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Article

The Justicizing of Quasi-Judicial Tribunals [a1]
Part II

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In Part I of this paper, the author traced the emerging recognition of the justice-system/judicial branch status of quasi-judicial tribunals. He examined the validity of that recognition in light of the historic reasons for understanding administrative tribunals as part of the executive branch. He concluded that acknowledgement of this branch status in both principle and policy was both valid and overdue. It was further argued by the author that this recognition required the "justicizing" of those tribunals. The term "justicizing" was adapted from the field of legal philosophy to mean "making tribunals just" in the sense of making them compatible with the structural imperatives of a valid justice system.

This second Part of the article takes the position that the "structural imperatives of a valid justice system" consist of structures that guarantee both independence and impartiality, as well as structural arrangements that ensure the optimization of adjudicative competence. The author's 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. He takes the position that we must look to the courts and 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. He 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.

*70 1. INTRODUCTION

Part I of this paper [2] traces the legal system's emerging recognition of the justice-system/judicial branch status of administrative tribunals that sit at the "high" or quasi-judicial end of the tribunal

spectrum; [3] examines the validity of that recognition particularly in light of the historic reasons for considering them to be regulatory agencies and part of the 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 both implicitly valid and long overdue. Part I leaves the systemic implications of that acknowledgement to be dealt with in Part II.

This is Part II, and this part of the paper supposes that the emerging view of the justice-system status of quasi-judicial administrative tribunals outlined and examined in Part I will become the orthodox legal ***71** view; that in due course it will be regarded as settled law that quasi-judicial tribunals are instruments of justice, not regulatory agencies, and part of the judicial branch of government, not the executive branch. Part II deals with the necessary implications of that supposition and argues that the principal implication is that, in keeping with their justice-system/judicial branch status, quasi-judicial tribunals must be *justicized.*

As explained in Part I, the word "*justicize*" comes from the literature of legal philosophy where it means "to make just" in the sense of making something compatible with the principles of a theory of justice that one considers valid. [4] In this paper -- Parts I and II -- the word is used by the author to mean "to make quasi-judicial tribunals 'just' by making them structurally compatible with the structural imperatives of a valid justice system".

Part II first identifies the structural imperatives of a justice system with which, the author argues, quasi-judicial tribunals must conform. It then describes the reforms that a *justicizing* program would require in light of those imperatives, and the various mechanisms through which one may expect to see those reforms emerge.

2. *JUSTICIZING* NOT TO BE CONFUSED WITH "JUDICIALIZING"

Fundamental to the author's *justicizing* concept is the point that "*justicizing*" is *not* "judicializing" nor does it lead, nor should it be allowed to lead, to judicializing. While quasi-judicial administrative tribunals are components of our justice system -- of, the author would suggest, the "administrative-justice *tier"* of the justice system -- they are not the same as courts, nor, if their unique value to the administrative regime is to be realized, can they be allowed to imitate courts. It is true that their adjudicative function is virtually identical to the adjudicative function of inferior courts; that is what makes them part of the justice system. However, they have a number of important practical advantages over courts that must be preserved.

These advantages include the statutory monopoly they have on the determination of all rights disputes arising within a narrowly focused jurisdiction defined by a particular statutory enterprise. That monopoly allows them to develop a high degree of expertise in the handling of those disputes and gives them an institutional, decision experience that is deeper, richer, and more current than is typically found in the ordinary ***72** courts. Other obvious advantages are the deference with

which modern courts treat tribunal decisions, and, perhaps most importantly, a tribunal's unique *adaptability*. The literature does not often stress the latter point, but the freedom of tribunals from the constraints of the *stare decisis* doctrine, their typical power to reconsider their own decisions, their right to be wrong and, moreover, to issue conflicting decisions, [5] all of these combine to create a capacity for constructive, measured, institutional responsiveness to the tribunal's continuous, highly focused, decision experience -- a responsiveness that cannot be found in comparable measure in the courts.

If the promise inherent in these unique advantages is to be realized -- and if the special institutional responsibilities implicit in a quasi-judicial tribunal's judicial monopoly are to be met -- quasi-judicial tribunals must be seen to have a *corporate* responsibility not only for the quality of their members' decisions but also for *what* those members decide. This is not to say that a tribunal may dictate a tribunal member's decision or interfere with his or her adjudicative autonomy. It is to say, however, that quasi-judicial tribunals have corporate interests in the decision-making of its members that are both legitimate and pressing -- corporate interests of which, in their decision-making, those members must take reasonable account. It is the existence of these corporate interests in the tribunal's decisions that requires that the decisions of the members of quasi-judicial tribunals be *institutionalized*. [6]

Accordingly, the corporate architecture and methodology of quasi-judicial tribunals must not only support a decision-making process ***73** that is efficient and fair but must also inculcate a tribunal culture that supports the institutionalizing of the tribunal's decisions.

Justicizing, as the author uses the term, does not interfere with any of that. It is not, for instance, concerned with the requirements of *gravitas* [7] - with the impressive physical settings and regalia, rigid formality of process and procedure (the constraining doctrines of *stare decisis* and *functus officio*, for example), and lofty status for judges -- that courts need but tribunals do not. Neither does it involve life tenure appointments of tribunal members. In fact, in the writer's view, the institutionalizing of a tribunal's decisions is contingent on maintaining short, fixed term, renewable appointments. It is the requirement of a periodic re-appointment, that holds members accountable -- to the tribunal -- for meeting the tribunal's institutional standards of quality and performance and complying with the tribunal's institutional, hearing and decision-making strategies and tactics. [8] *Justicizing* is also not concerned with the design of in-hearing processes or procedures. The latter are sufficiently protected by established principles of natural justice and procedural fairness. *Justicizing* is concerned only with what is required to bring quasi-judicial tribunals into line with a justice system's *structural* imperatives.

3. QUASI-JUDICIAL TRIBUNALS -- HOW MANY ARE THERE?

To understand the societal, justice system significance of *justicizing* quasi-judicial tribunals (or, conversely, of failing to *justicize* those tribunals), it is important to appreciate the high proportion

of administrative tribunals that fall within the quasi-judicial category. While it is not within the scope of this paper to calculate the actual number of quasi-judicial tribunals (at the margins, there will be debates about which tribunals qualify), there can be no doubt the number is a large one.

Perhaps, this would be a good place to remind readers of what the author means when he speaks of "quasi-judicial" tribunals. These are the tribunals that match the adjudicative attributes of the *Canadian Human Rights Tribunal* as described by the Supreme Court of Canada in *Bell*, which is to say: "tribunals whose function is exclusively or predominantly the authoritative adjudication of *justiciable* disputes about *existing*, statutory ***74** legal rights or regulations and who are not "involved in crafting policy". [9] The latter qualifying feature has also been described by the Québec Court of Appeal in terms of a tribunal not having "a social or economic mission". [10]

The administrative law literature sometimes leaves the impression that quasi-judicial tribunals are minor anomalies in an administrative landscape littered with regulatory tribunals. However, if one compares the attributes of the quasi-judicial tribunal, as described by the Supreme Court of Canada in *Bell,* with the attributes of particular administrative tribunals, perhaps especially with provincial administrative tribunals, one will find that a significant proportion -- indeed, perhaps a majority -- will prove to be a fit.

A contemporary indicator of the proportion of tribunals that are likely to be found to fall within the quasi-judicial category is the current Ontario Ministry of Government Services classification of tribunals. [11] Amongst the 61 "regulatory and adjudicative" Ontario agencies the Ministry classifies, nearly 70 per cent are classified as "adjudicative" and *not* as "regulatory". [12] In Ontario, the tribunals that may be seen to fall most clearly within the quasi-judicial category include, to mention only the most obvious:

- the Criminal Injuries Compensation Board,

***75** • the Custody Review Board,

- the Financial Services Commission (whose functions include the adjudication of personal injury automobile insurance claims, and the adjudication of pension appeals),

- the Human Rights Tribunal,

- the Labour Relations Board, [13]

- the Pay Equity Tribunal,

- the Public Service Grievance Board,

- the Rental Housing Tribunal,

- the Social Benefits Tribunal, and

- the Workplace Safety and Insurance Appeals Tribunal

4. THE STRUCTURAL IMPERATIVES OF A JUSTICE SYSTEM

The essential first step in a *justicizing* program is the identification of the structural imperatives with which quasi-judicial tribunals must be made to conform if they are to be "made just". The author argues that there are two categories of justice system structural imperatives that pertain *innately* to any quasi-judicial administrative tribunal. These are:

> 1. Structural guarantees of judicial independence -- *individual* independence of each of the tribunal's members, and *institutional* independence of the tribunal itself -- all as defined by the *Valente* Principles; and [14]

> 2. Structural arrangements for ensuring "*optimum* adjudicative competence".

***76** The components of individual and institutional judicial independence are, for the most part, now well understood. They are: security of tenure, financial security and administrative independence. [15] But the second structural imperative posited here -- the structural arrangements required to ensure *optimum* adjudicative *competence* -- is an imperative which is seldom mentioned -- never in the jurisprudence and rarely in the literature. Two exceptions, as far as the literature is concerned, are the following observations by Professor Philip Bryden (in his case comment on the B.C. Court of Appeal decision in *Ocean Port Hotel*): [16]

> If our goal is to ensure that Canadians receive a high quality of administrative justice, enhancing the [independence] of tribunal members will not significantly advance that goal (if it will advance it at all) unless we are confident that these individuals have the skills and temperament to use their independence wisely and to render sound and just decisions. [17]

And by Professor David Mullan (in his 1985 study of administrative tribunals for the *Royal Commission on the Economic Union and Development Prospects for Canada*):

> ... However, the current [tribunal member appointment] system does not ensure competence; nor does it ensure, where there is no protection from arbitrary removal, that there can exist the confidence to exercise one's competence without fear for one's position. Also, the processes by which appointments are made do not ensure that a sufficient number of those qualified to be members are given serious, or any, consideration for the positions in question. [18]

***77** While the requirement of competence for adjudicators is usually only implicit, it has not always gone unstated. Article 14(1) of the *International Covenant on Civil and Political Rights*, which came into force on March 23, 1976, and to which Canada is a signatory, requires that:

> In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a *competent*, independent and impartial tribunal established by law. [Emphasis added]

Obviously, it would be ideal if, in a tribunal hearing, one could insist on the adjudicative competence of individual tribunal members, just as one is able, at least in principle, to insist on their impartiality. But, of course, individual adjudicative competence is not something that one can, as a practical matter, measure or enforce. One needs and wants the adjudicator in one's case to be competent, but the evidence that would be required to convince a court that with respect to that adjudicator there were grounds for a "reasonable apprehension of incompetence" would not be evidence that any counsel is ever likely to be able or willing to muster, or a court to admit. Thus, the issue of a tribunal member's *competence* in a particular case is almost never addressed.

Nevertheless, as the aforementioned *International Covenant on Civil and Political Rights* confirms, the question of the adjudicative competence of tribunals or their members is not an issue that can be properly ignored. An incompetent adjudicator is at least as much a source of injustice as a biased adjudicator. And while it may be beyond the reach of a *justicizing* program to deal with the competence issue on an individual adjudicator basis, it *is* quite possible to deal with it on a systemic basis.

The competence-optimizing justice system imperative postulated by the author has two distinct components. The first is "adjudicative competence" itself -- what the system must look for in its adjudicator candidates in the way of skills, knowledge, innate abilities, temperament, training and experience if there is to be reason for confidence that individuals selected for appointment will become competent adjudicators. The second is the function of *optimizing* -- of installing and administering the structures required to ensure that the average adjudicative competence of a particular tribunal's roster of adjudicative members is always as good as it can be.

The structural arrangements necessary to optimize, over time, the average competence of a tribunal's adjudicative members would obviously include the following: appropriate qualification standards; open, merit-based *and competitive* selection and appointment processes; fair, transparent, and objective performance-evaluation and re-appointment ***78** mechanisms; and entrenched protocols for establishing and maintaining competitive compensation packages and appropriate working conditions. The true measure of a tribunal's compliance with the justice-

system imperative of optimized adjudicative competence will be the presence of the latter structures in appropriate degree, rather than the level of competence of any particular tribunal member.

A justice system that, either willfully or through indifference, fails to provide the systemic structures necessary to ensure that the average adjudicative competence of its tribunals and their members is as good, over time, as it can reasonably be is self-evidently no more acceptable in justice terms than one that fails to guarantee its members' independence.

5. THE INDEPENDENCE *JUSTICIZING* AGENDA

(a) Step One: Confirmation by the Supreme Court of Canada that the Judicial Independence of Quasi-Judicial Tribunals and their Members is a Constitutional Requirement

The extension of the Constitution's unwritten requirement of judicial independence [19] to quasi-judicial administrative tribunals is the essential prerequisite -- the *sine qua non* condition -- for the *justicizing* of those tribunals. In an ideal world -- one in which governments would readily acknowledge and respect their responsibility for the justice aspects of the administrative justice system -- the constitutional issue would not be so pressing. But, as Professor Bryden has noted:

> The logic that drives our interest in the recognition of a constitutionally protected right to independent administrative tribunals is *the sense that the political system is either incapable of, or has lost interest in, providing the administrative justice machinery that Canadians deserve* .... If we had sufficient confidence in our legislative processes to put in place appropriate administrative justice machinery, we would not need to go beyond the traditional boundaries of the common law and impose systems of tribunal independence on legislatures contrary to the expressed (and, one might hope, well-considered) desires of those institutions. [20]

***79** The reasons for not having confidence in our legislatures delivering the appropriate administrative justice structures include, as discussed in Part I, [21] the executive branch's deeply rooted interests in resisting the recognition of the justice-system/judicial branch status of quasi-judicial tribunals in order to preserve its *de facto*, political control. Over the decades, the latter interests, coupled with the executive branch's interests in preserving the availability of tribunal appointments as grist for government patronage mills and in avoiding the possibility of ministry officials or ministers being publicly embarrassed by decisions from a truly independent tribunal,

have proven to be much too strong for an impressive number of concerted reform initiatives, [22] virtually all of which the executive branch has effectively defeated, outlasted, or finessed. [23]

The latter experience should be more than enough evidence that in the absence of a constitutional override there is no realistic prospect of meaningful change. Thus, as a practical matter, the extension of the unwritten constitutional requirement of judicial independence to quasi-judicial tribunals and their members must be the first step in the *justicizing* of those tribunals. It is not a sufficient step, but it is the necessary first step.

But, readers may well ask, is it not already too late? In *Ocean Port Hotel*, [24] in the course of overturning a B.C. Court of Appeal decision on the independence of the members of the B.C. Liquor Appeal Board, did not the Supreme Court of Canada reject the extension of the unwritten constitutional requirement of judicial independence to administrative tribunals, quasi-judicial or otherwise?

It is true that many people seem to have thought so. However, as mentioned in Part I, in the Supreme Court's later decision in *Bell* (also, ***80** most importantly, in its companion decision to *Bell* in *Ell v. Alberta*) [25] -- and, for that matter, in its recognition of the justice system status of administrative tribunals in *Paul* [26] -- it appears to have re-opened the judicial debate of that issue, at least as it concerns quasi-judicial tribunals. And, in September 2006, through that opening stepped the B.C. Supreme Court. In *McKenzie v. British Columbia (Minister of Public Safety),* [27] that Court held that, notwithstanding *Ocean Port Hotel*, the unwritten constitutional requirement of judicial independence identified in the *Provincial Judges Reference* decision did apply to British Columbia's "Residential Tenancy Arbitrators" -- quasi-judicial arbitrators at the "high end" of the *Bell* spectrum. In the Court's view, a statutory provision clearly authorizing the rescission of the fixed-term appointments of such adjudicators at any time for "mere displeasure" would be incompatible with that requirement and thus constitutionally invalid. [28]

It is a view that resonates with the recent "Remarks of the Right Honourable Beverley McLachlin, P.C., Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand on December 1, 2005". [29] In those remarks, the Chief Justice of Canada addresses the topic of unwritten constitutional principles and the legitimacy of courts identifying and applying such principles. She describes the "idea" behind unwritten constitutional principles as "the idea that there exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in ***81** constitutional texts". [30] She concludes, in part, "that the real debate is not about whether judges should ever be able to rely on basic norms to trump bad laws or state action ... but rather about what norms may justify such action". [31] In *McKenzie*, the B.C. Supreme Court has concluded, in effect, that the requirement of judicial independence for B.C.'s Residential Tenancy Arbitrators is just such a norm. [32]

In what follows, it is supposed that the *McKenzie* decision will be upheld on appeal and that in due course the unwritten constitutional requirement of judicial independence identified in the *Provincial Judges Reference*[33] will be accepted as extending to all quasi-judicial tribunals and their members. It is a supposition that finds support not only in the analysis of the Supreme Court of Canada in the *Provincial Judges Reference* (and in *Ell*) and of the B.C. Supreme Court in *McKenzie,* but also in the trend of recent jurisprudence. First applied to provincial civil law courts and their judges,[34] the unwritten constitutional requirement of judicial independence has now been extended to Alberta Justices of the Peace,[35] to Ontario's part-time, fixed-term, small claims court "Deputy Judges",[36] and now, as we have seen, to B.C.'s Residential Tenancy Arbitrators.

(b) Step Two: Eliminate the Arbitrary and Secret Re-Appointment Processes

It is well known that, outside of Québec,[37] Canadian governments see themselves as having an untrammeled discretion to re-appoint or not to re-appoint any administrative tribunal member at the end of his or her fixed term. Tribunal members who want to continue their adjudicative careers must, as the expiration date of their current term approaches, petition either their Minister, or the Office of the Premier or Prime Minister, ***82** for what the government perceives as the "gift" of a further appointment.[38] Moreover, it is also an article of faith amongst governments that tribunal members whose petition the government decides not to accept are not entitled to -- or perhaps not deserving of -- any warning or notice of that decision. Nor, typically, are reasons for the rejection of a member's re-appointment petition provided.

A government's unexpected refusal to re-appoint a tribunal member is particularly devastating in personal terms because governments also hold fast to the belief that there is no right to compensation when reappointment petitions are denied. Since there is seen to be no right to notice, there is also seen to be no right to payment in lieu of notice. For members who serve in full-time positions, or who serve on part-time but regular schedules and for whom that service provides their primary source of income, the unexpected denial of a merited re-appointment involves, as one might imagine, significant hardship. In Ontario, it has not been unknown for members with years of commendable full-time service at a particular tribunal to be arbitrarily dismissed from their positions in this manner[39] without cause, warning, notice, or reasons, and without compensation.[40]

It is apparent that, in a real world context, where tribunal members must petition a government for re-appointment in circumstances where re-appointment decisions are known to be entirely discretionary, typically made *in camera* in an arbitrary manner and sometimes refused, and where the denial of such petitions means personal career disruption and financial hardship, the independence of such members is in fact entirely illusory. It is, with respect, disingenuous to say otherwise. And the length of the term in question does not alter the argument. Time passes, and,

eventually, a five-year term becomes a five-month, a five-week, and then a five-day ***83** term with the member still hearing cases and making decisions having the potential to alienate the government to which he or she must immediately look for the "gift" of another appointment. [41]

One must, of course, advance this latter point with considerable diffidence since the Supreme Court of Canada appears to have found to ***84** the contrary. First in *Valente* [42] and later, and more particularly, in *Regie,* [43] the Court has held that the security of tenure component of a constitutional requirement of judicial independence is, indeed, fully satisfied, as far as tribunal members are concerned, by any fixed-term appointment. All that is necessary, the Court has said, is that a member's appointment not be open to termination during the fixed-term except for cause. However, this conclusion did not arise in cases actually dealing with the arbitrary refusal of an expected and earned re-appointment, and it seems, with respect, doubtful that this is a position that can long survive the acknowledgement that these are tribunals that are instruments of justice and integral parts of our justice system. And, in point of fact, the first substantial judicial move towards the correction of that position has already occurred.

In its 2001 decision in the *Barreau de Montréal case* [44] -- a decision in respect of which leave to appeal to the S.C.C. was refused [45] -- the Québec Court of Appeal held that, if the *tribunal administratif du Québec* (TAQ) were to satisfy the Québec Provincial *Charter's* constitutional requirement that quasi-judicial administrative tribunals be independent, it was not sufficient that its members have security of tenure during their fixed terms of appointment. They must also be the beneficiaries of a process for determining whether or not their terms are to be renewed that is fair, objective, and independent. The Court distinguished *Régie* on this point on the basis that, in *Régie*, the Supreme Court was dealing with a "multi-functional and essentially regulatory agency", not one that (like TAQ) "exercises a purely adjudicative function". [46]

Québec's 1996 administrative justice legislation that created TAQ had, in fact, provided for an appointments renewal committee. However, amongst the members of that committee the legislation specifically included the TAQ President and a representative of the Minister of Justice. Furthermore, there was no provision for participation in the process by an affected tribunal member. In *Barreau de Montréal*, the Québec Court of Appeal held that TAQ members could not be said to be independent when the TAQ President and the Minister of Justice's representative were members of the appointments renewal committee, nor could ***85** the renewal process be considered sufficiently fair until individual tribunal members were given the right to know of and respond to criticisms. [47]

It is important to note that, in *Barreau de Montréal,* the Court's resolution of the independence problem inherent in a fixed-term, renewable appointment was not to require tribunal members to be appointed to "life-time" positions -- an outcome that would indeed have taken administrative

justice tribunals a long way down the *judicialization* road.[48] Rather, the Court's solution was simply to require that the renewal decision be the subject of a merit-based, transparent, fair and independent process.[49]

This is a precedent the Supreme Court might well eventually embrace.[50] One can surmise that at a time when the security of tenure issue for quasi-judicial tribunal members would have been perceived by the courts as presenting them with the "Hobson's choice" of, on the one hand, security of tenure only during a fixed-term or, on the other, a lifetime appointment,[51] the courts, chary of being accused of *judicializing* tribunals, would have felt compelled to opt for the former. But *Barreau de Montréal* has now presented a third option, and, when the opportunity arises for the Supreme Court to consider afresh the independence implications ***86** of fixed-terms that are subject to arbitrary and secret re-appointment processes, it will find an acceptable model of an objective, independent and fair, re-appointment process ready at hand in the post-*Barreau de Montréal* version of Québec's *Administrative Justice Act*.[52]

The Court's adoption of the latter process as an independence prerequisite would, of course, require the creation of independent committees to make the re-appointment decisions. Fortunately, a precedent for the Court taking a proactive role in structuring government justice system relationships was set when, in the *Provincial Judges Reference* decision,[53] in support of the independence of provincial court judges, the Court mandated "independent remuneration commissions". Thus, to mandate "independent re-appointment commissions" in support of the judicial independence of members of quasi-judicial tribunals should prove to be a reasonably digestible, comparable step.

However, if the Court should conclude that that would be a step too far, there is another potential way to make the discretionary re-appointment power compatible with the independence imperative. It would be a second-best remedy, but useful nonetheless.

The author refers here to the proposition that, within existing judicial review principles, a government's decision not to renew a particular adjudicative member's appointment is an appropriate subject of judicial review. The grounds of review would include procedural fairness (the fairness of the manner in which the discretion was exercised and the adequacy of the written reasons), and both the relevance and sufficiency of the considerations on which the decision was based. These are the principles and criteria that in its 2003 decision in *C.U.P.E. v. Ontario (Minister of Labour)*,[54] the Supreme Court of Canada applied to the review of an Ontario Minister of Labour's exercise of his statutory discretion to *appoint* arbitrators. It would take a very little stretch, if a stretch at all, to extend those same principles and criteria to a judicial review of a Minister's ***87** exercise of his or her statutory discretion to deny re-appointment to a meritorious arbitrator.

And, encouragingly, the first steps down that path have already been taken. In the 2005 decision of the Ontario Divisional Court in *Rai v. Métivier;* [55] the Court considered an application for judicial review of a senior judge's exercise of his statutory discretion to refuse to re-appoint a small claims court judge when that judge's three-year fixed-term of appointment expired. While the Divisional Court concluded, on the facts of the case, that the senior judge's decision should not be overturned, it found the decision to be subject to judicial review against a standard of patent unreasonableness. [56] It found, as well, that, in the circumstances where the small claims court judge had received fair notice of the senior judge's intentions, had been given a copy of the senior judge's written reasons, and had been offered an opportunity to respond, the applicable principles of procedural fairness had been met.

(c) Step 3: Eliminate the Conflicts of Interest Between Tribunals and Their Host Ministries

Once the applicability to all quasi-judicial tribunals of the constitutional requirement of judicial independence has been confirmed by the Supreme Court, the second challenge any *justicizing* agenda would have to address is the elimination of the egregiously conflicted, structural relationships between host line ministries and "their" quasi-judicial tribunals. [57] This is particularly necessary for tribunals that are burdened with ***88** a "heavy" conflict of interest -- the ones in which the tribunal is called upon to adjudicate appeals from the decisions of its own, host line ministry. But every quasi-judicial administrative tribunal that adjudicates disputes in which its host ministry has a direct interest, or is ever a party, is saddled with a conflict of interest that is incompatible with the *Valente* principles of judicial independence. And, once one recognizes that these tribunals are components of our justice system, one can no longer pretend, as governments now do -- and as, at one time, the legal system itself did [58] -- that the conflicts of interest and the lack of judicial independence inherent in a tribunal's dependent structural relationships with its host line ministry are, from a justice perspective, legally, or otherwise, benign. Of course, the conflicted relationships of quasi-judicial tribunals with their host line ministries have almost always been statutorily mandated. However, this does not make those relationships *acceptable* in justice terms. Once the constitutional requirement of judicial independence for all quasi-judicial tribunals has been established, those statute-mandated, conflicted relationships must inevitably fall to that requirement. [59]

(d) Step 4: Resolve the Problem of Compensation Levels

Historically, the egregiously low adjudicator compensation levels have been a notorious impediment to the independence of tribunals and their members, and as well, of course, to the optimizing of their adjudicative competence. This can probably be accounted for by a number of negative influences, amongst which, arguably, the most important are: (a) the tribunals' inability to compete for budget dollars within host ministries whose Ministers and Deputy Ministers are

not held politically or professionally ***89** accountable for the performance of these so-called independent tribunals (when the tribunal's performance is criticized, it is generally the tribunal's Chair who is deemed responsible); (b) the ironically pervasive disrespect that politicians and government officials have for those who seek and accept what the politicians and officials -- and the public -- continue to see as patronage appointments; and (c) the politicians' often deep-seated, "populist" view that tribunal work is, innately, amateur public service work and that if a tribunal's work is so complicated that it in fact requires high levels of skill, education, and professionalism -- and commensurate compensation -- that is a problem the tribunal must itself have created.

In her book about the patronage tradition in the United States, Anne Freedman refers particularly to President Andrew Jackson's historical impact on this view of government service. "The real shift in attitudes towards parties and patronage came", she says, "in 1828 when Jackson was elected President". Jackson, she reports, was "highly in favor of a 'rotation' system". He believed that "men who stayed too long in office are likely to become indifferent to the public's interests". And to those who were concerned that rotation in office would damage the government's capacities, Jackson's response was that, "*the duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance*". [60]

A modern resonance with that Jacksonian view may be easily discerned in the following observation by a Standing Committee of the Ontario Legislature. The observation concerns the significance of "qualifications" in the tribunal member selection process and was written by the Standing Committee on the Ontario Legislative Assembly. It appears in that Committee's 1986 Report on Appointments in the Public Sector [61] and reads as follows:

> In addition to recommending that the public appointments be made open, the committee will also make recommendations concerning the selection process. It wishes to emphasize that selection should be the result of a fair and equitable process that places stress on appropriate qualifications. The committee believes that the public interest is best served when qualified individuals are appointed to Ontario's agencies boards and commissions. Those who are appointed feel *a better sense of accomplishment* if they have ***90** the knowledge or expertise to deal with the matters before an agency. The public gains *a better respect for public institutions when it knows* or deals with individuals who are qualified to make decisions. This is not to suggest that the committee envisages only professional experts to be appointed.

> *On the contrary, the committee believes that ordinary Ontario citizens as a result of their work experience, interests and accumulated knowledge and experience will have the necessary qualifications for appointments to Ontario agencies.* At the same time, the Committee does not expect that only non-partisan appointments will be made. Those involved directly with particular political parties often have excellent qualifications, and the Committee would not want to discourage their participation in the public life of Ontario.

Here, in the author's opinion, is, effectively, the source of much of the resistance to optimizing adjudicative competence in administrative tribunals. The author can only speak with confidence on this subject based on his own operational, administrative justice system experience in Ontario during the decade prior to 1997.[62] Based on anecdotal evidence personally accumulated in the course of that experience, the author is convinced that most Ontario politicians typically do see tribunal positions from a Jacksonian, "populist" perspective -- as opportunities for short-term public service by well-meaning citizens, preferably of the appropriate political persuasion. How else can one understand the strikingly offhanded nature of the interest in qualifications reflected in the above-quoted passage from the standing committee's report, or the following official explanation by the Ontario government in the year 2000 as to why "at least some level of basic orientation and training [three days of training] early in the term of new appointees" is important:

> [Early orientation and training is important because] appointees come into the agency sector from many walks of life, and are *commonly* unfamiliar with government, the role of administrative justice agencies, the agency decision-making process, and particularly with the expectations associated with the role of an appointee.[63]

***91** The same view may also be seen manifest in the following "principle of remuneration" which, until the June 2006 Ontario administrative tribunal compensation reforms, was to be found in the Ontario Management Board Secretariat's Directive on "Government Appointees"[64] and which was applicable to quasi-judicial tribunal appointees as it was to all other appointees. The principle read as follows:

> i) An element of public service is implied in any appointment by the Government of Ontario and, therefore, any remuneration that may be paid is not expected to be competitive with the marketplace.

It is this populist perspective on tribunal appointments that presumably explains the politicians' apparently visceral resistance to the idea of professional adjudicators having careers as tribunal members and their insistence, accordingly, on limiting service in such positions to a maximum of six or ten years. [65] And it is this perspective that also begins to explain the otherwise truly inexplicable bland unconcern, long demonstrated by Ontario's politicians and governments, about the lack of *any* -- zero -- compensation increases for *most* tribunal positions in that Province for *over two decades*! [66]

Fortunately, recent case law suggests that the courts might eventually play a role in ensuring an end to the compensation problem. As we have seen, in the *Provincial Judges Reference* [67] the Supreme Court of Canada made the existence of independent remuneration commissions, responsible for periodic recommendations to governments for changes in provincial court judges' compensation, a constitutional requirement. The ***92** Court's mandating of those commissions was a truly unprecedented proactive intervention in the structuring of the government -- justice system relationship.

The Court couched its decision to mandate such commissions in the language of independence. Previously, *Valente* had identified "financial security" as one of the three essential components of judicial independence and, building on that foundation, the Supreme Court, in the *Provincial Judges Reference* case, discussed the importance of foreclosing the possibility that governments might be perceived to be using an unrestricted power to limit or refuse pay adjustments for judges as a means of influencing the judges' decisions. The Court also indicated its concern that judges might be perceived to be retaliating for the refusal or limitations of pay increases through adjustments in their decision-making. While some might dismiss such concerns as far-fetched, the Supreme Court accepted them as relevant and significant considerations. [68]

Moreover, in *Provincial Judges Reference,* the Supreme Court held, with respect to judges, that there is a minimum basic level of remuneration that is "required" -- *i.e., constitutionally* required. [69] The Court relied for this conclusion on the language of independence, when it might have more straightforwardly addressed it in the language of the need to optimize the provincial courts' adjudicative competence. But competence has not traditionally supported a constitutional analysis, and, thus, independence was the natural focus of the Court's attention.

The recent Ontario Court of Appeal decision dealing with the compensation level of Ontario small claims court deputy judges [70] also encourages one to think that the compensation-level structural issue in a tribunal *justicizing* strategy may, indeed, ultimately be resolved by the courts. The decision arose from an application to the Ontario Superior Court by the Ontario Deputy Judges Association for, *inter alia*, an order requiring the establishment of an independent remuneration commission. The Superior Court granted the application [71] and the Court of Appeal affirmed that decision. In Ontario a "Deputy Judge" is a part-time, Small Claims Court judge, appointed to a three-year fixed term renewable at the discretion of a Senior judge. And despite heroic efforts on their own behalf and by the Ontario Bar Association, and others, over a number of ***93** years, to persuade various Ontario Attorney Generals that Deputy Judges required and were entitled to an increase in pay, [72] at the time of the hearing their *per diem* rate had remained frozen for 23 years at $232. [73]

The following passages from the judgment of Justice Dambrot, [74] from which the Court of Appeal did not dissent might foreshadow a solution to the same quandary faced by quasi-judicial tribunals (assuming, as the author does, that in due course those tribunals, like the Deputy Judges, will also all be found to fall within the protection of the unwritten constitutional requirement of judicial independence). [75]

> The respondents [i.e., the Attorney General et al] go to great pains to refute what I consider to be obvious. In essence, they make three arguments. They say:
>
> 1. There is no evidence to suggest that public confidence in the office of deputy judge is waning, or that members of the public perceive a threat of economic manipulation by government.
>
> 2. The concern about salaries falling below an acceptable minimum is, at its core, a concern about improper attempts to curry favour with the government, or a particular litigant, where they appear before the court as a party. This concern applies with reduced force in the context of deputy judges, because of the part-time nature of their office. Practising lawyer adjudicators are not reliant on their per diems for all, or even a significant portion of their annual income. As such,

> the concern that salaries falling below a perceived "minimum" may prompt deputy judges to curry favour with the government or a specific litigant is not germane.
>
> 3. Third, the per diem compensation awarded to deputy judges is consistent with the remuneration provided to other analogous officers. Assessment Officers who resolve disputes between lawyers and clients respecting solicitor's bills have received a per diem of $200 since April 1990. The per diem for Board Members of the Criminal Injuries Compensation Board has been $135, including $17/hr preparatory work and travel, since January 1990.
>
> With respect to the first of these arguments, I do not think that the judgment of the Supreme Court in [*the Provincial Court Judges Reference*] contemplates that in advancing a claim of this nature, the applicant would be expected to find evidence that public confidence in the office of deputy judge is waning, or that members of the public perceive a threat of economic ***94** manipulation by government. I do not think it is necessary to wait for the Small Claims Court to begin to crumble before a constitutional claim of this nature can be justiciable. If the remuneration is low enough, a Court can conclude that there is a 'danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants.'
>
> The better way to approach the issue is to consider the rate of remuneration itself, and the period during which it has been allowed to erode, and then compare it to the remuneration paid other judicial officers remunerated by Ontario who do the same work or work of roughly equivalent importance and difficulty.

The foregoing final paragraph may be seen to be, in effect, a mandated formula for competitive compensation.

6. THE COMPETENCE *JUSTICIZING* AGENDA

Space does not permit addressing in detail the specific, *justicizing* requirements implicit in the justice imperative of optimum adjudicative competence. The *agenda* for *justicizing* relative to this imperative -- for optimizing the adjudicative competence of quasi-judicial tribunal members -- is, however, perfectly clear. It would include:

> (a) The adoption, as an appointment prerequisite, of a reasonable standard of adjudicative qualifications truly relevant to the work of the tribunal in question, and including particularly the qualification of judicial temperament;
>
> (b) The entrenching of statutory requirements for open, merit-based, *competitive* selections processes headed by tribunal Chairs who are responsible for the performance of their tribunals; or, in the case of the selection of a tribunal Chair, headed by a person selected by the "Administrative Justice Council" (see *infra*, item (m)).
>
> (c) The removal of limits on the number of re-appointments for competent and effective tribunal members;
>
> (d) The establishment of appropriate, objective and fair, performance evaluation strategies;
>
> (e) The entrenching of statutory requirements for routine re-appointments for competent and effective adjudicators pursuant to ***95** an independent, transparent, merit-based, and fair, re-appointment process;
>
> (f) The development of entrenched mechanisms for ensuring competitive, but proportional, compensation strategies for tribunal members and Tribunal Chairs;

(g) Statutory provision for reasonable separation packages;

(h) The provision of realistic training programs for new appointees, and regular continuing education programs for incumbent members;

(i) The recognition of the need for tribunal institutional commitment to high quality written and published reasons, with all of the institutional support strategies that such a commitment entails;

(j) The provision of sufficient, tribunal-directed administrative resources;

(k) The entrenchment of government responsibility for providing the financial resources necessary to satisfy the reasonable budget requirements to implement this agenda;

(l) Limiting the use of part-time members to situations where the arrangements for their deployment are compatible with maintaining both their own, and their tribunal's, competence and independence. [76]

(m) The creation of a statutory and independent "*Administrative Justice Council*" to provide an independent, expert oversight on the structure and operation of the administrative justice system, and to be a source of objective, expert advice for governments and others on administrative-justice issues. [77]

Thus, it is not difficult to identify what systemic structural changes it would take to optimize the adjudicative competence of tribunals and their ***96** members. The more challenging question is how all of this -- or any of it -- is likely to be achieved.

7. IMPLEMENTING THE COMPETENCE *JUSTICIZING* AGENDA

(a) The Courts' Role

The courts' possible role with respect to item (e) of the competence optimizing agenda (a fair, independent merit-based re-appointments process) and with respect to item (f)) (the development of competitive compensation levels) has been previously outlined. And the courts have already made the provision of good quality written reasons for tribunal decisions (item (i)) an essential requirement -- both as an element of the common law of procedural fairness [78] and in support of the selection by the courts of an appropriate standard of review. [79]

However, the balance of the items on the optimizing agenda do not lend themselves easily, if at all, to direct intervention by the courts. The courts' constitutional-based interventions respecting the independence issues referred to above may be expected to have a large influence. However, with respect to the remaining components of the competence-optimizing agenda, the courts' influence will be for the most part indirect. The actual implementation of those components will depend on the executive branch eventually embracing its justice-system responsibilities with respect to quasi-judicial tribunals and initiating legislative reform.

(b) The Executive Branch's Role

Of course, the executive branch's entrenched interests in political control of tribunals are too strong to expect its resistance to meaningful *justicizing* of quasi-judicial tribunals to be overcome in the near term. Decades of failed efforts to reform the Canadian administrative justice ***97** system in every province and territory except Québec, and in the federal realm, and 20 years of frozen tribunal compensation levels in Ontario, and, the author understands, elsewhere, could not have occurred either by accident or mere inattention. There is, therefore, every reason to conclude that, currently, the political system is, indeed, incapable of providing the administrative justice machinery that the principles of any liberal theory of justice require. However, judicial recognition of the justice-system/judicial branch status of quasi-judicial tribunals will create new windows of opportunity and a new *culture* of administrative justice and, eventually, the *justicizing* of Canadian quasi-judicial tribunals may be expected to follow.

The courts' attribution of justice system status to quasi-judicial tribunals, and the attendant recognition of the constitutional requirement of judicial independence of quasi-judicial tribunals and their members, promises, over time, a sea change in executive branch and legislature attitudes. With the historical “regulatory agency” justification for maintaining the *status quo* with respect to

quasi-judicial tribunals disappearing, the credibility of that concept will continue to recede, and so will the political traction of the executive branch's traditional culture of entitlement with respect to those tribunals.

This new awareness of the justice system status of tribunals will provoke increased support for merit-based and open and competitive appointments processes for quasi-judicial tribunals. When the justice-system/judicial branch status of quasi-judicial tribunals becomes widely acknowledged, politicians will be less comfortable being seen to be complicit in patronage appointment abuse than they were when these tribunals were regarded as executive branch, regulatory agencies. Moreover, with independent and merit-based re-appointments processes, and the routine performance evaluations attendant on those processes, tribunals will become an alien environment for traditional patronage supplicants unwilling to expose themselves to the rigors of such a system. And governments will not want the embarrassment entailed in appointees proving unable to meet the new standards.

The latter trends will be accelerated by the rapid expansion of the demands and expectations that the courts are already placing on adjudicative members of quasi-judicial administrative tribunals. These now include the burgeoning court requirements for persuasive written reasons for quasi-judicial tribunal decisions; [80] the expectation that, absent, perhaps, a statutory bar, tribunals and their members must determine *Charter* ***98** and other constitutional issues; [81] and the recently confirmed requirement that tribunals must rule on whether provisions in their own constituent statutes are compatible with applicable provincial or federal human rights codes, and, if not, to find those provisions to be invalid. [82]

Government embarrassment over their appointees' inability to deal with these heightened expectations, and, perhaps more to the point, the undermining of government adjudicative processes attendant on the courts' application of more stringent standards of review in the face of such failures will eventually make patronage appointments indefensible.

These are also expectations that are flatly incompatible with the populist view of tribunal appointments, and presumably they will in time discredit that archaic perspective.

A further influential development will be the gradual dilution of the bureaucracy's domination of government policies concerning the administration of tribunals, once line ministry hosting of tribunals is held to be unconstitutional. That domination is principally derived from the line ministries' sense of ownership of the tribunals they host. When the tribunals are constitutionally removed from within the line ministries' grasp and situated beyond their reach, that influence will gradually abate. This will reduce the bureaucratic pressure on the politicians to control the appointment and re-appointment processes.

The liberation of quasi-judicial tribunals from their "in-thrall" relationship with line ministries will, in the first instance, likely require litigation of the conflicts of interest issues based on the recognition of the constitutional requirement of judicial independence. But the liberation process will be accelerated once governments begin to be advised by their counsel that those relationships are no longer appropriate or lawful.

8. A PROGNOSIS

The foregoing influences and developments will gradually transform the administrative justice system. Increasingly, the dominant influence in the system will be quasi-judicial tribunal members chosen on merit through open and competitive selection processes. These members ***99** will not be beholden to, or dependent on, the goodwill of any government, and they will be committed to careers as professional adjudicators. Protected by the long-term security of tenure afforded by fair, merit-based and independent re-appointment processes mandated by the Constitution, these members may be expected to build the country's quasi-judicial tribunals into the institutions their functions require them to be: highly competent, fully *justicized* components of the administrative justice tier of the Canadian justice system.

Footnotes

a1 Earlier versions of both Parts I and II of this paper were presented at the Osgoode Hall Law School, Graduate Law Students Association's 2006 Conference on "*Scholars and Advocates: Driving the Changing Face(s) of the Law*".

1 Currently, D.Jur candidate in Osgoode Hall Law School's graduate student program. The author acknowledges the valuable assistance of Mary E. McKenzie, LL.B., MPA, member of the Law Society of B.C.

2 "The *Justicizing* of Quasi-Judicial Tribunals, Part I", (2006) 19 C.J.A.L.P 303 ["*Justicizing*, Pt. I"].

3 As defined in *Bell Canada v.C.T.E.A*. (2003), (sub nom. *Bell Canada v. Canadian Telephone Employees Association)* [2003] 1 S.C.R. 884, 2003 CarswellNat 2427, 3 Admin. L.R. (4th) 163 (S.C.C.) [*Bell* cited to S.C.R.].

4 "*Justicizing*, Pt. I", *supra* note 2 at 305.

5 *Domtar inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 1993 CarswellQue 145, 15 Admin. L.R. (2d) 1 (S.C.C.). See, as well, *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952, 1992 CarswellQue 108, 3 Admin. L.R. (2d) 173 (S.C.C.) at 974 [S.C.R.]:

> [o]rdinarily, precedent is developed by the actual decision makers over a series of decisions ... a tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges.

6 The principles underlying judicial approval of internal "institutionalized decision-making" processes and procedures for administrative tribunals as set out in the *Consolidated-Bathurst* line of cases provide the markers for this essential difference between courts and tribunals. For a detailed analysis of these differences in the context of a criticism of the Québec proposal to appoint tribunal adjudicators to fully tenured positions, see the author's article: "Misconceiving Tribunal Members: Memorandum to Québec" (2005) 18 C.J.A.L.P. 189 ["Memorandum to Québec"].

7 "*Justicizing*, Pt. I", *supra* note 2 at 313-15.

8 This assumes the existence of an appropriate and objective re-appointment process. (See 5(b), *infra*.) A full argument in support of the importance of maintaining fixed term, renewable appointments may be found in "Memorandum to Québec", *supra* note 6.

9 *Bell, supra* note 3 at para. 23.

10 *Barreau de Montréal c. Québec (Procureur général)*, 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*].

11 For a description of the history of quasi-judicial agency classification in Ontario, see "*Justicizing*, Pt. I", *supra* note 2, at note 16.

12 The Ministry's current classification identifies 50 "advisory agencies", 19 "regulatory agencies", and 42 "adjudicative agencies". The definitions of these categories are to be found at p. 19 of Appendix A of 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.) A "regulatory agency" is defined as an agency that "makes independent decisions (including inspections, investigations, prosecutions, certifications, licensing, rate-setting, *etc.*) *which limit or promote* the conduct, practice, obligations, rights, responsibilities, *etc.* of an individual, business or corporate body". An "adjudicative agency" is defined as an agency that "makes independent quasi-judicial decisions, resolves disputes, *etc.* on the obligations, rights responsibilities, *etc.* of an individual, business or corporate body against *existing* policies, regulations, and statutes, and/or hears appeals against previous decisions". [Emphasis added]

13 The "quasi-judicial" status of the B.C. Labour Relations Board was recently explicitly affirmed by the Board itself. See its decision in *Farmer Construction Ltd. v. B.C. Provincial Council of Carpenters* (2004), [2004] CarswellBC 3350 (B.C. L.R.B.). See also *Hewat v. Ontario* (1998), 37 O.R. (3d) 161, 156 D.L.R. (4th) 193, 1998 CarswellOnt 806, 7 Admin. L.R. (3d) 257 (C.A.), re the "quasi-judicial functions" of the Ontario Labour Relations Board.

14 The reference here is to the principles of judicial independence first established in 1985 in the unanimous decision of the S.C.C. in *R. v. Valente (No. 2)* (1985), [1985] 2 S.C.R. 673, 1985 CarswellOnt 948 (S.C.C.) [*Valente*], and uniformly respected and applied ever since.

15 *Ibid.* As far as tribunals are concerned, the requirements relative to these components are not set as high as they are with respect to the courts and are understood to vary from tribunal to tribunal depending on the nature and function of the particular tribunal. See *Bell, supra* note 3 at para. 21.

16 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)* (1999), 174 D.L.R. (4th) 498, 1999 CarswellBC 1044, 15 Admin. L.R. (3d) 13 (B.C. C.A.), leave to appeal allowed, [2000] 2 S.C.R. xii (S.C.C.), reversed (2001), 2001 CarswellBC 533 (S.C.C.), additional reasons at [2001] 2 S.C.R. 781 (S.C.C.) [*Ocean Port Hotel*].

17 Philip Bryden, "A Common Law Constitutional Principle of Tribunal Independence? A Comment on *Ocean Port Hotel Ltd. v. British Columbia*" (2002), 22 Admin. L.R. (3d) 43 at 57 [Bryden, "*Ocean Port Hotel"*].

18 David J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984", in *Royal Commission on the Economic Union and Development Prospects for Canada: Regulations, Crown Corporations and Administrative Tribunals, Volume 48 in the series of studies in the Commission's research program*, R. C. Ivan Bernier & Andrée Lajoie (Toronto: University of Toronto Press, 1985) 155 at 184.

19 The reference here is to the unwritten constitutional requirement of judicial independence identified in the judgment of the Supreme Court of Canada written by Lamer C.J. in *R. v. Campbell, (*sub nom. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island)*, [1997] 3 S.C.R. 3, 1997 CarswellNat 3038, 49 Admin. L.R. (2d) 1 (S.C.C.) [*Provincial Judges Reference* cited to S.C.R.].

20 Bryden, "*Ocean Port Hotel", supra* note 17 at 58. [Emphasis added]

21 "*Justicizing*, Pt. I" at 328-38.

22 Over the course of the last 100 years, one can count over 30, significant Canadian reform initiatives involving substantial inquiries into either the federal or a provincial system of administrative agencies resulting in major reports that have almost always included recommendations for radical structural reform from a justice perspective. Except for the enactment of the *Statutory Powers Procedures Act* in Ontario in 1971 following the McRuer Report, one is hard pressed to find evidence of the ultimate, meaningful implementation of any of the significant justice recommendations in any of those Reports.

23 For a full discussion of this phenomenon, see the author's article: "Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals" (2001) 15 C.J.A.L.P. 15 at 42-44. In the category of reforms "finessed", one can now probably include most of the significant "independence" reforms recommended in the B.C. Administrative Justice Project's White Paper.

24 *Ocean Port Hotel, supra* note 16, particularly at paras. 23, 24, 29-31 [S.C.R.].

25 *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 CarswellAlta 915, 2 Admin. L.R. (4th) 167 (S.C.C.) [*Ell*]. Issued the same day as *Bell*, the Court's unanimous judgment in *Ell* (written by Major J., but with McLachlin C.J. one of the concurring justices) extended the application of the unwritten constitutional requirement of judicial independence (first identified in *Provincial Judges Reference, supra* note 19), to Alberta Justices of the Peace. *Ell* provides a full analysis of the principles that ought to determine the applicability of that requirement -- principles that seem readily evoked by the functions and responsibilities of quasi-judicial tribunals.

26 *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 CarswellBC 2432, 5 Admin. L.R. (4th) 161 (S.C.C.) [*Paul* cited to S.C.R.]. See "*Justicizing*, Pt. I" at 306-07.

27 2006 BCSC 1372, 2006 CarswellBC 2262 (B.C. S.C.) [*McKenzie*]. (The author, it should be noted, was a member of the Petitioner's legal team in *McKenzie)*.

28 At the time of writing, the B.C. Supreme Court's decision on the constitutional issue in *McKenzie* is under appeal.

29 Recently posted on the Supreme Court of Canada's Web site. For a related and also supportive academic analysis see David Dyzenhaus, "The Unwritten Constitution and the Rule of Law", in Grant Huscroft & Ian Brodie (eds.), *Constitutionalism in the Charter Era*, (Markham, Ont.: Butterworths, 2004).

30 Web site text, page 1.

31 *Ibid.* at 5.

32 *McKenzie, supra* note 27 at paras. 150-52 [BCSC].

33 *Provincial Judges Reference, supra* note 19.

34 *Ibid*.

35 *Ell, supra* note 25.

36 *Ontario Deputy Judges Assn. v. Ontario* (2006), 2006 CarswellOnt 3137, 268 D.L.R. (4th) 86 (C.A.) [*Ont. Deputy Judges*].

37 Beginning in 1996, the Province of Québec has already effectively *justicized* the bulk of its adjudicative tribunals, and, as was explained in Part I (see particularly notes 3, 18, 36, 40 and 41), references in this paper to shortcomings in Canadian administrative justice policies should be read as containing the implicit qualifier: "with the exception of Québec".

38 The traditional reference to a tribunal appointment being "in the gift of" a minister or of a premier is reflective of how these appointments were -- and are -- in fact regarded. Of course, as a practical matter, the "petition" takes the form of a recommendation for re-appointment to the host Minister by the tribunal Chair on the member's behalf.

39 The author uses the word "dismissed" advisedly. The expiration of a term of appointment without a renewal may not, in law, technically constitute a dismissal. Nevertheless, in the context of a quasi-judicial tribunal where multiple renewals of member appointments are routine and, from an operational perspective, an institutional necessity, the arbitrary refusal of a particular member's re-appointment without cause or reasons is clearly a *de facto*, idiosyncratic *dismissal*.

40 The author has direct knowledge of a number of Ontario quasi-judicial tribunal members who have had this very experience.

41 Nor is such potential alienation and its possible career consequences of only theoretical concern. The author can attest to the fact that, within the communities of tribunal members with which he is familiar, it is well understood that, contrary to the historical, Anglo/Canadian tradition of governments respecting the independence of *judicial* adjudicators as referred to in *Valente (No. 2)* [See discussion in Part I, at 320-28], Canadian governments have traditionally, and do still, use their re-appointment power with respect to quasi-judicial tribunal members as a tool of reprisal or as a means of arbitrarily dispensing with members whose decisions are perceived to be insufficiently attuned to a government's interests. This understanding is implicit in the famous observation, 18-years ago, by Madam Justice Rosalie Silberman Abella, now of the Supreme Court of Canada, but, then, Chair of the Ontario Labour Relations Board, that

> [I]t takes herculean feistiness for tribunal adjudicators to develop decisions of a potentially controversial kind ... when they know that at the end of the political telescope through which they are observed is a person with the power to renew or not renew a three- or five-year appointment.

See: Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization" (1988) 2 C.J.A.L.P. 1 at 10.
This practice of idiosyncratic removals of tribunal members is rarely reported upon, and objective evidence of a government's reasons is rarely available, but the legal profession's understanding that the vulnerability noted by Abella in 1988 was still a reality -- at least in Ontario -- 14-years later, may be seen evidenced in a newsletter published by the Toronto administrative law firm, Fink & Bornstein. The July 2002 issue of that newsletter is principally devoted to an analysis of the decision record of a particular experienced and respected, Ontario quasi-judicial tribunal adjudicator whose appointment had recently been shockingly not renewed. The law firm concluded that what must have alienated the "provincial political power brokers" and lead to the adjudicator's "removal" was the fact that the adjudicator's decision-making, while always competent and fair, was too often "out of step with government interests". See also the following comment by two, experienced, Ontario labour counsel in the conclusion of an article in which, *inter alia*, they had traced the Ontario Conservative government's abuse of its re-appointments power with respect to Labour Relations Board Vice-Chairs from 1995 to 2003.
If Labour rights are to be taken seriously *... it is ... necessary that the Board's independence be restored so that adjudicators feel free, once again, to make decisions that may be unpopular with the government of the day.* [Emphasis added]

Lebi & Mitchell, "The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification" (2003) 10 C. L. E. L. J. 472 at 484.

42 *Valente, supra* note 14.

43 *2747-3174 Québec Inc. c. Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, 1996 CarswellQue 965, 42 Admin. L.R. (2d) 1 (S.C.C.) [*Régie*].

44 *Barreau de Montréal, supra*, note 10.

45 *Ibid.*

46 *Ibid.* at para. 174.

47 *Ibid*. at paras. 172-190.

48 See above.

49 That process would not necessarily entail an independent renewal committee making the decision. It would be arguably sufficient to have the re-appointment decision made in the first instance by the Tribunal Chair subject to an appeal to an independent body such as an "Administrative Justice Council". (See item (m) on the Competence Optimizing Agenda proposed below) If the process excluded the Tribunal Chair from the renewal decision itself, it is obvious that it would have to be a process that nevertheless accorded a prominent place to the Chair's performance-based recommendations.

50 An occasion for doing so will inevitably arise. One may anticipate that in due course a long-serving, meritorious and competent member of a quasi-judicial tribunal will be refused re-appointment where colleagues with similar qualifications have continued to be re-appointed. With the constitutional requirement of judicial independence by then clearly applicable, the member, supported perhaps by his or her professional body, will challenge the constitutionality of the government's untrammeled re-appointment discretion, having regard to its incompatibility with any reasonable notion of a quasi-judicial tribunal member's judicial independence. The Court will be asked to adopt the *Barreau de Montréal* analysis, and to distinguish *Régie* as *Barreau de Montréal* did, on the basis that in *Régie* the Court was not dealing with a quasi-judicial tribunal.

51 As recommended, for instance, in the Ratushny Report -- *Canadian Bar Association Report on the Independence of Federal Administrative Tribunals and Agencies* written by Ed Ratushny, University of Ottawa, (1990).

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

53 *Provincial Judges Reference, supra* note 19.

54 [2003] 1 S.C.R. 539, 2003 CarswellOnt 1803, 50 Admin. L.R. (3d) 1 (S.C.C.), *(known colloquially as* the "retired judges" case).

55 (2005), 76 O.R. (3d) 641, 2005 CarswellOnt 3477 (Ont. Div. Ct.).

56 This standard of review makes sense when the official exercising the discretion to re-appoint or not re-appoint an adjudicator is himself or herself a judge. The relative expertise as between a *judge* exercising that discretion and a reviewing *court* on the re-appointment issue would argue in favour of the court showing the most deference. But if the official exercising the re-appointment discretion relative to an appointee exercising a judicial function is a Minister -- or the Cabinet -- the comparative expertise argument in favour of the courts showing less deference might be persuasive.

57 Typically, the ministries that are assigned to "host" quasi-judicial tribunals are the line ministries that have operational responsibility for the policies underlying the legislation, regulations, and policy guidelines from whence the *justiciable* rights disputes the tribunal is mandated to adjudicate arise. Tribunals are dependent on their host ministries for their budget, for the compensation levels for their Chairs and members, for their administrative support, for their housing, for the training of their members, for, as a practical matter, the selection and appointment - and, most ominously, the re-appointment -- of their Chairs and members. Their Chairs report to the Minister and/or Deputy Minister. It is in this context of abject dependency that Tribunal Chairs and members find themselves having to contemplate adjudicative decisions that may seriously inconvenience or, possibly, publicly embarrass their host ministry or its senior officials. For some tribunals, their host ministry is frequently -- or always -- a contesting party in the tribunal's hearings.

58 For an account of the Canadian legal system's pre-*Valente* lack of concern for objective structural guarantees of judicial independence for adjudicators -- or judges -- see. "*Justicizing*, Pt. 1" at 320-28.

59 It is very clear that, in the absence of an acknowledged constitutional requirement of judicial independence, these conflicted relationships will not fall at all, no matter how unacceptable they are from a justice perspective. They have been tolerated, virtually without comment, for nearly 100 years. And, most recently, they have survived - intact and undisguised - the much-heralded B.C. *Administrative Justice Project*.

60 Anne Freedman, *Patronage: An American Tradition* (Chicago: Wilson-Hall, 1994) at 12. [Emphasis added]

61 Tabled in the Legislature on June 26, 1986 at 13-14. This is the report that led to the establishment in Ontario of the Standing Legislative Committee review of tribunal appointments. [Emphasis added]

62 Chair, Ontario Workers' Compensation Appeals Tribunal, 1985 to 1997; President of the Society of Ontario Adjudicators and Regulators (SOAR), 1992 to 1996; member CCAT Board of Directors, 1986 to 1994.

63 See: "Tools, Templates and Guides" -- the binder the Ontario Attorney General and Chair of Management Board presented to the Council of Ontario Boards and Agencies Conference on November 16, 2000, representing their implementation of the *Guzzo Report* (see Part I of this article in the previous issue at note 16). [Emphasis added] Note that the reference in this passage to "appointees" encompassed appointees to *adjudicative* positions.

64 A "Corporate Management Directive" issued by the Corporate Policy Branch, Program Management and Estimates Division, Management Board Secretariat in November 1994.

65 In Ontario, a general rule limiting appointments to two, three-year terms has long existed even though it was never applied consistently. For instance, it was never applied, as far as one knows, to Labour Relations Board appointments, nor to WSIAT appointments. But as of September 2006, the Ontario government has adopted a ten-year cap on appointments which is to be of general application subject to such exceptions as may be explicitly approved from time to time. In the Federal jurisdiction, the maximum is ten years and the traditionally rigid enforcement of that maximum ensures the annual, mid-career exodus of the Federal tribunals' most talented members.

66 In Ontario, this glaring deficiency appears to have been finally addressed in June 2006 when a new directive was issued tying tribunal member and Chair remuneration directly to appropriate levels of the public service compensation structure. See "Addendum to the Government Appointees Directive" dated June 9, 2006.

67 *Provincial Judges Reference, supra* note 19.

68 *Ibid.* at paras. 145 and 246.

69 *Ibid.* at para. 40.

70 *Ont. Deputy Judges, supra* note 36.

71 *Ibid.* Judgment of Justice Michael R. Dambrot of the Superior Court of Justice dated November 16, 2005. (Reported at (2005), 18 C.P.C. (6th) 324.

72 All as detailed in the judgment. *Ibid.* paras. 24-31.

73 It is of interest to note that a *per diem* rate of $232 is roughly 10 per cent of the *per diem* rate typically charged by Ontario's professional, labour relations grievance arbitrators.

74 *Supra,* note 71.

75 *Ibid.* paras. 47-49.

76 Regular part-time members with assured assignments to a significant number of specified hearing days per month would be an example of such an arrangement.

77 Recognition of the need for an independent oversight "Council" has been a constant feature of law reform recommendations over many years. See, for example, the Ratushny Report, *supra* note 51 and Ontario's "Macaulay Report" (Macaulay, R. 1989. *Directions*: Report on a Review of Ontario's Regulatory Agencies prepared for the Ontario Management Board of Cabinet). Compare as well, the "Administrative Conference of the United States", Title 5, U.S.C. Part I, Chapter 5, sub-chapter V, ss. 591-96.

78 A full examination of the developing jurisprudence on the procedural-fairness requirement of written reasons is beyond the scope of this paper, but see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 1999 CarswellNat 1124, 4 Admin. L.R. (3d) 173 (S.C.C.) [*Baker*]; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 CarswellNfld 174 (S.C.C.) [*Sheppard*]; and *Megens v. Ontario Racing Commission* (2003), 64 O.R. (3d) 142, 2003 CarswellOnt 3531, 10 Admin. L.R. (4th) 83(Div. Ct.) at para. 15 [O.R.] [*Megens*].

79 See, for example, *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 CarswellNB 145, 48 Admin. L.R. (3d) 33 (S.C.C.) at para. 49 [S.C.R.] [*Ryan*].

80 *Baker, Sheppard, Megens* and *Ryan, supra* notes 78 and 79.

81 *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 CarswellNS 360, 4 Admin. L.R. (4th) 1 (S.C.C.); and *Paul, supra* note 26.

82 *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Service*, [2006] 1 S.C.R. 513, 2006 CarswellOnt 2350, 42 Admin. L.R. (4th) 104, (sub nom. *Tranchemontagne v. Disability Support Program (Ont.)*, 347 N.R. 144 (S.C.C.).

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