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“Tribunal Independence and Impartiality in Canada. How Real is it?”

NOT REAL BY ANY MEASURE

By

Ron Ellis¹

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¹ S. Ronald Ellis, Q.C., B.A.Sc., LL.B, Ph.D. (Ph.D degree to be conferred at Osgoode Hall’s June 2009 Convocation), is a Toronto-based administrative law lawyer with extensive experience in the administrative justice system – WCAT Chair, 1985-1997, CCAT Board Member 1986-1994, SOAR President, 1992-1996 – who has written extensively on the issues of the administrative justice system in Canada. This paper was originally presented at The Canadian Institute, 8th Annual Advanced Administrative Law & Practice Conference, Ottawa, October 2008, in response to the panel topic: “Tribunal Independence and Impartiality in Canada. How real is it?”

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PREFACE

This paper was originally presented at The Canadian Institute, 8th Annual Advanced Administrative Law & Practice Conference, Ottawa, October 2008, in response to the panel topic: “Tribunal Independence and Impartiality in Canada. How Real is it?”

On this topic, one has no choice but to preface one’s submissions by making it clear that, for the most part, one is not talking about Québec tribunals.

Québec’s 1996 radical and progressive reform of its system of administrative law dramatically changed the architecture of that system. For the new Administrative Tribunal (TAQ) and its other major tribunals, the reform created a professional administrative justice system devoted to merit-based competitive appointments processes and institutional independence, impartiality and competence.² In administrative law terms, Quebec is now a different case from the rest of the country. It is, also, the only province in which there is a written constitutional requirement that tribunals in general be independent and impartial.³ My understanding, therefore, is that the issues of independence and impartiality that this panel is addressing have in Québec been largely resolved. There may be remnants of the independence and impartiality issues in fact still in play in that province in respect of some of the

² The reform was introduced by Bill 130, “*An Act Respecting Administrative Justice*”, enacted December 1996. The new legislation 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 Quebec tribunals. For a convenient, authoritative description of TAQ, see the Quebec Court of Appeal’s judgment in *The Attorney General of Québec v. Barreau du Montréal*, [2001] J.Q. No. 3882 (C.A.), leave to appeal refused (2002), 2002 CarswellQue 2078 (S.C.C.), reconsideration refused (2002), 2002 CarswellQue 2683 [*Barreau*], cited to J.Q. (C.A.).

³ *Charter of human rights and freedoms*, R.S.Q. c. C-12, s.23: “Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.”

smaller tribunals, but for the most part the independence question has been answered.

I shall refer to Quebec in comparative terms from time to time, but my analysis of the problems with the Canadian administrative justice system is simply not pertinent to Québec's system of administrative justice. My concerns about the independence and impartiality of tribunals relate to the rest of Canada where it is perfectly clear that the Quebec reforms have had no discernable impact.⁴

For a recent, comprehensive, English language description of Quebec's restructuring of its administrative justice system see University of Montréal Professor France Houle's presentation to the University of Toronto Symposium on the Future of Administrative Justice in January 2008.⁵

A second caveat that I must enter at the outset is that when I say that Canadian adjudicative tribunals and their members are not, by any measure, independent or impartial – and that is, indeed, the theme of this paper – I am not intending any reflection on the personal integrity of any individual tribunal members. I am evaluating the independence and impartiality of tribunals using the test the law has specified – that is, would an objective and fully informed and fair-minded observer have a reasonable apprehension of dependency or partiality? As advocates treading the sensitive ground of seeking to have judges recuse themselves are always wont to say: "I am of course, your honours, not suggesting in any way *actual* bias (although, I am asserting actual dependency). It is just that these circumstances have, in my submission, given my client, who does not have the advantage that I have of knowing of you personally, a reason to be apprehensive about your

⁴ Convenience dictates that I continue to refer to the administrative justice structures in the rest of Canada, and to the problems with those structures under the generic "Canadian" label, but in what follows references to "Canada" or to "Canadian" agencies or tribunals are to intended to respectfully exempt Québec and Québec agencies and tribunals, unless the context indicates otherwise.

⁵ France Houle, "A Brief Historical Account of the Reforms to the Administrative Justice System in the Province Of Quebec" (2009), 22 Can. J. Admin. L. & Prac. 47.

independence and impartiality, and, of course, if that is a reasonable apprehension, then in law you are neither independent nor impartial". And, in this paper, that is the case I will be making.

INTRODUCTION

This paper is concerned with the myriad of judicial, adjudicative functions assigned by Canadian statutes to persons who are not judges and to institutions that are not courts. Taken together, these persons and institutions are now commonly said to comprise an "administrative justice system". It is a justice system with a pervasive, major influence on the life of all Canadians; the justice system to which the majority of Canadians must look for the recognition or vindication of their rights; the only justice system most people are likely to encounter. It is a system of tribunals which routinely make life-altering rights decisions in a broad range of contexts, and which are as capable as courts of inflicting injustice; a system that is as much a part of our rights regime, and as much a child of the rule of law, as is our traditional judicial system.

I am concerned in this paper only with tribunals at the high end of the *Bell* spectrum – what the Supreme Court in *Bell* called "quasi-judicial" tribunals – whose functions are predominantly judicial.⁶ I believe the Supreme Court's application of the label "quasi-judicial" to these tribunals was, with respect, an inappropriate use of the "quasi-judicial" label, having regard to its common law provenance. The McRuer Report called these tribunals "judicial tribunals"⁷, and in previous articles, and in my Ph.D. Dissertation, I have called them "rights tribunals". Here, in order to make it clear that I am speaking of tribunals and tribunal members that exercise judicial adjudicative functions that are, effectively, no different from the adjudicative functions of a court and am not referring to tribunals that make regulatory decisions, I will

⁶ *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884.

⁷ *Royal Commission Inquiry into Civil Rights*, Report No. 1, Vol.1 (1968) at 120-123 (Chair: James Chalmers McRuer)

use McRuer's label, "judicial tribunals". Obvious exemplars of such tribunals would include the Canadian Human Rights Tribunal (the focus of the litigation in *Ocean Port*), the IRB, Ontario's Workplace Safety and Insurance Appeals Tribunal (WSIAT), and its Social Benefits Tribunal, and its Landlord and Tenant Board.

My thesis in this presentation is that, outside of Québec, Canadian judicial tribunals and their members are not independent or impartial – not impartial in law, and not independent in fact or law, and that, accordingly, their decisions are typically invalid, as a general rule.

Since I believe the majority of our tribunals fall within the judicial category, and that judicial tribunals are a principal component of our justice system, the omission of regulatory agencies and their decision-makers from the analysis does not substantially diminish the potential importance of the argument.

The panel topic refers to both independence and impartiality. However, my principal focus will be on the question of independence. On the subject of impartiality, I have two points to make and then will move on to the independence issue.

First, the law is clear that if there is no independence there can be no impartiality. Independence is a cornerstone of the rule of law because its indispensable purpose is understood to be the establishment of what Binnie J. described in *CUPE* as "a protected platform for impartial decision making".⁸ McLachlin J. (as she then was) put it this way in *MacKeigan v. Hickman*:

It should be noted that the independence of the judiciary must not be confused with impartiality of the judiciary. As Le Dain J. points out in *Valente v. The Queen*, impartiality relates to the mental state possessed by a judge; judicial independence, in contrast, denotes the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially. Thus the question in a case such as this is not

⁸ *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 [CUPE] at para. 189.

whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the *independence which is the underlying condition of judicial impartiality* in the particular case.⁹ (Emphasis added)

My second point is the perfectly obvious one that the politicized processes for the appointment and re-appointment of judicial tribunal members in Canada create, implicitly, a reasonable apprehension of tribunal partiality – apprehension of partiality towards the government and its decisions and policies and apprehension of partiality towards the government's influential friends and their interests.

I am of course aware of the arguments that are made in support of governments having a legitimate interest in populating tribunals with members who share its ideological view of the world. These arguments are, in my respectful submission, entirely invalid with respect to judicial tribunals, because they wrongly assume that all judging is ideological judging. The arguments are more respectable with respect to regulatory agencies, although, I must say, if the issue is whether a licence to operate a nuclear facility should be granted, or renewed, or suspended, and the only issue is whether the operation of the facility would be safe (and in the nuclear context, that means very safe), I find it difficult to see where, in that decision, ideology or political partisanship come into it. I would have thought that, in those cases, sufficient qualifications and optimum competence would be seen to be the only appropriate appointment criteria.

Nevertheless, I leave the question of the independence and impartiality of regulatory agencies to another day, and now turn to the question of the independence of judicial tribunals.

I rather suspect that readers who may know of my role as one of Mary McKenzie's counsel in the *McKenzie* case will be anticipating that my argument on the independence issue will be largely based on the applicability

⁹ *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 at para. 57. (Emphasis added)

to judicial tribunals of the unwritten constitutional requirement of judicial independence identified in the *PEI Reference*¹⁰; a constitutional requirement that *McKenzie*¹¹ found to be applicable to BC Residential Tenancy Arbitrators. However, my thesis that the lack of independence of judicial tribunals and their members invalidates their decision-making is not contingent on their enjoying constitutional protection of their independence. In my opinion, virtually all of Canada's judicial tribunals fail to meet one or more of the *common law* requirements of judicial independence. I will be addressing *Ocean Port* and *McKenzie* and the applicability of the *PEI Reference*'s unwritten constitutional requirement of judicial independence to judicial tribunals later in the paper but that will not be the main focus of this presentation.

What I am principally here to say is that there is hardly a judicial tribunal in Canada whose decisions could not be rationally challenged on the basis of the failure of the tribunal or its members to meet the common law requirements of judicial independence as those requirements currently stand. To challenge the decisions of any of these tribunals on the basis of their failure to comply with the procedural fairness principle of judicial independence, one would need to make no new law; one would need only to have a court apply existing law.

PREFATORY POINT

Taken together, the myriad of ad hoc judicial functions assigned to Canadian administrative tribunals – federal, provincial, territorial and municipal –are now commonly said to comprise an “administrative justice system”.

¹⁰ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R. v. Campbell; R. v. Ekmeçic; R. v. Wickman Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 [*PEI Reference*]

¹¹ *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)* (2006), 272 D.L.R. (4th) 455.

It is only recently that this collection of judicial functions has been seen in Canada to be a “system” and more recently still that it has been seen to be a “justice” system.¹² Since the functions in question are typically exercised by what we have in recent years called administrative tribunals, it was natural to call this newly recognized *justice* system, the “*administrative justice system*”, the name now in general use.

However, as I have pursued my graduate studies in administrative justice over the past several years, it has become increasingly clear to me that it has been a mistake to give so respectable a name to a system that from a justice policy perspective is so – not to mince words – shameful. Apart from Québec, the system we have is in truth no more than an “*executive branch justice system*”. To call it an administrative justice system is to give it a misleading aura of respectability – to be complicit in what is, effectively, a pretence.

Outside of Québec, Canada’s so-called administrative justice system is no more than an excuse for a justice system, It is in truth an executive branch justice system comprised for the most part of what Dicey disparagingly and appropriately dismissed as “official courts”¹³, and in this paper that is what it will be called. We need an administrative justice system but we do not currently have one.

THE HISTORICAL CONTEXT

In Canadian legal history, no one has ever doubted that the cornerstone of the rule of law is the judicial independence of those institutions or individuals

¹² Ron Ellis, “The Administrative Justice System in the New Millenium: A Vision in Search of a Centre” (1999-2000), 13 Can. J. Admin. L. & Prac. 171 at 173-175.

¹³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution, 6th Edition* (London, UK: Macmillan and Co. Limited, 1902) at 333. [Dicey]

entrusted with the exercise of judicial functions, whether they be courts and judges or tribunals and tribunal adjudicators. But it used to be that the actual, structural dependency of provincial court judges,¹⁴ justices of the peace, and tribunal adjudicators was seen to be perfectly compatible, in law, with judicial independence. For example, throughout most of Canada's history, security of tenure for provincial court judges, justices of the peace and tribunal adjudicators was not seen to be necessary; its absence not thought to present an independence issue.

Until 1962, all Ontario provincial court judges were appointed at pleasure and, until the year of the Charter – 1982 – Ontario provincial court judges who served after the age of 65 – until age 75 – did so pursuant to discretionary, at-pleasure appointments by the Attorney General. And, of course, most adjudicative tribunal members traditionally served pursuant to at-pleasure appointments, and many still do.

In those days, the common law of judicial independence amounted to nothing more than the courts – and the bar – simply presuming that anyone appointed to perform a judicial function could be counted on to *act* independently. Where governments had powers that were inconsistent with the actual independence of adjudicators, such as the right to terminate “at pleasure” appointments without notice or cause, the courts thought it sufficient to trust that governments would not abuse those powers and that adjudicators would not allow themselves to be influenced by the possibility that they might. For convenience, I label this the “trust doctrine of judicial independence”.

And one of the striking aspects of what I think of now as this “pre-history” of judicial independence in Canada is that for over a hundred years this trust doctrine existed as nothing more than an implicit understanding in our legal culture, and lasted only five years once it was brought to light by official court

¹⁴ The independence of superior court judges is protected by explicit constitutional provisions and is not relevant to this analysis.

recognition. It found its first judicial expression in 1980 in the Supreme Court of Canada decision in *MacKay*¹⁵ – the first case in recorded Canadian legal history in which anyone mounted a court challenge of the independence of an adjudicator; was expounded more clearly in 1983 in the Ontario Court of Appeal decision in *Valente (No. 2)*¹⁶ and even more clearly a year later in the Ontario Court of Appeal decision in *Currie*¹⁷. But, in 1985, it was overruled and relegated to the dust bin of legal history when the Supreme Court of Canada heard the appeal of *Valente (No. 2)* and rejected the “trust doctrine” in the watershed decision, *Valente*.¹⁸

In *Valente*, the “trust doctrine” was rejected and replaced by the legal requirement of objective structural guarantees of independence in accordance with principles that are now, in their broad outline, so widely understood and so thoroughly settled that they may be conveniently labeled the *Valente Principles*.

Of course, the unanimous judgment of the Supreme Court in *Valente* – a judgment written by Justice Gerald Le Dain – dealt only with the concept of “tribunal” independence as that concept was constitutionally mandated by section 11(d) of the Charter.¹⁹ Thus, *Valente* could not be seen as necessarily changing the common-law content of the judicial independence requirement of procedural fairness 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 recognized that it was addressing language in section 11(d) that encompassed “tribunals”

¹⁵ *R. v. MacKay*, [1980] 2 S.C.R. 370

¹⁶ *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417 [*Valente No. 2*].

¹⁷ *Reference re Justices of the Peace Act; Re Currie and Niagara Escarpment Commission* (1984), 14 D.L.R. (4th) 651 [*Currie*].

¹⁸ *R. v. Valente*, [1985] 2 S.C.R. 673 [*Valente*].

¹⁹ Charter, s. 11: “Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing *by an independent and impartial tribunal*.” (Emphasis added)

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*,²⁰ overruling *MacKay*²¹ with respect to court martial tribunals; *Matsqui*,²² extending the *Valente Principles* of structural guarantees of judicial independence to tribunals not protected by either constitutional or quasi-constitutional independence requirements, and others²³ – have eventually entrenched the requirement of judicial independence as an essential component of the common law doctrine of procedural fairness and/or natural justice for both provincial court judges and judicial tribunals and their members, whether or not there is any constitutional or quasi-constitutional requirement of independence.

Matsqui, a decision that is now only 14 years old, marked, as we know, the beginning of the modern common law of judicial independence of judicial tribunals in which objective structural guarantees are now understood to be the fundamental, prerequisites of their judicial independence.

Since *Valente*, and the many cases such as *Matsqui* and *Généreux* that followed and applied it, the law is now settled that if provincial court judges or administrative tribunals and their members are to be seen to meet the common law’s procedural fairness requirement of judicial independence it will be necessary that they are seen to be protected by objective structural guarantees of the three “conditions” (sometimes referred to as the three “core characteristics” or “mechanisms”) of judicial independence: security of tenure, financial security, and administrative control .

²⁰ R. v. *Généreux*, [1992] 1 S.C.R. 259.

²¹ Supra note 15.

²² *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 [*Matsqui*]

²³ See also *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 [*CUPE*] – the “retired judges case” – at para. 189.

THE POST-VALENTE CONTEXT

Before *Valente*, the fact that a judicial tribunal was clearly exercising a judicial function but depended on its host line ministry for the appointment and re-appointment of its members; or that the appointments of its members were at-pleasure appointments only; or that the ministry staff picked the adjudicators that would hear particular cases, or provided the tribunal's registrar functions and decided the time available for each hearing and for the making of each decision, and determined whether or not the tribunal would provide written reasons; or that the Deputy Minister effectively controlled the tribunal's budget; or even that the same host ministry was routinely one of the parties to the tribunal's cases; or that the adjudicators were appointed to short, fixed terms and their re-appointments were entirely in the untrammelled discretion of the ministry – none of that was seen in law, or in our legal culture, as presenting issues of judicial independence. Why? Because, as I have said, the law presumed that, on the one hand, the host ministry would not abuse its powers, and, on the other, that the tribunal and its members would not allow their decisions to be affected by the possibility that it might. In our justice system history prior to *Valente*, the *presumption* of independence always finessed the *issue* of independence.

But this no longer holds. The jurisprudence based on *Valente* now requires that the compliance of any particular tribunal with the procedural fairness principle of judicial independence depends on there being objective, structural guarantees of security of tenure, financial security and administrative control. Thus, all of these relationships between tribunals and government ministries fall now to be assessed through the common-law lens of the *Valente Principles*.

THE COMMON LAW OF INDEPENDENCE

A. As far as Content is Concerned, the Common Law Requirement and the Constitutional Requirement are the same

Since *Matsqui*²⁴, it is settled law that the content of the requirement of judicial independence applicable to tribunals is the same whether the requirement is only a common law requirement or is a constitutional requirement. The effect of there being a constitutional requirement is to elevate the common law requirement to constitutional status. The only effect of there being no constitutional requirement is that the requirement in question can be trumped by legislation.

B. The Content is Variable

Perhaps the most interesting feature of the Canadian law of judicial independence, whether it be constitutional law or common law, is that its content is understood to be variable in its application. The nature of the structural guarantees that will be seen to be necessary – the standard of guarantee that will have to be met if a reasonable apprehension of bias is to be avoided – may well differ from tribunal to tribunal. It will not be as high as that accorded to the superior courts by the explicit provisions of the BNA Act, nor as high as that typically accorded to Provincial Court Judges under provincial court legislation, nor, for a particular judicial tribunal, not necessarily as high as that which will be accorded to other tribunals. The degree of independence required will vary depending on the nature and function of the tribunal.

The law on the variability of the standard of independence is conveniently summarized by the Supreme Court itself in the following passage from *Bell*:

The requirements of procedural fairness -- which include requirements of independence and impartiality -- vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24: "the rules of natural justice do not have a fixed content

²⁴ Supra note 22.

irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" (see also ... Matsqui ... at para. 82, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22, per L'Heureux-Dubé J.). As this Court noted in *Ocean Port ...*, administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. *Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence* (see *Newfoundland Telephone*, at p. 638, per Cory J., and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.)).²⁵

C. Security of Tenure

1. General Principles

It is settled that for members of judicial tribunals the common law principle of judicial independence does not require life-tenured appointments.²⁶ It is also clear, however, that "at pleasure" appointments do not meet the minimum requirement of security of tenure.²⁷ What is required, as a minimum, are fixed-term appointments with the appointee structurally guaranteed to be free from executive branch interference during the length of the fixed term except for a dismissal for cause.²⁸

Furthermore, the Supreme Court jurisprudence requires a structural

²⁵ Bell, supra note 6 at para. 21. (Emphasis added)

²⁶ Ibid. at para. 29. See also 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 [*Régie*] at para. 67.

²⁷ Ibid, *Régie* at para. 67.

²⁸ Valente, supra note 18, at para. 31. See also *Régie*, Ibid, at para. 67.

guarantee that adjudicators be protected from arbitrary dismissal *for cause* by a legal right not to be so discharged except in accordance with a fair-hearing procedure equal or akin to a “judicial review”.²⁹ This is a requirement that seems to have been sometimes overlooked.³⁰

2. Discretionary Re-appointments are not Congruent with the Common Law of Independence

In a keynote address to the 1997 annual conference of Ontario Boards and Agencies (COBA), the Honourable Roy McMurtry, the then Chief Justice of Ontario, endorsed the following statement of the legal principles defining adjudicator independence.

1. Issues involving legal rights and obligations can at law only be validly determined by adjudicators who are independent and impartial and whose circumstances do not provide any reasonable basis for an informed observer to think otherwise.
2. The confidence of the adjudicator, and of the parties, that the adjudicator is free to make a decision in their case without fear of personal consequences is a fundamental prerequisite for any independent and impartial adjudication.³¹

He then went on to say that freedom “from fear of idiosyncratic removal” – his phrase – is integral to the concept of adjudicative independence.³²

“Idiosyncratic removal” is a phrase of particularly pertinence to our executive branch justice system. The phrase precisely describes the frequent events in that system that have had the cumulative effect of fixing in its adjudicators’ minds a pervasive, constant awareness of the possibility of personal career damage if they should make decisions that unduly inconvenience the government or its friends. It is easily arguable that that pervasive awareness of the possibility of reprisals may alone justify the

²⁹ *Valente*, *Ibid.* at paras. 30-31. See also *Therrien (Re)*, [2001] 2 S.C.R. 3 at para. 39.

³⁰ See *Weatherill v. Canada (Attorney General)*, [1999] F.C.J. No. 787 at para. 88, and *Wedge v. Canada (Attorney General)* (1995), 133 F.T.R. 277.

³¹ Ellis, *Appointments Policies in the Administrative Justice System: Lessons from Ontario: Four Speeches* (1998), 11 C.J.A.L.P. 205.

³² *Ibid.*

conclusion that a reasonable apprehension of bias is a generic feature of executive branch justice – an argument that, in my submission, may usefully be included in any judicial review challenge of the independence of any part of that justice system.

An idiosyncratic removal is what occurs when, for undisclosed reasons, a government selects a particular member of a tribunal for either a mid-term dismissal, without cause or reasons, or for non-reappointment when that member's term of appointment is expiring and re-appointment has been earned and is expected – expected by the member, the member's tribunal chair and the member's tribunal colleagues.

The word "removal" may not, from a technical point of view, be perfectly apt in the latter circumstance since what that removal involves is not a termination of a term of appointment but the refusal to renew an expiring term of appointment. However, in the circumstances where the efficient operation of a tribunal requires the routine re-appointment of competent members (which is almost always the case, a two-terms-and-out policy or a ten-year cap notwithstanding), and where, in the ordinary course, competent members are in fact routinely re-appointed and have a reasonable expectation that they will be, then an arbitrary refusal to re-appoint a particular, competent, meritorious member for whom the re-appointment is validly expected is for all relevant purposes a "removal".

An idiosyncratic removal of a part-time member may also be accomplished by an arbitrary decision by a Tribunal Chair not to assign him or her to any more cases despite their appointments having not yet expired.

It is well known that, outside of Quebec, Canadian governments see themselves as having an untrammelled 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 their Minister, or the Premier's or Prime Minister's Office, for what governments perceive as

the “gift” of a further appointment.³³ Moreover, it is also an article of faith amongst governments that tribunal members whose petition for re-appointment 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 meritorious member is especially devastating in personal terms because governments also hold fast to the belief that there is no right to compensation when re-appointment 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. The attitude one often detects is that the victim of the removal should be grateful for the time he or she has already had in the public “trough”.

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, a re-appointment unexpectedly denied involves, as one might imagine, significant hardship. In Ontario, and based on second-hand reports from colleagues in other provinces as well, it is not uncommon for members with years of commendable full-time service at a particular tribunal to be “removed” from their positions in this manner without cause, warning, notice, or reasons, and without compensation.³⁴

Those who understand implicitly that adjudicative decisions that are unpopular with a government or its friends may lead to an idiosyncratic removal cannot often point to evidence that will prove the reliability of that understanding beyond a reasonable doubt. Governments rarely give reasons

³³ 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” typically takes the form of a recommendation for re-appointment to the host Minister by the tribunal chair on the member’s behalf.

³⁴ The author has direct personal knowledge of a number of Ontario rights tribunal members who have had this very experience.

for the removals, and it is understood that idiosyncratic removals of experienced and meritorious adjudicators may sometimes be explained not by any particular unhappiness with the person removed but merely by the government's desire to create vacancies to accommodate the appointment of one its friends.

Still, in failing to give reasons where none are obvious, governments leave the victims of each removal, and their tribunal colleagues, to speculate about the reasons and, as one might expect, that speculation will often run along the lines of: "I wonder which of the removed adjudicator's decisions so offended the government or its friends as to lead to his or her removal?"

As I have argued elsewhere, where re-appointment decisions are known to be on the one hand reasonably expected and, on the other, entirely discretionary, and where idiosyncratic removals through the arbitrary denial of re-appointments are seen to be commonplace, and where the denial of an expected re-appointment means personal career disruption and financial hardship, it is disingenuous to say that appointments for fixed terms are compatible with judicial independence.

One must, of course, advance this latter point with some diffidence since the Supreme Court of Canada may arguably be said to have found to the contrary. First in *Valente* and later, and more particularly, in *Régie*, the Court has held that the security-of-tenure component of a constitutional requirement of judicial independence is, indeed, satisfied, as far as tribunal members are concerned, by apparently any fixed-term appointment.³⁵ 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, it is useful to note that this opinion has not been given in cases in which the arbitrary refusal of an expected and earned re-appointment was in issue. And, in point of fact, the Supreme Court of Canada has never had

³⁵ *Régie*, supra note 26

occasion to opine on the question of the compatibility of discretionary re-appointment regimes with the security of tenure condition of judicial independence.

The issue, however, has been dealt with authoritatively elsewhere. In its 2001 decision in *Barreau*³⁶ – a decision in respect of which leave to appeal to the SCC was refused – the Quebec Court of Appeal held that, if the *tribunal administratif du Québec* (TAQ) were to satisfy the Quebec Provincial Charter’s constitutional requirement of tribunal independence, 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 re-appointments process that is fair, objective, and independent. Against the argument that a fixed-term guaranteed free of intervention during the term was all that was required, the Court distinguished *Régie* 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”³⁷. But *Régie* could have been distinguished as well on the grounds that in that case the effect of the re-appointments regime on the independence of the tribunal was not considered.

Surprisingly – given the Canadian tradition in this respect – Quebec’s 1996 administrative justice legislation that created TAQ had not, in fact, left re-appointments solely to the discretion of the government. Instead, it had provided for a precedent-setting, transparent re-appointments process. It had put the re-appointment decisions in the hands of a special renewal committee – a committee whose members included the President of TAQ and a representative of the Minister of Justice.³⁸ It had not, however, made any

³⁶ *Barreau*, Supra note 2.

³⁷ *Barreau*, supra note 2 at para. 174.

³⁸ Section 49 of the *Act Respecting Administrative Justice*, S.Q. 1996, c. 54, provided for the renewal of a term of office to be “examined” according to a procedure to be established by regulation. Subsequently, the regulation required the forming of a committee that would “determine” whether the member still fulfilled the necessary criteria for appointment and recommend to the Minister of Justice whether or not the appointment should be renewed.

provision for participation in the process by the tribunal member whose re-appointment was being considered.

Mr. Justice René Dussault, speaking for a unanimous Court of Appeal in *Barreau*, held that the presence of the TAQ President and the Minister of Justice's representative on the renewal committee (two of the three members) meant that the legislated renewal process did not meet the *Valente* requirement of security of tenure. He also took the view that with members having no right to participate in the process – no right to have notice of the grounds of complaint and an opportunity to respond – the process did not meet the fairness requirement.³⁹ He concluded that these defects in the re-appointments process were incompatible with the *Valente Principles* insofar as the security of tenure of TAQ members was concerned.

Significantly, having found that the constituent legislation's statutory provision for a transparent re-appointments process did not satisfy the *Valente* requirement of a structurally guaranteed security of tenure, the Court of Appeal did not accept the argument put forward by the TAQ members⁴⁰ that for the tribunal to meet the constitutional requirement of independence their appointments needed to be life-tenured, like the appointments of provincial court judges. That would have been an outcome that would indeed have taken judicial tribunals a long way down the judicialization road. Rather, the Court's solution was simply to require that the re-appointment process be guaranteed by statute to be merit-based, transparent, fair and independent.

See Regulation Respecting the Procedure for the Recruitment and Selection of Persons apt for Appointments as Members of the Administrative Tribunal of Québec and for the Renewal of their Term of Office, Order in Council 317-98, 18 March 1998 (1998) 130 G.O.Q. II 1800, Division IX, Renewal of Terms of Office, s. 25-29. The third member of the committee was a "representative of the legal community".

³⁹ *Barreau*, supra note 2 at paras. 172-190.

⁴⁰ The TAQ members' association and a number of individual members had intervened in the decision to challenge the fixed-term appointments as being incompatible with the requirement of independence.

In 2003, the Quebec National Assembly responded to the *Barreau* decision by amending its legislation to remove the TAQ President and the representative of the Minister of Justice from the renewal committee and by giving TAQ members the right to be heard by the committee.⁴¹

This is a precedent the Supreme Court might well eventually embrace. One can surmise that when the courts perceive the security-of-tenure re-appointments issue for rights tribunal members as presenting the courts with the Hobson's choice of, on the one hand, security of tenure during a fixed term followed by the traditional, discretionary gift-or-refusal of re-appointment, or, on the other, of life-tenured appointments⁴², the courts, chary of judicializing tribunals, are likely to opt for the former. But *Barreau* presents a third option, and, when the opportunity arises for the Supreme Court to finally actually address the independence implications of fixed-terms that are routinely subject to discretionary re-appointment processes, it will find an acceptable model of a merit-based, transparent, fair and independent re-appointment process ready at hand in the post-*Barreau* version of Quebec's *Administrative Justice Act*.⁴³

The Court's adoption of the latter process as an independence prerequisite would, of course, require the Court to stipulate for re-appointment structures that would give reasonable assurance of independent, merit-based,

⁴¹ *An Act Respecting Administrative Justice*, R.S.Q., chapter J-3, as amended to May 13, 2003, contains the applicable, post-*Barreau* provision. See section 49 dealing with appointment renewals.

⁴² As recommended, for instance, in the *Ratushny Report: Canadian Bar Association, Report on The Independence of Federal Administrative Tribunals and Agencies* (presented to President John R. Jennings at the Annual General Meeting Commemorating the Seventy-Fifth Anniversary of the Canadian Bar Association, London England, 1990; Principal Author: Ed Ratushny, Q.C., Professor of Law University of Ottawa), Recommendation # 38, at 62.

⁴³ *An Act Respecting Administrative Justice*, R.S.Q., chapter J-3, as amended to May 13, 2003, contains the applicable, post-*Barreau* provision. See section 49 dealing with appointment renewals. It may be noted, however, that, subsequent to the 2003, post-*Barreau* amendments to the renewal committee provisions, the National Assembly did itself finally opt for life-tenured 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".

and fair re-appointment decisions. Fortunately, a precedent for the Court taking a pro-active role in structuring government-justice system relationships has been set. In the *PEI Reference*,⁴⁴ in support of the independence of provincial court judges with respect to the *Valente* condition of *financial* security, the Supreme Court made “independent *remuneration* commissions” a required structural component of the process for determining judges’ compensation.

Thus, to require something akin to “independent *re-appointment* commissions” as a necessary component of *Valente*’s structural guarantees of security of tenure for members of judicial tribunals might be seen as a comparable, reasonably digestible step. It would be arguably just the next natural move in the ongoing evolution of the judicial independence concept, an evolutionary process which the Court described so elegantly in its decision in *Provincial Court Judges’ Assn. of New Brunswick*.⁴⁵ It would also be a step that would accord with long standing recommendations from official studies of the administrative justice system in Ontario and elsewhere.⁴⁶

Of course, it must be noted that *Barreau* was admittedly addressing a judicial independence requirement that *was* constitutional in nature. The Quebec Charter requires tribunals to be independent and impartial. But, like *Valente*, by virtue of the now settled law that the *Valente Principles* define the requirements of judicial independence applicable to tribunals whether or not there is a constitutional requirement, on this issue *Barreau* stands as both a constitutional and common law authority. And, as far as I am aware, there is

⁴⁴ *Supra* note 10.

⁴⁵ *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges’ Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005] 2 S.C.R. 286 at paras. 2 and 3.

⁴⁶ See e.g. Reform Commission on Ontario’s Regulatory and Adjudicative Agencies, *Everyday Justice* (Chair: Gary Guzzo. [*Guzzo Report*] at 16 (It is important to ensure the process used to make reappointments is “open and transparent”).)

currently no Canadian legislation that explicitly authorizes an arbitrary and unprincipled refusal to re-appoint meritorious members of rights tribunals.

Obviously, outside of Québec, *Barreau* is only persuasive authority. However, given that *Barreau* is a unanimous decision of the Quebec Court of Appeal written by the Honourable René Dussault, J.A., who prior to his appointment to the Quebec bench was one of Canada's principal academic authorities in Canadian administrative law⁴⁷, it is an authority that might well be regarded as especially persuasive.

However, when the Supreme Court is eventually confronted with a challenge to a rights tribunal's independence based on a discretionary re-appointments regime, it might conclude that requiring governments to create independent re-appointment structures would be a step beyond the Court's appropriate reach. Should that be the result, there is an alternative, common-law based strategy for challenging the discretionary re-appointment power that might serve the interests of judicial independence almost as well.

Start with the proposition that within existing judicial-review principles a ministerial exercise of a statutory discretion is generally subject to judicial review. This is well-settled law.⁴⁸ And see the Ontario Divisional Court

⁴⁷ A principal author, for instance, of the administrative law treatise: R. Dussault and L. Borgeat, *Administrative Law*, 2d ed. (Toronto: Carswell, 1985).

⁴⁸ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 is the leading case on this point. See, as well *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*] at paras 37-38:

Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors... .

The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion. [Emphasis added.]

decision in *Rai v. Métivier*⁴⁹ where a senior judge's refusal to exercise a statutory discretion to renew the appointment of a small claims court deputy judge (appointed to a three-year fixed term) was subjected to judicial review. The standard of review and the criteria of review will naturally be issues, but the reviewability of the exercise of the re-appointment discretion should not be an issue.

Then look at the 2003 decision of the Supreme Court in *CUPE*, the retired judges case.⁵⁰ In that decision, the Court dismissed the Ontario Minister of Labour's appeal of an Ontario Court of Appeal decision⁵¹ in which the Court of Appeal had declared, inter alia, that the Minister's process for appointing arbitrators under the *Hospital Labour Disputes Arbitration Act ("HLDA")* had "created a reasonable apprehension of bias and interfered with the independence and impartiality of the boards of arbitration".⁵² It is important to note that the unions had applied for judicial review of the *process* that the Minister had adopted for the exercise of his ostensibly untrammelled statutory discretion to select and appoint the chairs of arbitration boards.⁵³

The Supreme Court did not agree with all of the Court of Appeal's reasons and while, in a majority judgment written by Binnie J., the Court dismissed the appeal, it varied paragraphs 1, 2 and 3 of the Court of Appeal's order to read:

1. The Court declares that the Minister is required, in the exercise of his power of appointment under s. 6(5) of HLDA, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour

⁴⁹ 76 O.R. (3d) 641.

⁵⁰ *CUPE*, supra note 23.

⁵¹ *Canadian Union of Public Employees v. Ontario (Minister of Labour)* (2000), 138 O.A.C. 256.

⁵² Supra note 50 at paras. 105-107.

⁵³ The arbitration boards were to be established under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 [HLDA] for the purpose of their deciding the terms of collective bargaining agreements for hospitals and hospital employees. S. 6(5) of that Act provided that if the party-appointed members of the board could not agree on the selection of the board chair, then "the Minister shall appoint as a third member a person who is, *in the opinion of the Minister*, qualified to act". (Emphasis added.)

relations community as generally acceptable to both management and labour.

2. This order speaks from the date hereof and does not invalidate completed arbitration awards.

3. Any challenges to continuing arbitrations, including those chaired by retired judges appointed by the Minister under s. 6(5) of HLDAA, are subject to judicial review on a case-by-case basis.⁵⁴

On the issue of the susceptibility to judicial review of the Minister's exercise of his appointments discretion, the dissenting judgment of Bastarache J. (speaking for himself and McLachlin C.J. and Major J.) did not disagree with the majority judgment (written by Binnie J., speaking for himself and Gonthier, Iacobucci, Arbour, LeBel and Deschamps, JJ.).⁵⁵ And there was unanimous agreement that the standard of review was patent unreasonableness. The dissent turned on the view that, from an overall perspective, the bottom-line decision – to select retired judges for appointment as the chairs of the arbitration boards – could not be considered *patently* unreasonable.⁵⁶

The majority, however, applied what is sometimes referred to as the “proper purpose” principle. Referring to “Justice Rand’s dictum in *Roncarelli* that the exercise of a statutory discretion “is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration”, Justice Binnie observes that “[t]he principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous occasions”. He cites in support of that proposition: *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, and Madam Justice Wilson’s reliance in that case on Lord Denning’s statement in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693,

⁵⁴ *CUPE*, Supra note 23 at para. 208.

⁵⁵ *Ibid.*, Bastarache J. at paras. 1-2, and Binnie J. at paras. 48-49.

⁵⁶ *Ibid.*, Bastarache J. at para. 2.

that “the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration”.

Justice Binnie also cites Madam Justice Wilson’s observation in *Reference re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1191, that “it is well established today that a statutory power to make regulations is not unfettered. It is constrained by the policies and objectives inherent in the enabling statute.... It cannot be used to frustrate the very legislative scheme under which the power is conferred”. He also refers to *Suresh*’s reference to the “established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors”⁵⁷.

He concludes:

I accept as correct the Minister's February 2, 1998 statement that the HLDAA process must be "perceive[d] ... as neutral and credible". I also accept that neutrality, and the perception of neutrality, is bound up with an arbitrator's "training, experience and mutual acceptability" (as Professor Weiler testified). I conclude as well that the Minister's approach was antithetical to credibility because he excluded key criteria (labour relations expertise and broad acceptability) and substituted another criterion (prior judicial experience) which, while relevant, was not sufficient to comply with his legislative mandate even as he, in his February 2, 1998 letter, defined his mandate.⁵⁸

He finds that the Minister’s exclusion of these key criteria from his selection process made his exercise of his discretion patently unreasonable.⁵⁹

In my submission, it would take a very little stretch, if stretch at all, to extend those same principles and criteria to a judicial review of a Minister’s process for exercising his or her discretionary re-appointment power in respect of a particular judicial tribunal.

⁵⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*] at paras 37-38.

⁵⁸ *CUPE*, supra note 23 at para. 183.

⁵⁹ *Ibid.* at para.184.

And, as noted above, the first steps down that path have already been taken. In *Rai*,⁶⁰ the Ontario Divisional Court heard an application for judicial review of a senior judge's exercise of her statutory discretion 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 not to renew to be subject to judicial review against a standard of patent unreasonableness⁶¹. 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.

It should be noted that the "proper purpose" aspect of the *CUPE* decision did not address the question of the judicial *independence* of the arbitrators, per se. The unions had also argued that the Minister's process of selection did not produce arbitration boards that were independent of the Minister. In rejecting this argument, Justice Binnie relied on the fact that the structure of the arbitration boards and of the appointments process and the Labour Minister's role in those processes were all mandated by legislation which trumped the independence requirement. The possibility that the independence requirement was a constitutional requirement was neither argued nor considered. The omission of that argument is not, however, surprising given the labour relations context in which *CUPE* was argued. No one in the labour field would want to risk upsetting the traditional statutory

⁶⁰ Supra note 49.

⁶¹ This standard of review (which is now, of course, obsolete, having been replaced in *Dunsmuir* by simple "reasonableness") 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.

regime of grievance arbitrations where the independence of grievance labour arbitrators is seen to be generally assured not by security of tenure, or financial security, or administrative control, but by the arbitrators' specialized experience and training in the field and especially by the unique factor that their appointments to arbitrate particular disputes is typically by agreement of both parties to the dispute.

Binnie J., taking note of all of this (and of the evidence to that effect), observed, for example, that since the decision he had made would require the Minister to consider the mutual acceptability and labour expertise of an appointee as the factors to be considered in the exercise of the Minister's discretion, the independence requirement, as it was uniquely understood in the labour relations context, would be seen to have been met.⁶²

D. Financial Security

The content of the financial security condition of judicial independence has emerged most importantly from the litigation that has ensued between judges and governments over the issue of how judges' compensation is to be maintained at levels consistent with the independent status of the judiciary without the judges having to be seen to be negotiating or disputing with the government, or dependent on the government's good will. The 1997 judgment of the Supreme Court in the *PEI Reference*⁶³ is the leading case in that regard followed by the Court's judgments in *Mackin*⁶⁴ and in *New Brunswick Provincial Court Judges Association v. New Brunswick*⁶⁵. It is this

⁶² *CUPE*, supra note 23 at paras. 190-193

⁶³ Supra note 10. This seminal decision is awkwardly named and in the jurisprudence one finds various short-form references. "Provincial Court Judges Reference" is one. "R v. Campbell" is another. As will have been seen above, I am referring to the case as the "PEI Reference".

⁶⁴ *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405.

⁶⁵ Supra note 45.

jurisprudence that established independent remuneration commissions as a necessary element of the financial security condition of independence.

This is also the jurisprudence from which has emerged the “unwritten” constitutional requirement of judicial independence. I will be addressing the issue of the applicability of that requirement to rights tribunals in due course.

But like the security of tenure condition of independence, *Valente’s* financial security condition is also now an essential component of the common law principles of procedural fairness and natural justice. And, for most judicial tribunals, one may search in vain for anything resembling a structural guarantee of a member’s financial security.

The only case that I am aware of in which a judicial tribunal member’s lack of financial security was a basis for challenging the tribunal’s decision is *Katz v. Vancouver Stock Exchange*⁶⁶ – a decision of the BC Court of Appeal which was confirmed without further analysis by the Supreme Court⁶⁷. The Court of Appeal rejected the challenge on the basis that on the facts of the case there was no problem of financial security – the part-time panel chairs were lawyers in private practice and while their payment for their service as panel chair was not in any way guaranteed, they would submit their bills in the ordinary way and as a practicable matter there was no doubt that they would be paid. In the context of this paper, *Katz* is important for two reasons. It confirms that the requirement of financial security – and security of tenure and administrative control – are common law conditions of judicial independence applicable to judicial tribunals, and it provides an interesting illustration of the courts’ commitment to finding a practicable fit between the independence requirements and the nature and role of the tribunal in question.

Another case that arguably comes very close to being a case of the application of the financial security requirement to judicial tribunals is the

⁶⁶ (1995), 128 D.L.R. (4th) 424 (B.C.C.A.)

⁶⁷ *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405.

2006 decision of the Ontario Court of Appeal in *Deputy Judges Assn. v. Ontario (Attorney General)*.⁶⁸

In Ontario, “Deputy Judges” are part-time, deputy small claims court judges appointed to three-year, renewable terms, and how they might be distinguishable from the members of Ontario’s judicial tribunals on any relevant criteria is not at all clear. In any event, in this case, the Ontario Court of Appeal dismissed a government appeal from a Superior Court decision granting the judges’ association’s application for an order requiring the province to establish an independent remuneration commission for Deputy Judges. The circumstances under which this application was made and the order given may be seen from the following head-note summary of the Superior Court’s decision:

The deputy judges were paid \$232 per day since 1982 — Supernumerary former Provincial Court judges who continued to sit in Small Claims Court performed the same work as Deputy Judges and received a per diem rate of \$995 for a full day, and \$447 for a half day — The deputy judges were concerned that they lacked sufficient financial security and sufficient administrative support and services to ensure their judicial independence — HELD: Application allowed — The salary of the deputy judges was so low that it jeopardized the independence and the perception of independence of deputy judges — The remuneration was so obviously inadequate and so disgracefully eroded that no great leap in logic was required to conclude there was 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 salaries of the deputy judges of the Small Claims Court had fallen below a minimum acceptable level and the salaries had been maintained without recourse to an independent commission — As a result, they did not have sufficient financial security to meet the legal test for judicial independence and a remuneration commission was ordered.⁶⁹

⁶⁸ 80 O.R. (3d) 481 (C.A.).

⁶⁹ Headnote summary of the Judgment of Dambrot J. (2005), 78 O.R. (3d) 504.

In this case, the requirement of an independent remuneration commission was characterized as a “constitutional requirement” following *PEI Reference*.⁷⁰

The Court accepted that the unwritten constitutional requirement of judicial independence identified in *PEI Reference* applied to Ontario’s Deputy Judges. It was, therefore, unnecessary for it to consider what the position would have been if the Deputy Judges had had to rely only on the common law requirement of judicial independence. But there is no reason to think that the result would have been different. Admittedly, a court order requiring that an independent remuneration commission be a part of the process for establishing the judges’ compensation might be short-lived if the basis for it were only the common law requirement. In those circumstances, the Legislature could validly legislate a different process – or specify that there be no process other than the Order-in-Council determination of salaries which pertained with respect to the Deputy Judges. But that the court would have directed the establishment of a remuneration commission based on the common law requirement seems clear. Whether the judges’ association would have bothered to make the application if there were not a constitutional requirement is, of course, another question.

Of particularly current interest on this issue of the implications of the financial security condition of independence for tribunals and their members is the application brought before the Québec Superior Court in October, 2008, by the Association Des Juges Administratifs Du Tribunal Administratif Du Québec and others in which it will be argued that it is contrary to the constitutional principles of judicial independence for the adjudicative members

⁷⁰ Court of Appeal, *Supra* note 68 at para. 15, issue 2.

of Québec's TAQ (who are now called "administrative law judges") to negotiate their work conditions directly with the executive branch.⁷¹

E. Administrative Control

In *Valente*, Justice Le Dain defined the "administrative control" condition of judicial independence as "institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function". With respect to this condition, there is very little jurisprudence to be found. It was one of the issues in *Katz*, but that decision contributes little to the understanding of the content of this condition. Perhaps, the Supreme Court of Canada's recent decision in *Charkaoui*⁷² will play a future leading role in defining the limits of executive branch or legislative intervention in the design or management of an adjudicative process.

In *Charkaoui*, the Court reviewed, inter alia, the impact of the adjudicative procedures specified in the *Immigration and Refugee Protection Act's* security certificate scheme on the perception of judicial independence and impartiality of the adjudicator in that scheme.⁷³ The Court examined whether the specified procedures were such that they might be perceived as (1) co-opting the adjudicator as an agent of the executive branch of government, or (2) constituting the adjudicator as an investigative officer rather than a judge, or (3) associating the adjudicator with one of the parties in the case.⁷⁴

There is no suggestion that the latter list would constitute an exhaustive list of what would be objectionable in a legislature or executive branch meddling in the management or design of an adjudicative function. And,

⁷¹ The author was alerted to the existence of this application by a member of the Section des affaires sociales Tribunal administratif du Québec, one of the applicants in these proceedings.

⁷² *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9 [*Charkaoui*]. See also *British Columbia v. Imperial Tobacco Ltd.*, [2005] 2 S.C.R. 473 [*Imperial Tobacco*].

⁷³ The adjudicator was a "designated judge" of the Federal Court.

⁷⁴ *Charkaoui*, supra note 72 at paras. 32-47.

while the Court in *Charkaoui* referenced the unwritten constitutional principle of judicial independence, there is, again, no reason to think that the application of the common law requirement of judicial independence would not be available to challenge an executive branch meddling with an adjudicative function. Of course, if the vehicle through which the meddling was effectuated was legislation then the common law requirement would not enter the picture.

F. Institutional Independence – and Impartiality

It is also important to note that, in addition to the three conditions, or core characteristics, of judicial independence and impartiality, the jurisprudence, beginning with *Valente*⁷⁵, also recognizes two “aspects” or “dimensions” of judicial independence: “individual” independence and “institutional” independence – each of which is equally important.⁷⁶ This is also true of judicial impartiality, and when it comes to the relationships between the government and a tribunal (as opposed to a member of the tribunal) the independence issue is often more appropriately cast in terms of impartiality.

Chief Justice Lamer, speaking for the Court in *Lippé*⁷⁷ acknowledged the point about the individual and institutional aspects of judicial independence and recognized that the same two aspects applied to judicial impartiality. *Lippé* illustrates the fact that tribunal-government relationships may often raise apprehensions of institutional partiality rather than present issues of judicial independence per se. The following is the pertinent passage from Chief Justice Lamer’s judgment.

The issue in this appeal should be characterized as one of "institutional impartiality". Like the requirement of judicial independence, the requirement of judicial impartiality has both an individual and an

⁷⁵ *Valente*, supra note 18 at para. 20.

⁷⁶ See e.g. *PEI Reference*, supra note 10 at paras 118-125. See also, amongst others, *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at paras. 21-24, and *Elli v. Alberta*, [2003] 1 S.C.R. 857 [*Elli*] at para. 28.

⁷⁷ *R. v. Lippé*, [1991] 2 S.C.R. 114

institutional aspect and both aspects are encompassed by the constitutional guarantee of an "independent and impartial tribunal". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement [page117] of impartiality is not met. The appearance of impartiality is important for public confidence in the system.⁷⁸

THE INVALIDITY OF JUDICIAL TRIBUNAL DECISIONS UNDER THE CURRENT COMMON LAW OF INDEPENDENCE

If one were to think seriously about the implications of the foregoing modern common law procedural fairness principles of judicial independence and impartiality for Canadian judicial tribunals outside of Quebec, one would have to conclude, in my submission, that decisions made by most of those tribunals are invalid. Judicial independence is a common-law necessity for judicial tribunals, but, for reasons of executive branch administrative policy that is not commonly specifically authorized by statute, most judicial tribunals suffer from a deficiency in one or more of the common law conditions of judicial independence.

First, with respect to the security of tenure condition:

- Tribunal members are appointed to fixed terms of short duration and the re-appointments regimes are inevitably in flagrant breach of the objective, merit-based, fair process requirements, arguably established in *Barreau* and implicitly a common-sense prerequisite of any viable concept of independence.
- The executive branch's re-appointment regimes typically do not adhere to the proper purpose requirements for the exercise of statutory discretions as established in *CUPE*.
- The well-known practice of idiosyncratic removals has created an adjudicative environment throughout the executive branch justice

⁷⁸ Ibid. at 116.

system in which, by reason of the adjudicators having reasonable cause to fear reprisals for decisions that are unpopular with the government or its influential friends, an objective and fully informed observer would have a reasonable apprehension of bias.

- There are no formal complaints procedures akin to a judicial council, as required by *Valente*. Tribunal members can be discharged for cause – and have been – without the guarantee of an independent, objective and fair hearing process.
- Part-time members have, effectively, no security of tenure – their continued assignment to cases is entirely dependent on the tribunal chair’s continuing to find their decisions satisfactory on a case by case basis.

Second, rights tribunal members typically have no objectively guaranteed financial security:

- The arrangements for compensation – the nature and the amount – are typically left entirely to the discretion of the executive branch.
- The compensation that is in fact paid will often be arguably below a level that would be seen to be consistent with judicial independence – the level that was addressed by the Ontario Court of Appeal in *Deputy Judges*.⁷⁹
- Again, part-time members are a special case. They, in point of fact, have zero financial security. Whether or not they receive any further remuneration is at all times entirely in the discretion of the tribunal chair.

Deficiencies in the “administrative control” condition will usually raise issues of institutional rather than individual independence. One will often find a degree of control of Canadian judicial tribunals’ adjudicative processes by the executive branch that would not comport with the “administrative control”

⁷⁹ Supra note 68.

condition of judicial independence. It is, for example, not unheard of for a tribunal's host ministry officials to reserve the function of assignment of adjudicators to particular cases to itself, to perform the tribunal's registrar function, or for the ministry to dictate whether or not the tribunal will provide written reasons and the amount of time to be budgeted for each case. The administrative arrangement whereby the Ontario Criminal Injuries Compensation Board's operational funds were reduced by the amount of each of its substantive monetary awards, as disclosed in the recent report on that tribunal by the Ontario Ombudsman,⁸⁰ would be one case very much in point.

To the extent that these interventions are not directly authorized by legislation, they become, in the aftermath of *Valente*, a basis for a common law-based challenge to the independence of the tribunal.

And then there are the inherent conflicts of interest in a line ministry's hosting of its "own" tribunal – providing the funding and administrative support, influencing the appointments and re-appointments. These are the relationships that can be criticized on independence principles – they create an egregious relationship of dependency between the tribunal and the ministry – but it is the effect of those relationships in creating a reasonable perception of institutional bias that is the legal basis for objection.

As a practicable matter, tribunals cannot avoid being ultimately, and at some point, *administratively* accountable to the government. The objection in respect of administrative accountability in our executive branch justice system is that in that system accountability typically flows through the line ministries whose policies and decisions the tribunals are charged with reviewing and whose own budgets those decisions will impact. These relationships serve to "associate the adjudicator with one of the parties in the case" – to cite one of the administrative control categories of concern the Supreme Court

⁸⁰ André Marin, Ombudsman of Ontario, *Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board: Adding Insult to Injury*, February 2007.

identified in Charkaoui (*supra*) – and are otherwise egregiously incompatible with the common law principles of judicial independence and impartiality. To the extent, that they are not directly authorized by statute, they are open to challenge.⁸¹

Of course, most of these relationships will be found to have been established pursuant to direct statutory authority. But not all. It is clear, for example, that the Ontario Ministry of the Attorney General had no statutory authority to require the Criminal Injuries Compensation Board to put a cap on the amount of its awards or to require the Board to deduct the awards from its own operational budget.

In short, for anyone with a tactical interest in putting an oar in the decision-making of a particular judicial tribunal, or in exposing the shortcomings in our executive branch justice system, there seems a plethora of opportunities in the common law itself.

TACTICALLY USEFUL COMMON LAW PRINCIPLES

A. Challenging the System and not the Individual

An aspect of the *CUPE* decision that is especially important for counsel from a tactical perspective is that the unions were successful in that case in challenging through judicial review the generic appointments *process* rather than a particular application of that process. The dissenting members of the Court objected to this review of the process rather than of the application of the process in a particular case. The significance of the majority's view to the contrary may be seen mirrored in the following paragraph from the dissenting judgment of Bastarache J.

Moreover, the constraints on the exercise of the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the independence or impartiality of boards actually

⁸¹ *Lippé*, *supra* note 77.

appointed. The respondents' attack on the institutional independence or impartiality of the boards must be levied against a particular board. This attack is not appropriately an argument as to whether the Minister abused his discretion.⁸²

In the majority approach objected to in this dissent one finds, in fact, Supreme Court of Canada authority for an interested party to challenge the general re-appointments process for a particular tribunal by applying for judicial review of that process rather than having to challenge a refusal to re-appoint a particular member of that tribunal.

Further support for the appropriateness of challenging the independence implications of a process or system of appointments, without challenging the independence or impartiality of a particular tribunal member, may also be conveniently found in *Lippé*.⁸³

Lippé addressed the question of whether, under the statutory scheme in place in the province of Quebec, a municipal court judge constituted an "independent and impartial tribunal" as required by s. 11(d) of the Canadian Charter and s. 23 of the Québec Charter. The judicial review proceedings had been brought as a challenge to the structure of the municipal court system which allows for the appointment of practicing lawyers as part-time judges, not to the independence or impartiality of any particular municipal court judge. The Québec Attorney General had argued that a specific conflict of interest must be shown in a particular case and, responding to this, Chief Justice Lamer said this:

Just as the requirement of judicial independence has both an individual and institutional aspect (Valente, supra, at p. 687), so too must the requirement of judicial impartiality.⁸⁴

I cannot interpret the Canadian Charter as guaranteeing one on an institutional level and the other only on a case-by-case basis. On this point I must respectfully disagree with Tourigny J.A. and adopt the language of Proulx J.A. in the Court of Appeal (at p. 79):

⁸² *CUPE*, supra note 23 at para. 3.

⁸³ *Lippé*, supra note 77.

⁸⁴ The court saw the issue to be one of impartiality not of independence.

[TRANSLATION] Since the problem concerns the impartiality of the tribunal as guaranteed by the Constitution, I believe that it would be useful to consider impartiality in fact or objectively, as Le Dain J. did in dealing with the notion of judicial independence This would permit emphasizing both impartiality as related to the status of the judge and to the manner in which he in fact acts.

In his factum, the Attorney-General submitted that impartiality must be evaluated on the facts and not on the basis of speculation [and] that the respondent must as a result prove a specific conflict of interest. Accordingly, the appellant continues, to find bias solely on the basis of a legislative provision is to engage in pure speculation.

This approach empties the constitutional guarantee of all its meaning. As I demonstrated above, the question is one of perception of the image of justice and it is as important for the maintenance of the public's confidence in the impartiality of the courts *that the system or the legislative framework* does not leave itself open to criticism and give rise to a reasonable apprehension of bias.

The objective status of the tribunal can be as relevant for the "impartiality" requirement as it is for "independence". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. ...⁸⁵

It was also established in *Lippé* that, for allegations of apprehension of a lack of impartiality to be brought at an institutional level, one must first ask whether there will be a reasonable apprehension of a lack of impartiality in the mind of a fully informed person "in a substantial number of cases". If not, the

⁸⁵ Supra note 77 at para. 50-51 (Emphasis added). It is to be noted that, while in *Lippé*, Chief Justice Lamer wrote only for himself and Sopinka and Cory JJ, the other justices - La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ – agreed with his judgment on all points except on his view that the issue of judicial independence (as distinguished from impartiality) involved only the relationships between a tribunal and the government. See judgment of Gonthier J. at paras 80-81.

allegations cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.⁸⁶

B. Government's Interpretation Burden

Anyone seeking to rely on the common law's procedural fairness requirements of judicial independence to defeat a decision of a judicial tribunal would likely find themselves butting up against a government's allegation that the interpretation of some statute authorizes the offending policy and thus trumps the common law requirement. It is useful, therefore, to keep in mind that the principles of statutory interpretation impose a significant burden on a government trying to make that case. Those principles include the principle that legislatures should not be readily presumed to have intended to legislate in a way that is discordant with established legal norms.⁸⁷ This would seem to be particularly true for interpretations that ascribe to a legislature the intent to override rule-of-law principles of natural justice and procedural fairness and especially interpretations that are said to override the foundational principle of judicial independence.

The point is made most pertinently and forcefully in *Ocean Port*,⁸⁸ - the Supreme Court of Canada decision on which governments are currently depending for the proposition that the constitutional requirement of judicial independence does not apply to tribunals. I will deal with the latter aspect of *Ocean Port* in the constitutional law discussion which I will come to shortly. At this point, however, it is somewhat ironic to note the burden that *Ocean Port* imposes on those who would rely on statutory provisions as overriding

⁸⁶ Ibid. at paras 60-61.

⁸⁷ See e.g. *Joplin v. Chief Constable of the City of Vancouver* (1982), 144 D.L.R. (3d) 285 (B.C.S.C.), aff'd (1985), 20 D.L.R. 4th 314 (B.C.C.A.) (legislature presumed not to have intended rule making power to be used to exclude a common law duty of fairness), *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, at para. 79 (the principle against confiscating property), and *Dikhranian v. Attorney General of Quebec*, [2005] 3 S.C.R. 530 at paras. 32-36 (the principle against interfering with vested rights).

⁸⁸ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 [*Ocean Port*]

judicial independence requirements. The point is made most strongly in the reference to *Ocean Port* in the following passages from Justice Binnie's judgment in *CUPE*.

[In this Court in *Ocean Port*] ... it was held, *per* McLachlin C.J., that "like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication" (para. 22 (emphasis added)). Affirming the rule of interpretation that "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice" (para. 21), the Court nevertheless concluded that "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction" (para. 22 (emphasis added)). Further, "[w]here the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence" (para. 27 (emphasis added)).⁸⁹

In the case of tribunals established, as here, to adjudicate "interest" disputes between parties, it is particularly important *to insist on clear and unequivocal legislative language* before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication.⁹⁰

The reason for putting this interpretation burden on those who would argue that the Legislature had intended that the requirements of procedural fairness be disregarded is to ensure that established and foundational norms such as these are not swept away inferentially or consequentially as a result of a legislature not paying enough attention. The point is made expressly in the following direct statement by the House of Lords in its 2000 decision in *Secretary of State for the Home Department, ex p. Simms*.

[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even

⁸⁹ *CUPE* supra note 23 at para. 117. (All the notes in this paragraph indicating that the underlining emphasis was added are part of the original text – ie., the emphasis was added by Justice Binnie himself.)

⁹⁰ *Ibid.* at para. 121 (Emphasis added)

the most general words were intended to be subject to the basic rights of the individual.....⁹¹

EXPECTING THE WORST

Experience tells us that in the absence of a constitutional requirement of judicial independence, any ruling party with a majority is capable of enacting “orangutan” legislation⁹² eradicating the effects of any common-law based court decision on judicial independence that it finds inconvenient. If there is a constitutional requirement of judicial independence that trumps legislative intervention all will be well, but, failing that, the positive effect of a decision based on the common law of judicial independence may prove to be short-lived. It would, however, have at least the merit of putting a particular issue of independence on the table for all to see – not to mention perhaps achieving a useful result in a particular case.

⁹¹ *R. v. Secretary of State for the Home Department, ex p. Simms*. [2000] 2 A.C. 115 (H.L.) at 131. See also *Morgan Grenfell & Co. v. Income Tax Special Commissioner*, [2002] 2 All E.R. 1 (H.L.) at para. 8. (I am indebted to my co- counsel in the *McKenzie* appeal, Frank A.V. Falzon, Q.C. of Victoria B.C., for this especially apt House of Lords authority and for the felicity of the language in the preceding paragraph.)

⁹² The “orangutan” label for legislation that makes mockery of the rule of law emerged in the Toronto union labour bar, circa 2002, to describe the Ontario government’s legislation authorizing the Labour Minister to appoint anyone he or she chose as an interest arbitrator for the purpose of determining the collective bargaining agreements that would apply to workers in the hospital services fields, explicitly regardless of their having zero experience or training in labour relations and whether or not they were at all acceptable to either or neither of the parties. This legislation was known to have been enacted as a direct response to the Ontario Court of Appeal’s decision in *CUPE - the retired judges case*. As the wags in the Toronto labour bar said, that was legislation that would permit the government to appoint an orangutan as an arbitrator and no one could object. As I have suggested elsewhere, it seems to be a convenient, self-explanatory and aptly risible label for any legislation that explicitly overrides jurisprudence in a manner that is egregiously disrespectful of the rule of law.

THE CONSTITUTIONAL LAW OF JUDICIAL INDEPENDENCE FOR QUASI-JUDICIAL TRIBUNALS

A. Remember the New Context

Earlier in the paper, I dwelt at particular length on the watershed nature of the change respecting the common law of judicial independence for judicial tribunals ushered in by *Valente*. I have felt it important to emphasize that change in part because it is essential to realize that it is a change that has radically altered the common law relating to the independence and impartiality of tribunals and their members and, in part, because, as we will now see, it has presented a constitutional question that had not been present before.

At the forefront of any modern debate concerning the status of judicial tribunals must be the understanding that prior to 1985 the law surprisingly managed to reconcile the acknowledged need for judicial independence of inferior court judges and tribunal adjudicators with the actual, structural dependency of those same judges and adjudicators. Keeping that history in view is important because the nature of the modern debate about the status of these tribunals is prone to being unwittingly obscured by the shadows cast by the thinking of that earlier era.⁹³ To see clearly what must come next, an alert awareness of the existence and nature of those shadows is necessary

Post-*Valente*, the issue of independence is no longer finessed by the now defunct, pre-1985, presumption of independence – what in the previous discussion I have called the doctrine of trust. And the, so far, largely unnoticed consequence is that the government-tribunal relationships of structural dependency that commonly define the executive branch status of judicial tribunals are mostly now, in point of fact, incompatible with the new common law of judicial independence. Thus, to the extent that these relationships are *de facto* rather than statute-based, they are, as I have

⁹³ See *Saskatchewan Federation of Labour, et al v. Saskatchewan (Attorney General, Department of Labour, Labour Relations Board)*, 2009 SKQB 20 [*SFL v. Saskatchewan*] at paras. 55-61, and the commentary in Ellis and McKenzie, “Ocean Port or the Rule of Law?” (2009), 22 CJALP 267.

indicated above, invalid at law. All of the executive branch's controlling relationships with its rights tribunals are now sustainable in law only to the extent that they are explicitly authorized by statutory provisions – statutory provisions that trump the common law but could not stand up to a constitutional requirement of judicial independence, should there be one.

Because of *Valente* and the judicial independence jurisprudence that followed *Valente*, the courts must now face up to the question, never before presented, as to whether they are in fact prepared to recognize the legitimacy of legislatures removing judicial functions from the courts – or creating new judicial functions – and assigning those functions to executive-branch institutions and/or individuals who, it is now clear, are not, in law, judicially independent. Before *Valente*, this question did not arise because, as we have seen, before *Valente* the law presumed – deemed – that executive branch adjudicators were judicially independent by virtue merely of their having been assigned a judicial function.

Post-*Valente*, the courts must now say whether or not in Canada's administrative justice system – the *system in which we now acknowledge the bulk of the rights disputes of our citizens are decided* – the rule of law is merely optional – optional in the sense of being open to legislative override in the ordinary course.

B. Written Constitutional Requirements for Judicial Independence

Of course, there are important categories of administrative-justice adjudication where the latter question does not arise because the constitutional requirement of judicial independence is already a written requirement. I have referred to s. 23 of the *Quebec Provincial Charter*, and there is, as well, sections 11(d) and 7 of the *Canadian Charter of Rights and Freedoms*, and s. 2(e) of the *Canadian Bill of Rights*. Thus, any tribunal exercising the function of trying persons charged with an “offence” is required

by s. 11(d) of the Charter to be independent and impartial.⁹⁴ Any tribunal whose decisions are dispositive of rights respecting life, liberty or the security of the person is required by s. 7 of the Charter to be independent and impartial.⁹⁵ And, any federal tribunal that is “determining” a person’s “rights and obligations” is required by s. 2(e) of the quasi-constitutional Canadian Bill of Rights to be independent and impartial.⁹⁶

C. The Reach of the Unwritten Constitutional Principle of Judicial Independence

It is, however, a fact that the adjudicative functions of a large proportion of tribunals do not fall within the protection of any of the written constitutional requirements of independence – and, of course, the *Canadian Bill of Rights* requirement can be overridden by a federal legislature prepared to rule out the application of the Bill. Moreover, it is not only the adjudicative functions of tribunals that are not protected by written constitutional requirements of judicial independence. Situated within what the Supreme Court has referred to as the “gap” in the written constitutional requirements relating to judicial independence one not only finds most judicial tribunals but also all provincial

⁹⁴ This requirement is confined to tribunals exercising penal jurisdiction. See *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. (The rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the State for public offences involving punitive sanctions, either because it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.)

⁹⁵ The section 7 Charter requirement that no one may be deprived of such rights except in accordance with the principles of “fundamental justice” has been taken to have encompassed the principles of procedural fairness including a hearing by an independent and impartial tribunal.

⁹⁶ Canadian Bill of Rights, S.C. 1960, c. 44, s.2:

“Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...
(e) *deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice* for the determination of his rights and obligations.” (At common law, a fair hearing in accordance with the principles of fundamental justice requires an independent and impartial tribunal. See *R. v. Généreux*, [1992] 1 S.C.R. 259.)

courts exercising civil law jurisdiction, such as the provincial family law courts and the small claims courts, as well as the justices of the peace.

And that takes us to the “unwritten constitutional requirement of judicial independence” first identified in the *PEI Reference*⁹⁷ and to the current big question in Canadian administrative law, viz: Is the *PEI Reference*’s unwritten constitutional requirement of judicial independence applicable to administrative tribunals at all, and, if to some, to which and to what effect?

Space in this paper obviously does not permit an extensive exposition of the doctrinal arguments that are pertinent to that big question. And, since it is a current topic, probably most readers will be generally aware of the basic outline of the arguments in any event. I will, therefore, confine myself to a general description of those arguments and of the relevant authorities.

Since, as I have mentioned above, I was one of the counsel for Mary McKenzie in *McKenzie*,⁹⁸ no one will be surprised to hear me say, most respectfully, that I believe that BC Supreme Court Justice, E. McEwan, was clearly right when he held in that case that the *PEI principle* applied to BC’s residential tenancy arbitrators. This is, so far, the only case in which the principle has been actually applied to a judicial tribunal.

In support of her Petition for Judicial Review, Mary McKenzie and her counsel burdened Justice McEwan with a lengthy doctrinal argument in support of the applicability of the *PEI principle* to the residential tenancy arbitrators. An important part of that argument was, of course, addressed to distinguishing the Supreme Court of Canada’s decision in *Ocean Port*⁹⁹. In *Ocean Port*, one finds broad language that certainly appears to say that the *PEI* principle of judicial independence applies only to “courts” and does not apply to tribunals. In its doctrinal argument in response to the Petition, the BC

⁹⁷ *PEI Reference*, supra note 10.

⁹⁸ *McKenzie*, supra note 11.

⁹⁹ *Ocean Port*, supra note 88 **Error! Bookmark not defined..**

government relied heavily on *Ocean Port*, as do all of those who oppose the extension of the principle to tribunals.

The constitutional argument filed by Mary McKenzie in support of her Petition may be summarized as follows. When *Ocean Port* is read in light of the subsequent decisions of the Supreme Court in *Bell*¹⁰⁰ and *Ell*¹⁰¹ it must be seen as having intended to rule out the application of the principle to regulatory agencies such as licensing bodies and not to judicial tribunals as defined in *Bell*. Also, the Supreme Court, given the opportunity to close the door on the applicability of the *PEI* principle to judicial tribunals in *Bell*, conspicuously left that door open. In *Ell*, a decision released the same day as *Bell*, the Supreme Court extended the applicability of the *PEI principle* from “courts” to Alberta’s “non-sitting justices of the peace” and, in the course of doing so, defined general rules for determining the principle’s applicability to office holders generally. It defined those rules in language that clearly contemplates its possible application to “tribunals”. And, when one considers the fit between the *Ell* rules for determining the reach of the principle, and the judicial functions of judicial tribunals, it is apparent that *Ell* contemplates the principle applying to those functions.

Until another occasion arises for a higher-level court to consider the applicability of the *PEI* principle to judicial tribunals, *McKenzie* must be taken as defining the Canadian law on this issue. In bald terms, the government appealed Justice McEwan’s decision, the BC Court of Appeal dismissed the appeal¹⁰², and an application to the Supreme Court of Canada for leave to appeal was dismissed. No court has expressed any criticism of Justice McEwan’s decision on its merits.

¹⁰⁰ *Bell*, supra note 25.

¹⁰¹ *Ell*, supra note 76.

¹⁰² *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)* (2007), 287 D.L.R. (4th) 313 (BCCA).

Of course, in light of the jurisprudential facts enveloping the Court of Appeal decision, things are not quite as straightforward as that. The Court of Appeal dismissed the appeal on the grounds that, on the appeal, the issues were moot. It did not consider the constitutional issue on its merits. It also questioned the precedential value of Mr. Justice McEwan's decision. It did that, not on the basis of doubting its correctness, but on the basis that the impugned legislation had been repealed in the meantime and, most notably, on the basis that the issue had been moot at the time of the lower-court hearing and that Mr. Justice McEwan's judgment on the constitutional issue was, therefore, "unnecessary obiter dictum".

The application for leave to appeal was made by Mary McKenzie – an application which she brought in her role, by then, as a public interest litigant. The application was made in an effort to have this important constitutional principle dealt with at the highest level and to address what the applicant saw to be a significant error in the Court of Appeal's characterization of Justice McEwan's judgment as unnecessary obiter dictum. The BC government resisted that application on the grounds that the applicant was the "successful" party on the appeal and was seeking merely to appeal the Court of Appeal's reasons. Thus, it is difficult to know what substantive significance to attach to the Court's dismissal of the application for leave.

In his judgment on the constitutional issue, Mr. Justice McEwan did not find it necessary to address the details of the applicant's doctrinal argument. His judgment cuts through to the essentials, distinguishes *Ocean Port*, relies on *Bell* and *Ell*, and ultimately deals with the issue largely in terms of basic constitutional theory.¹⁰³

For an objective analysis of the potential significance of *McKenzie*, see the Case Comment by New Brunswick University's Dean of Law, Philip Bryden: "*McKenzie v. British Columbia (Minister of Public Safety and Solicitor*

¹⁰³ *McKenzie*, supra note 11 at paras. 116-153.

General): A Constitutional Guarantee of Tribunal Independence?”.¹⁰⁴ This comment was written while the appeal was pending before the B.C. Court of Appeal.

For anyone who has reason to be seriously interested in the details of the Petitioner’s argument in *McKenzie*, an electronic copy of the “written argument” filed in support of the Petition and of the Respondent’s Factum filed on the appeal is available from Mary McKenzie by application to this writer at srellis@idirect.com. And, for anyone interested in the Respondent’s perspective on the Court of Appeal decision in *McKenzie*, a copy of the argument made in support of her application to the Supreme Court of Canada is available from the same source.

EPILOGUE

As the title to this paper indicates, the independence and impartiality of our judicial tribunals cannot be judged to be real by any measure. It is clear that the constitutional issue is important and, while still unresolved at a satisfying level of authority, currently looks promising from a reformer’s perspective. But, for all of the reasons set out above, when it comes to the independence and impartiality of judicial tribunals there is much more than constitutional issues in play.

The common law that I have attempted to elucidate should be of interest to potential litigators but it should be of even more interest to our politicians. One cannot help but ask why our legislatures are comfortable with continuing to be the proprietors of what is, in short, both a shamefully inappropriate and, now, an unlawful justice system? And why does the executive branch continue to promote and defend such a system?

In addition to the injustices the system inflicts on individual Canadians, it is a system that must eventually undermine Canada’s international reputation

¹⁰⁴ (2007), 40 U.B.C. L. Rev. 677.

for good sense and fair play, for it leaves Canada (other than Québec) in blatant breach of several of its international commitments to the determination of rights by independent and impartial tribunals.

It is well established that international human rights law entitles each individual to a fair and public hearing by an independent and impartial tribunal in the determination of his or her rights and obligations. This right is expressly guaranteed in several international declarations and conventions, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and the *American Convention on Human Rights*. It has been observed, based on a wide-ranging review of state constitutions, legislation and supporting state practice regarding judicial independence, that “the general practice of providing independent and impartial justice is accepted by states as a matter of law” and is thus a customary norm of international law. ... ¹⁰⁵

It also a system that leaves it completely out of step with its international partners.

For Canada, its most significant international partner on justice and rule of law matters is traditionally the U.K., and the U.K. has recently made ground-shaking reforms in the structures of its administrative justice system that simply leaves Canada in the shade.

In the first stage of those reforms, it enacted the *Constitutional Reform Act 2005* (U.K.) (“CRA”) which amongst other things (such as transferring the judicial functions of the House of Lords to a new “Supreme Court”) created an independent Judicial Appointments Commission for the appointment of judges and gave that Commission the responsibility for appointing tribunal adjudicators (now to be called “administrative law judges”).

¹⁰⁵ Gerald Heckman and Lorne Sossin, “How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence” (2005), 50 McGill L.J. 193 at 200. (Citations for the referenced material have been omitted.)

Next, in 2006, it ended, with one stroke, the conflicts of interest between portfolio ministries and their tribunals by moving all of the administrative support of tribunals from the portfolio ministries to an independent single agency which it called the “Tribunals Service” – an agency located in what has become the new “Ministry of Justice”. The latter was an administrative move that did not require legislation. The individual tribunals retained their separate existence at that point, with the Tribunals Service providing common administrative support.

Then came the “super” tribunal. In 2007, the U.K. Parliament enacted *The Tribunals, Courts and Enforcement Act 2007*¹⁰⁶ (“TCEA”). In a speech to the University of Toronto Symposium on the Future of Administrative Justice, in January 2008, Lord Justice Carnwath, U.K.’s Lord Justice of Appeal and the newly appointed Senior President of Tribunals, described the effect of the TCEA as far as it relates to the “super” tribunal idea in the following terms:

The TCEA creates two new, generic tribunals, the *First-tier Tribunal* and the *Upper Tribunal*, into which existing tribunal jurisdictions can be transferred. The First-tier will hear first instance cases, and will deal with fact and law. The Upper Tribunal is intended to be primarily, but not exclusively, an appellate tribunal from the First-tier Tribunal. The Act also provides for the establishment of “chambers” within the two tribunals so that the many jurisdictions that will be transferred into the new tribunals can be divided into groups with related interests. Each chamber will be headed by a Chamber President and overall leadership will be provided by the Senior President of Tribunals.

The U.K. government has effectively now implemented virtually all of the radical recommendations of the Leggatt report¹⁰⁷ thus fully *justicizing*¹⁰⁸ a U.K. executive branch justice system that seven years ago suffered from all

¹⁰⁶ *Tribunals, Courts and Enforcement Act 2007* (U.K.), Chapter 15

¹⁰⁷ (U.K.) *Tribunals for Users One System, One Service* (Report of the Review of Tribunals) by Sir Andrew Leggatt, March 2001

¹⁰⁸ “Justicizing” – making just (which is entirely different from “judicializing”). See S. Ronald Ellis, “The Justicizing of judicial Tribunals, Part I (2006), 19 Can. J. of Admin, L. & Prac. 303; and Part II (2007), 20 Can. J. of Admin, L. & Prac 69.

the egregious justice policy deficiencies of our Canadian executive branch justice system.

New Zealand's government is now proposing a similar justicizing of its administrative justice structure¹⁰⁹, and, as appears from the review of the systems of "other jurisdictions" in the New Zealand Law Commission's 2008 report, "Tribunals in New Zealand",¹¹⁰ the various Territories of Australia have now adopted structures akin to the Australian Commonwealth's Administrative Appeals Tribunal.- the establishment of which was the first move towards the justicizing of Australia's administrative justice system (in 1976).

And, of course, there is Québec – Canada's exemplar of a justicized administrative justice system

It is way past time that the rest of us got at it.

S.R.Ellis
Toronto, Ontario
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¹⁰⁹ New Zealand, *The Government's Preferred Approach to Reform*, January 2008.

¹¹⁰ New Zealand Law Commission, "Issues Paper 6, Tribunals in New Zealand", January 2008.