# JUDICIAL TRIBUNALS AND THE RULE OF LAW

# A CAUTIONARY TALE

By

S. Ronald Ellis, Q.C.

*PREFACE*

On June 1, 2009, at the Council of Canadian Administrative Tribunals annual conference held that year in Halifax, Nova Scotia, the Monday morning plenary session featured a formal debate about tribunals, *Ocean Port*, and the rule of law. The resolution presented for debate read as follows:

> RESOLVED THAT: *Ocean Port (SCC, 2001) represents the appropriate view of administrative tribunals in Canada, i.e., that court-like principles of independence should not be guaranteed for tribunals, and that there should be no restrictions on how governments may wish to design tribunals and their membership and processes.*

The debating teams' members were:

In support of the resolution: Kevin Whitaker, *Chair, Ontario Labour Relations Board, Toronto, Ontario* [as he then was] and Craig Jones, *Supervising Counsel, Constitutional & Administrative Law Group, Ministry of the Attorney General, Victoria, British Columbia*;

Against the resolution: Kimberley Turner, *Partner, Pink Breen Larkin, Halifax, Nova Scotia*, and S. Ronald Ellis, Q.C., *administrative justice consultant, Toronto, Ontario.*

Moderator: Wayne D. Cochrane, Q.C., *Member, Nova Scotia Utility and Review Board, Halifax, Nova Scotia.*

For the "opposition", Kimberley Turner debated the "government's" interpretation of *Ocean Port* on doctrinal grounds and Ellis presented the opposition's policy-based argument and reply. It is the latter presentation that is published here. The speech was given five years ago but the issues haven't changed.

The reader will find the tone of the speech to be of the exuberant adversarial nature called for in the context of a formal public debate.

Ocean Port and Independence – for the Opposition: Ron Ellis

The first thing I absolutely must do is to express my complete astonishment at the – what shall I say? – *excessively positive* vision our opponents have of the utopian prospects for the administrative justice system, if the government's right to eliminate any parts of the rule of law the executive branch finds inconvenient could be clearly established.

Our opponents embrace this optimistic view notwithstanding the overwhelming historical record of executive branch indifference or disrespect for tribunals. In Ontario, notwithstanding the good work of Debra Roberts and her Public Appointments Secretariat in recent years in reforming the procedures for selecting and appointing and re-appointing members, in the last four years alone we have had three egregious instances of executive branch abuse of tribunals exposed by highly credible inquiries. My reference is to the inquiry reports on: (1) the Criminal Injuries Compensation Board[1], (2) the Ontario Securities Commission[2], and (3) the Ontario Medical Review Committee[3].

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[1] André Marin, Ombudsman of Ontario, *Investigation into the Treatment of Victims by theCriminal Injuries Compensation Board: Adding Insult to Injury*, February 2007: "…By law, the Board is obliged to receive claims and determine appropriate awards, unfettered by extraneous influences. *Unfortunately, it has never been permitted to do so*. One government after another has hindered its statutory mission by giving the Criminal Injuries Compensation Board *an unrealistically low budget and then forcing it to pay out of that budget not only its own operating costs, but any compensation it awards.*" (Emphasis added)

[2] *Report of the Fairness Commission to David A. Brown, Q.C., Chair of the Ontario Securities Commission* (March 5, 2004). (Chair: The Honourable Coulter A. Osborne, Q.C., Committee members: Professor David J. Mullan, Bryan Finlay, Q.C.). (Amongst other things, the Report offered this: "We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole …" – see Conclusion 5 at 32.)

[3] The Honourable Peter deC. Cory, C.C., C.D., Q.C., LL.D., *Study, Conclusions and Recommendations pertaining to Medical Audit Practice in Ontario*, submitted to The Hon. George Smitherman Minister of Health and Long-Term Care, Government of Ontario, at Toronto, on the 21st day of April, 2005. (Publication information unknown.) The Report was harshly critical of the Medical Review Committee and recommended its replacement. See, inter alia: "The responsibility for conducting audits should be conferred on a new body that I will call the 'Physician Audit Board'.

In the same period, we have seen on the public record the Saskatchewan government's politicalization of the Saskatchewan Labour Relations Board (amongst other Saskatchewan tribunals) [4]; the Alberta government's co-option of the Alberta Labour Relations Board[5]; and the BC government's elimination of its Residential Tenancy Arbitrators and the transfer of the Arbitrators' independent and impartial adjudicative powers to employees in the Residential Tenancy Branch of the Office of Housing and Construction Standards in the Ministry of Energy and Mines (the latter powers including, it may be noted, the power to evict tenants from their homes – tenants that include the tenants of ministry-managed housing).[6]

And this week comes the news that the BC Government has disbanded its Administrative Justice Office – one of the enduring products of BC's vaunted Administrative Justice Project that those of us working in the field have held in high esteem – now, all gone.

We have also seen the federal government's demonstration of its disrespect for so-called "independent" tribunal members in its highly public, arbitrary firing of the President of the Canadian Nuclear Safety Commission, and the same government's refusal to re-appoint meritorious members of the IRB, or fill the resulting vacancies, thus willfully precipitating an unconscionable increase in the IRB backlog.

And before that, in Ontario we had lived with a rental housing tribunal known far and wide as the "eviction machine",[7] and with a social benefits tribunal with

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This body must, to the extent possible, be completely separate from and independent of the Ministry, OHIP, the OMA and the College." – at page 165.

[4] See for example: *The Globe and Mail*, March 8, 2008, and James Wood, "Sask. Party politicizing labour relations board …", The StarPhoenix (Saskatoon), Thursday March 13, 2008.

[5] Lorne Sossin, *The Independent Board and the Legislative Process* (June 2006), commissioned and released by the Alberta Federation of Labour. For litigation of the issue in the Alberta Queen's Bench see *Communications, Energy and Paperworkers Union of Canada, Local 707 v. Alberta (Labour Relations Board),* [2004] Alta. L.R. B. R. 1.

[6] Section 62-85, *Residential Tenancy Act* [SBC 2002] CHAPTER 78, as amended.

7 See, e.g. Paul Stuart Rapsey, "See No Evil, Hear No Evil, Remedy No Evil: How the Ontario Rental Housing Tribunal is Failing to Protect the Most Fundamental Rights of Residential Tenants", (2000), 15 J. L. & Soc. Pol'y 163. See also *Jung v. Toronto Community Housing Corp*., [2007] O.J. No. 4363 (Div. Ct.), paras. 25-27. (An eviction application heard by the Ontario Rental Housing

appointments publicly selected for their known bias against welfare claimants[8], and, for a number of years after 1995, with overt attempts at the politicalization of the OLRB[9] and of other Ontario tribunals, including WSIAT[10]. And, until two years ago, we had also lived in Ontario with a system of tribunal justice to whose members the executive branch had not seen fit to give any compensation increases – zero compensation increases – for over 20 years.

And all of that is only the tip of the iceberg.

(I don't expect there are similar problems here in Atlantic Canada where in this, as in all else, everything is, no doubt, sublime.)

This unremitting record of executive branch disrespect and abuse of tribunals our opponents somehow seem able to ignore. They seem also able to somehow ignore the implications of that record for what the future would hold for tribunals in an environment of unrestrained government discretion. I can only say that they and I do not seem to be living in the same world.

As my partner in this debate, has indicated, we are opposing this morning's resolution only because of its attack on the rule-of-law integrity of the justice system, and thus only as it applies to what are now commonly called adjudicative tribunals, what I have in other places labeled "rights tribunals" but which for the purpose of today's debate and in the interest of making it particularly clear what we are talking about I will call "judicial tribunals" – tribunals such as workers compensation appeals tribunals, human rights tribunals, landlord and tenant boards, labour relations boards, etc .

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Tribunal respecting a long-time occupant of public housing. The Court was of the view that the transcript of the hearing disclosed that virtually all the rules of natural justice had been violated. The Court concluded: "The Tribunal appeared biased. The person most at risk was denied a hearing. It was, as [tenant's counsel] said, a 'trial by ambush'. The decisions must be set aside.")

[8] See Ontario, Legislative Assembly, Official Report of Debates (Hansard), 11 October 1995 at 216, and column by James Rusk, *The Globe and Mail*, October 12, 1995.

[9] Ron Lebi & Elizabeth Mitchell, "The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification" (2003), 10 C.L.E.L.J 472 at 475 and 484.

[10] Ron Ellis, "An Administrative Justice System in Jeopardy: Ontario's Appointments Policies", Canadian Labour & Employment Law Journal, Vol. 6 No. 1, 1998.

If the resolution were approved and came to reflect the actual law, the effect would be to render the rule of law in the adjudication of rights by judicial tribunals optional – think of that, the rule of law *optional* in the adjudications that dispose of the majority of Canadian's everyday rights disputes and routinely deliver life-altering rights decisions.

The resolution speaks disparagingly of "court-like principles of independence". The inference is that there are "court-like" principles of independence and other, non-court-like principles of independence. What are the other principles? The fact is that no one can think of any. The resolution can, therefore, be writ shorter: *judicial tribunals need not be independent.*

And, since the law has always acknowledged that independence is only important because without it there can be no impartiality, the resolution can be writ plainer: *judicial tribunals need not be impartial.*

My colleague has addressed the doctrinal issue: the resolution's premise that *Ocean Port* in fact stands for the proposition that court-like principles of independence are not constitutionally guaranteed for judicial tribunals, and shown you how that premise simply ignores all subsequent constitutional authority and is clearly wrong. I will now speak to the underlying *policy* problem.

The policy-question the resolution presents is, indeed, whether in judicial tribunal adjudication the rule of law should be optional.

I will not take the time here to examine the unmentioned, unprincipled and unethical things that one might suspect would motivate many governments to support this resolution. Instead, I will deal solely with the only *principled* reason that has ever been given for opposing independence as a constitutional requirement for judicial tribunals – that is, the concern that applying a constitutional principle of independence to judicial tribunals will ultimately lead to their judicialization – to ever-increasing, court-like inflexibility in their process. Our opponents entire argument comes down, I submit, to that.

My response to this concern is straightforward. The judicialization threat, such as it was, has long been recognized and has already been vanquished – by the courts themselves. In short, this resolution presents a radical and extreme solution for a problem that does not exist.

Why is the concern about judicialization unwarranted?

First, it may be counter-intuitive, but it is nevertheless true, that the *constitutional* requirements of judicial independence for tribunals are *not* more onerous than the common-law procedural fairness requirements of tribunal independence. In fact, they are exactly the same – both defined by the *Valente* principles.[11] (See *Matsqui*[12], et al.)

The only difference between the constitution's independence requirements and the common law's independence requirements is that the latter can be overridden by legislation.

Moreover, contrary to our opponents' suggestion, neither the common law nor the constitutional law requires life-tenured appointments of tribunal members.[13] Nor, outside of Québec, is anyone I know arguing for life-tenured appointments for judicial tribunal members in Canada – objective, merit-based and fair re-appointment procedures, yes, but not life-tenured terms.[14]

Second (and this is of critical importance): the law of judicial independence as it applies to tribunals already contains the unique feature of what one might call "idiosyncratic adaptability". The courts have demonstrated that they are prepared to adapt the content of the independence requirements to fit the practical needs of individual tribunals in light of their particular nature and function, their operating circumstances, and the interests of the parties that come before them.

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

[12] *Canadian Pacific Ltd. v. Matsqui Indian Band***,** [1995] 1 S.C.R. 3 [*Matsqui*] at paras. 76-80.

[13] *Bell Canada v. Canadian Telephone Employee's Association*, [2003] 1 S.C.R. 884 [*Bell*], para. 29.

[14] Ron Ellis, "Misconceiving Tribunal Members: A Memorandum to Quebec" (2005), 18 C.J.A.L.P. 189

In Bell,[15] the Supreme Court of Canada made this plain. In paragraph 21, it said this:

> The requirements of procedural fairness -- which include requirements of independence and impartiality -- vary for different tribunals … As Gonthier J. wrote in *Consolidated-Bathurst*: 'the rules of natural justice do not have a fixed content 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*, the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal … . [16]

In further support of the idiosyncratic adaptability of the independence principle, *Bell* also cited *Matsqui*, at para. 82, and *Baker* at paras. 21-22.

Moreover, the Courts have not just paid lip service to this principle. Consider, for instance, the *Consolidated Bathurst* line of cases that adapted the principle of independence to allow tribunals to institutionalize their members' decisions in ways that would not be tolerated in the courts.[17]

Consider also *Ell.* In *Ell*[18], legislation directed at improving the qualifications of Alberta's justices of the peace resulted in the removal of justices who could not meet the new qualification requirements.

These justices applied to the courts for a declaration that the statute that applied the new standards to them contravened their constitutionally mandated independence.

This argument succeeded in the lower courts, but, on appeal, while the Supreme Court agreed that the constitutional principle of independence applied to justices of the peace, for practical reasons it nevertheless allowed the government's appeal.

What I am calling the idiosyncratic adaptability of the principle of independence is uniquely evidenced in the following explanation from the judgment in *Ell*.

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[15] *Bell*, supra note 13.
[16] The full names and citations of the cases *Bell* referred to have been omitted.
[17] *IWA v. Consolidated-Bathurst Packaging Ltd.,* [1990] 1 S.C.R. 282.

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

> "… it is evident", the Court said, "that a reasonable and informed person would perceive the [statutory] amendments to strengthen, rather than diminish, the independence and qualifications of Alberta's justices of the peace. It is evident that the Legislature concluded that the positive impact of the reforms on the interests that underlie judicial independence outweighs any negative impact of the respondents' removal from office. Their removal was necessary to give effect to those reforms. As such, the respondents' removal cannot be said to be arbitrary, and does not violate the principle of judicial independence."[19]

Further examples of the Supreme Court sensibly fashioning the independence requirements to fit a particular tribunal's practical needs include, in addition to *Ell*: *Bell* itself (supra), *Katz v. Vancouver Stock Exchange*[20], and *CUPE* – the retired judges' case[21]. On the same point, there is the *IBEW* decision of the Ontario Divisional Court to which Kevin Whitaker has already referred.[22]

It is apparent from this jurisprudence, that the law has already resolved any judicialization worries there might otherwise have been with respect to a constitutionally mandated independence requirement.

I must note in passing our opponents' suggestion that, in the nirvana of government-dominated tribunals which they are promoting, one might look forward to having 80 or 90% of all cases decided through mediation. Outside of the labour boards and some other business or commercial oriented boards, in most of the tribunals I know, where the only possible answers are likely to be yes or no to questions of entitlement, and where power imbalances are endemic, mediation goals in anything like those proportions would not in my opinion be appropriate, whether or not they were possible. Moreover, mediation does not displace the need for independent tribunals. It is the prospect of independent and impartial adjudication as the alternative to settlement that makes mediation work.

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[19] *Ell*, para. 37

[20] *Katz v. Vancouver Stock Exchange* (1995), 128 D.L.R. (4th) 424 (B.C.C.A.), aff'd. [1996] 3 S.C.R. 405.

[21] *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".

[22] *I.B.E.W. Local 1739 v. I.B.E.W., et al., and Attorney General of Ontario (Guild Electric)* (2007), 86 O.R. (3d) 508 (Div. Ct.) [*IBEW*], leave to appeal denied November 28, 2007.

Our opponents contend that their world of brilliantly conceived alternative dispute resolution tactics would be frustrated by a constitutional requirement of judicial independence. However, there is no evidence. As we have seen, the jurisprudence goes entirely the other way. The *IBEW* decision of the Ontario Divisional Court which they seem to see as the ultimate example of the need for flexibility in a tribunal's process is in fact a particular case in point.

In that case, the Divisional Court concluded that the OLRB's radical procedure – a procedure that had eliminated an oral hearing notwithstanding issues of credibility in the evidence – was not, in fact, in the special circumstances of that case, incompatible with the common law principles of procedural fairness.[23] Nothing would have been different in the outcome of that case had the constitutional issue been argued (as it was not) and the constitutional independence of the OLRB recognized.

Finally, in *Imperial Tobacco*[24] and *Charkaoui*[25], we have seen the Supreme Court of Canada demonstrate a strong measure of deference to the role of legislatures in fashioning special procedural regimes in response to uncommon adjudicative challenges.

It is also worth noting that there is nothing radical about independence being constitutionally mandated for judicial tribunals. Since 1982, all tribunals covered by the written constitutional requirements in sections 11(d) and 7 of the Charter, and, since 1960, all federal tribunals covered by section 2(e) of the *Canadian Bill of Rights*[26], and, since 1975, all Québec tribunals[27], must be independent and impartial.

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[23] *IBEW*, at paras. 60 to 66.

[24] British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473.

[25] Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, paras. 32-47 (These are the paragraphs in which the Court considers and rejects the appellant's argument that the procedural regime specified by the legislation was inconsistent with the unwritten constitutional principles of judicial independence.)

[26] S.C. 1960, c.44.

[27] Québec's Charter of Human Rights and Freedoms specifies that all adjudicative tribunals must be independent and impartial.

Also, contrary to our opponents' suggestion, other common law jurisdictions have embraced the need for the independence of judicial tribunals. Note in particular that the recent radical restructuring of the UK administrative justice system is all about ensuring tribunal independence. That reform has been driven by the recent applicability to the U.K. of the European Union's human rights laws which dictate independent and impartial tribunals, and the U.K.'s modern acknowledgement that judicial tribunals are not part of the executive branch of government at all but are integral components of the judicial branch.[28]

In administrative justice matters, Canada is out of step with the rest of the common-law world, not, as our opponents seem to suggest, because of any Canadian commitment to tribunal independence or because of any "threat of independence" – now, there's a concept – but because of the traditional, deeply ingrained disrespect our governments and their bureaucracies have always had for the independence of judicial tribunals.

And, as I have said, what our opponents propose would also put Canada completely offside with all of its international commitments to the determination of legal rights by independent and impartial tribunals.[29]

Finally, in the short time I have left, I just want to put a small spoke in this Alice-in-Wonderland world apparently inhabited by our opponents, where wrong is right, and right is wrong. Nothing justifies accusing the supporters of tribunal independence as being "isolationists" – as seeking a world where tribunals will have no truck with governments. No one is advocating that.

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[28] See for example, Leggatt, A. 2001. *Tribunals for Users: One System, One Service*. London, United Kingdom. Available at http://www.tribunals-review.org.uk/index.htm; and *Constitutional Reform Act 2005* (U.K.), and *The Tribunals, Courts and Enforcement Act 2007* (U.K.). See also the description of the UK reforms in Ellis, S.R., *Executive Branch justice: Canada's 'official courts',* Ph.D Dissertation catalogue, York University, KF 5407 E45 2009, at pp. 446-448.

[29] 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.

Instead, let me leave you, the audience, with this question: If you were interested in creating a strong, effective, fair, efficient, creative, administrative justice system, which vehicle would you choose:

> A collaboration between executive branch officials and tribunal chairs beholden to those officials for their own appointments and their re-appointments and for the appointment and re-appointment of their tribunal colleagues, and for their tribunal's budget, and for all else?

**or**

> A collaboration between executive branch officials and tribunal chairs equal in status with those officials, and confident of their own independence and that of their tribunals?

In summary, in urging you to reject this resolution, the contra team makes essentially two points – the only points that are necessary:

> 1. The resolution's premise that *Ocean Port* made the subversion of the impartiality of judicial tribunals constitutionally permissible is simply demonstrably wrong[30], and
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> 2. The resolution's policy goal of subverting the impartiality of judicial tribunals and making the rule of law optional is, in any event, not only from a justice system and rule of law perspective horrifically bad policy, it is also not required for any valid purpose.

The resolution is, in short, both constitutionally invalid, and egregiously unsound. In the adjudication of the majority of Canadian's rights disputes, it proposes to make the rule of law optional; it proposes to do that in a manner that is contrary to our laws and traditions; and it proposes to do that, moreover, for the sole purpose, apparently, of solving a problem that does not exist.

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[30] For the argument in support of this conclusion, see Kimberly Turner's presentation, and, also posted on the CCAT website, an article by the author: Ellis, "Not by Any Measure".
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