385; and *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, 1989 CarswellNS 113, 57 D.L.R. (4th) 1.

47 Québec's *tribunal administratif du Québec* (TAQ), referred to earlier, is a particular case in point. TAQ is acknowledged to be an exclusively adjudicative tribunal, with no "social or economic mission", with broad judicial powers and a range of jurisdiction that includes many matters that would have originally been found within the jurisdiction of s. 96 courts. As mentioned previously, an authoritative description of TAQ is to be found in the Québec Court of Appeal's judgment in *Barreau de Montréal, supra* note 40. But, while various aspects of TAQ's constituent legislation have been challenged, at no point has there been any suggestion that the tribunal presented a s. 96 issue. (See *Barreau de Montréal, supra* note 40 at para. 53).

48 *Valente, supra* note 32.

49 *BNA Act*, ss 96, 99 and 100.

50 Justice LeDain's name has been so closely associated with this judgment that it may sometimes be forgotten that it was, in point of fact, a unanimous judgment.

51 *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, 1983 CarswellOnt 12, 145 D.L.R. (3d) 452 (Ont. C.A.), affirmed, on other grounds 1985 CarswellOnt 948, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97 (S.C.C.) [*Valente (No. 2)* cited to C.C.C.]. It is, in retrospect, perverse that the Court of Appeal decision that led to the by now iconic Supreme Court decision that is now always referred to as "*Valente*", was actually named "*Valente (No. 2)*". Still, there it is. It may also be noted that the Court of Appeal decision in *Valente (No. 2)* was subsequently followed and applied by a differently constituted panel of the Ontario Court of Appeal in *Currie v. Ontario (Niagara Escarpment Commission)* (1984), 14 D.L.R. (4th) 651, 1984 CarswellOnt 1173 (Ont. C.A.). In the latter decision, Ontario Justices of the Peace were found to meet the *Charter* requirements of independence notwithstanding their at-pleasure appointments. This decision was released shortly after *Valente (No. 2)* and prior to the appeal of *Valente (No. 2)* being dealt with by the Supreme Court.

52 The panel was comprised of William G. Howland, Chief Justice of Ontario, a former Treasurer of the Law Society, and a renowned lawyer; Bert MacKinnon, Associate Chief Justice, and a highly respected former counsel whom Mr. Justice Binnie once described as belonging, with John Sopinka and others, to a "long line of heroic counsel reaching back to Edward Blake, and descending through W. N. Tilley to John Robinette and others" (See *First John Sopinka Advocacy Lecture* presented by Binnie, J., to the Criminal Lawyers' Association at Toronto, on November 27, 1998); Justice Charles Dubin, also a highly respected former Ontario counsel who was later to succeed Howland as Chief Justice of Ontario; Justice G. Arthur Martin, widely acknowledged to be one of Canada's greatest criminal defence counsel before he became a leading jurist on the Ontario Court of Appeal; and Justice F. S. Weatherston, a highly respected and senior member of that Court.

53 *Valente (No. 2), supra* note 32 at 422.

54 *Ibid*. at 423-29. The historical information in this paper's following paragraph is wholly derived from Chief Justice Howland's account.

55 Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Toronto: Canadian Judicial Council, 1995) at 6, as cited by Howland C.J.

56 See *Valente (No. 2), supra* note 51 at 428. For judges appointed to the bench late in their careers, the exercise of that discretion in their favour would have been of critical importance, as they depended on those extensions to qualify for a full pension.

57 It was certainly the first such case in Ontario and, so far as one can find -- or, more importantly, that the Ontario Court of Appeal could apparently find -- the first in any Canadian jurisdiction.

58 *R. v. MacKay*, [1980] 2 S.C.R. 370, 1980 CarswellNat 213, 114 D.L.R. (3d) 393 (S.C.C.) [*MacKay* cited to S.C.R.]. The issue in *MacKay* was the independence of a court martial tribunal and the nature of the independence problem in that case from a structural perspective may be seen in the following passage from the dissenting decision of Laskin J. [at 379]:

> The Standing Court Martial was ordered by a senior commander ... [A] member of the armed forces, a Lieutenant-Colonel, was appointed from an approved list as the Standing Court Martial ... Both the officer constituting the Standing Court Martial and the prosecutor were part of the office of the Judge Advocate General. In short, the accused, who was tried on charges under a general federal statute, the Narcotic Control Act, was in the hands of his military superiors in respect of the charges, the prosecution and the tribunal by which he was tried .... [The officer appointed to conduct the court martial] was an ad hoc appointee, having no tenure and coming from the very special society of which the accused, his prosecutor and his 'judge' are members.

> The majority's acceptance of tradition and duty (in this case, implicitly tradition and explicitly duty) as sufficient guarantors of judicial independence, even in the face of structural shortcomings as clear as these, may be seen in the following passage from the judgment of Ritchie J. [at 395]:

> There is no evidence whatever in the record of the trial to suggest that the president [of the court martial tribunal] acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed .... I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

> That acceptance may also be seen in the following passage from the concurring judgment of McIntyre J. with whom Dickson J. agreed. [at 404]:

> I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline--which includes the welfare of their men--are less able to adjust their attitudes to meet *the duty of impartiality* required of them in this task than are others. [Emphasis added.]

59 The issue in *MacKay* had concerned the independence of what we would now characterize as a quasi-judicial tribunal.

60 The question in *MacKay* was not strictly constitutional. The issue was whether a Standing Court Martial satisfied the explicit requirement for an "independent and impartial tribunal" specified in s. 2(f) of the *Canadian Bill of Rights*. Mr. Valente, on the other hand, relied for the requirement of independence on s. 11(d) of the *Charter*.

61 *Valente (No. 2), supra* note 51.

62 *Supra* note 58

63 *Valente (No. 2), supra* note 51 at 431-44. [Emphasis added].

64 *Valente, supra* note 32 at para. 35.

65 Alfred Thompson Denning, Baron, *The Road to Justice* (London: Stevens, 1955) at 16-17.

66 *Valente, supra* note 32 at para 36.

67 *R. v. Généreux*, [1992] 1 S.C.R. 259, 1992 CarswellNat 668, 88 D.L.R. (4th) 110 (S.C.C.) [*Généreux* cited to S.C.R.].

68 *MacKay, supra* note 58. In *Généreux*, the challenge to the independence of a court martial tribunal, originally dismissed in *MacKay*, came again before the Supreme Court, this time in reliance not on the *Canadian Bill of Rights* but now on the constitutional requirement

of independence under s. 11(d) of the *Charter*. Chief Justice Lamer wrote the majority judgment, and after quoting from the relevant passages from the judgment of Ritchie J. and McIntyre J. in *MacKay*, he made plain his rejection of the duty-based, tradition-reliant concept of judicial independence guarantees reflected in those passages, a concept which he referred to as "a subjective test". He said this (para. 59):

MacKay v. The Queen assists us by revealing various concerns with the independence and impartiality of the court martial system. The question raised in this appeal, however, is not resolved by this earlier case. First, the majority of this Court in *MacKay* seems to have applied a subjective test. It asked whether the Standing Court Martial actually acted in an independent and impartial manner. This is not, in light of *Valente*, the appropriate test. Secondly, we must, in this appeal, apply the jurisprudence of this Court with respect to s. 11(d) of the Charter. We must now therefore undertake an analysis that was not undertaken in MacKay.

The Chief Justice proceeded to analyze the objective guarantees of the three conditions of independence defined in *Valente*, and his conclusion was that the court martial tribunal did not satisfy the *Valente* conditions of independence -- not the security of tenure condition, not the financial security condition, and not what he called the institutional independence condition.

69 *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 1995 CarswellNat 264, 26 Admin. L.R. (2d) 1, 122 D.L.R. (4th) 129 (S.C.C.).

70 An interesting example of this perspective may be found in the following passage from a Report of a Select Committee of the Ontario Legislature on the Ontario Municipal Board. The passage was quoted in a 1987 article by Professor Ed Ratushny. The statement is by the chair of the Select Committee, J. McBeth. It reads as follows:

Since it is important for members [of the Municipal Board] to be responsive to government policy, they should hold office during pleasure -- not for life or a fixed term. *The Government should not interfere with the conduct of individual proceedings, but it should have the right to remove a Board member whose conduct and record indicates he is not responding to government policy*. [Emphasis added].

Edward Ratushny, "What Are Administrative Tribunals? The Pursuit of Uniformity in Diversity" (1987) 30:1 Canadian Public Administration 1 at 11.

71 The school of Critical Legal Studies (CLS), is the most prominent modern source of skepticism about the possibility of there ever being such a thing as objective, non-ideological adjudication -- whether by a judge or a tribunal member. See Duncan Kennedy, *A Critique of Adjudication: Fin de Siecle* (Cambridge, Mass: Harvard University Press, 1997). See also Duncan Kennedy, "Toward a Critical Phenomenology of Judging" in *The Rule of Law: Ideal or Ideology*, Allan C. Hutchinson, & Monahan, eds. (Toronto: Carswell, 1987) at 141-67.

72 See Raimo Siltala's criticism of Kennedy's *Critique of Adjudication* in "Whose Justice, Which Ideology?" 16:1 Ratio Juris 123-30.

73 In Siltala's article: "*Whose Justice, Which Ideology*"?, *supra* one will find references to the most notable of those theories.

74 The phrase is one once used by Lord Francis Bacon in advising his King to ensure that "any case in which the interests of the [government] are concerned" be dealt with by the Chancellor of England rather than the English judges. Dicey, citing Bacon's letter to the King, reports that Bacon advised that the reasons such matters should be left to the Lord Chancellor are that he is "dependent on the King and therefore like to be *a safe and tender guardian* of the Regal rights". Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed. (London, UK: Macmillan, 1902) at 333.

75 A particularly clear, recent example of such a transfer may be found in British Columbia's Bill 72, the *Tenancy Statutes Amendment Act, 2006*, through which the positions of independent residential tenancy arbitrators are to be eliminated and their adjudicative jurisdiction, which included the former jurisdiction of the Supreme Court of B.C. to order evictions, is to be transferred to the staff of the government ministry responsible for housing.

76 The acceptance of such a view is rarely explicitly acknowledged in public but in a previous article of this author's (Ronald Ellis, "Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals," 15 C.J.A.L.P. 16 at 24-25), a couple of public admissions are recorded. The relevant passages reads in part as follows:

... Along the same lines are the 1995 assertions by the Ontario Premier and one of his Ministers of a government's need to have biased adjudicators in rights tribunals. The Minister in question was the then Minister of Community and Social Services in the newly elected Conservative government. His statement was made in response to criticism of what was seen by opposition parties to have been particularly egregious partisan appointments to adjudicative positions on the Ontario's Social Assistance Review Board (now the Social Benefits Tribunal) -- the tribunal that hears appeals from the decisions of the Ministry of Community and Social Services' welfare officials. The Minister is recorded as saying:

These appointments were done on the basis of principles, not politics. We wanted individuals who would take a tough stand on welfare and welfare fraud.

The Ontario Premier, responding later to questions from the media on the same appointments, is reported to have said that one of the appointees in question had been selected for her new post, not because she was a Conservative but because she 'agrees with the Government's position on welfare'. 'It helps ... that she has views similar to the government's views', the Premier told reporters. 'Whether she's a Tory or not is not as important as her belief that welfare should be a hand up'. [For the sources of these quotes see the citations in the Ellis article.]

77 First identified and applied to provincial civil law courts in *R. v. Campbell*, [1997] 3 S.C.R. 3, (sub nom. (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island)*), extended to justices of the peace in *Ell v. Alberta*, [2003] 1 S.C.R. 857; and applied to deputy small claims court judges in *Ontario Deputy Judges Assn. v. Ontario (Attorney General)%i, [2006] O.J. No. 2057 (C.A.). Currently, the application of the principle to quasi-judicial tribunals, notwithstanding the apparent obstacle raised by* Ocean Port supra *note 13, is before the courts in* McKenzie v. the Minister of Public Safety and Solicitor General, the Minister of Forests and Range and Minister Responsible for Housing, and the Attorney General of British Columbia (British Columbia Council of Administrative Tribunals, Intervenor)*, the Supreme Court of British Columbia Proceedings No. L041335, Vancouver Registry, hearing completed January 24, 2006 (hereafter "the* McKenzie *case".) The author is a co-counsel in the* McKenzie *case.*

78 See s. 51 of the Society of Ontario Adjudicators and Regulators, Model Code of Professional and Ethical Responsibilities (1996): "An adjudicator shall apply the law to the evidence in good faith and to the best of his/her ability. The prospect of disapproval from any person, institution, or community must not deter an adjudicator from making the decision which he or she believes is correct, based on the law and the evidence. Adjudicators must be prepared to go where the evidence and law fairly takes them."

79 The Ratushny Report, *supra* note 19 at 7-9, 18 and 24.

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