25 Can. J. Admin. L. & Prac. 289

Canadian Journal of Administrative Law & Practice
December, 2012

Speech

Quasi-Judicialism: The Cuckoo Chick in the Administrative Justice Nest [a1]

Ron Ellis

I assume no one will understand, from the title, what this paper is about, with the general reaction probably being that the author has finally lost it.

So, first, for those of you who are not birders, let me tell you about Cuckoo birds. Cuckoos lay their egg (only one) in another bird's nest and, when the Cuckoo egg hatches, the Cuckoo chick emerges, three times the size of the host bird's chicks and it elbows them out of the nest, taking their place. The Host mother bird is conned into believing that the interloper is her own kith and kin because at feeding-time the hyper-active Cuckoo chick presents itself as three chicks with three mouths, and the host mother, misinterpreting the situation, continues to bring food to it as if it were her own three chicks.

In Canada, the emergent doctrine of quasi-judicialism has become the administrative justice system's equivalent of a Cuckoo chick; a doctrine in danger of elbowing the concept of tribunal *judicial* functions out of the administrative justice nest.

The emergent doctrine I refer to as “quasi-judicialism” holds that when administrative tribunals exercise rights-determining functions, those functions are always *administrative* in nature -- that is, that they are always policy driven -- and are to be found on a spectrum that runs between administrative functions that are executive in nature at one end and administrative functions that are “quasi-judicial” at the other. The doctrine is evidenced most clearly in the Supreme Court's 2003 decision in *Bell Canada v. C.T.E.A.*.[1] In that decision, as you know, the Court located the Canadian Human Rights Tribunal (“CHRT”) at the high end of a spectrum of tribunals running, the court said, from, at one end, tribunals exercising administrative functions that were closest to executive branch functions and which it suggested might be labelled “quasi-executive tribunals”, to, at the other end, tribunals such as the CHRT exercising administrative functions “closest” to the functions of a court, that it labelled “quasi-judicial tribunals”.

The problem with that analysis is that there is no place on that spectrum for the tribunals -- the majority of tribunals -- whose functions are not quasi-judicial, but judicial.

Bell located the Canadian Human Rights Tribunal at the highest end of the spectrum closest to the courts and labeled it a quasi-judicial tribunal. In fact, however, ***290** the CHRT is not a quasi-judicial tribunal; if one applies the accepted definition of a judicial function [2] to the Canadian Human Rights Tribunal's function as described by the court in *Bell*, it is perfectly clear that the tribunal is exercising a judicial function, and if one is looking for a label for that tribunal, the appropriate label is by no means "quasi-judicial", it is "judicial". The CHRT's adjudicative function is not just *close* to the adjudicative function of a court's, it is *identical* to the adjudicative function of a court. (This has recently been confirmed in practical terms by the Saskatchewan Legislature's abolishment of the Saskatchewan Human Rights Tribunal and the transfer of its adjudicative function to the Saskatchewan Court of Queen's Bench. [3]) And equally judicial in nature are the adjudicative functions of workers compensation appeals tribunals, landlord and tenant boards, pension appeals tribunals and of each of those 37 tribunals that the Ontario government recently officially identified as "adjudicative tribunals".

None of these may properly be regarded as quasi-judicial tribunals; they are all, in fact, what McRuer called them: "judicial tribunals"; and the problem is that the routine labelling of them as only quasi-judicial threatens to confound the case for the constitutional protection of their independence and impartiality.

That *judicial* functions exercised by administrative tribunals in fact come within the protection of the so-called unwritten principle of judicial independence first recognized in *PEI Reference* is now, in my opinion, self-evident, even though the Supreme Court has yet had the occasion to actually apply that principle to the judicial function of any particular tribunal. In any event, it is not my intention to argue the issue of constitutional protection of the independence of tribunal judicial functions this morning, pausing only to refer you to the *Canadian Journal of Administrative Law & Practice* ("CJALP") article jointly authored by my colleague Mary McKenzie and me entitled "Ocean Port or the Rule of Law" [4] and my forthcoming book [5] in which you will find the arguments in support of the application of the principle to tribunal judicial functions laid out in full, and to the recent decision of the Ontario Supreme Court in which the court acknowledged that the *PEI Reference*'s [6] unwritten principle of judicial independence is now "uniformly applied to administrative tribunals and all forms of inferior courts". [7]

My subject this morning is the implications of the quasi-judicialism doctrine for the future of the principle of judicial independence in the administrative justice system.

***291** The process of pushing the concept of tribunal judicial functions out of the administrative justice nest began with two decisions of the Supreme Court of Canada in 1979 -- *Coopers and*

Lybrand[8] and the iconic *Nicholson*.[9] It was these two decisions that put the Cuckoo's egg in the administrative justice nest.

The label "quasi-judicial" originated, of course, long before that, in the distant era when the courts' judicial review jurisdiction did not include the review of administrative -- that is, policy-driven -- rights decisions, but when the government's exercise of regulatory functions had grown to the point where administrative decisions had increasingly serious impacts on the property and rights of individuals, and had developed a felt need for judicial review of the fairness of these decisions. The courts ultimately responded to this felt need by accepting jurisdiction to review administrative rights decisions that, while clearly administrative in nature, were, in terms of their impact on individual rights, nevertheless court-like. The courts concluded that the rule of law must be presumed to require that such decisions be reached through a process that was at least "somewhat akin" to a judicial process, and decisions which were seen to fall within that new jurisdiction were labelled "quasi-judicial" decisions.

The concept of quasi-judicial decision-making and its place on the spectrum of tribunals as it was understood prior to 1979, is conveniently summarized by Justice McRuer in his 1968 report on his *Royal Commission Inquiry into Civil Rights*.[10] (The McRuer Report has been criticized for what is seen to have been an excessive respect for Professor Dicey's views on tribunals, but the reliability of its understanding of administrative law as it existed in 1968 has never been doubted.) McRuer identified three categories of tribunal functions recognized in Ontario's administrative law jurisprudence in 1968: "purely administrative", "quasi-judicial administrative" and "judicial", and so, if he had thought to talk in terms of "spectrum", his spectrum of tribunal rights-determining functions would have run from the purely administrative rights-determining functions at one end, past the quasi-judicial administrative functions in the middle, to tribunal functions that are purely judicial at the other end.

The relevant passages from the McRuer Report read as follows:

> We adopt the expression "tribunal" as embracing corporations, groups of persons or single persons *exercising either administrative or judicial powers* ....
>
> It is, however, *necessary ... to distinguish between tribunals exercising "administrative" and "judicial" powers*. If the power conferred on a tribunal is *administrative* we will refer to it as an "administrative tribunal". If the power so conferred is *judicial* the tribunal will be referred to as a "judicial tribunal".

> The terminology in this branch of the law of Ontario is further complicated ***292** by a subdivision of administrative powers. In legal parlance it is said in some cases *administrative powers* must be exercised by "acting judicially". That is, the decision, although *administrative because it is arrived at on grounds of policy, is to be made after compliance with certain minimum standards of fair procedures, somewhat resembling judicial procedure .... In these cases, the administrative power is termed "quasi-judicial"*. In other cases no obligation to act judicially -- no requirements to follow any minimum standards of fair procedures -- is imposed ... In such cases the power is termed *"purely administrative"* .... [11]

Thus, originally, a "quasi-judicial" function was a policy-driven, *administrative*, rights-determining function that was not a judicial function but whose exercise impacted on rights to such a degree that fairness required it to be exercised in a *somewhat* judicial manner.

The presence of the quasi-judicial function in the middle of the McRuer spectrum was only necessary because of the pre-*Nicholson* view that administrative decisions could not be judicially reviewed unless they were seen to be of a quasi-judicial nature. But since *Nicholson* has removed that requirement, there is no longer any need for the quasi-judicial category, and thus McRuer would see a modern spectrum of tribunal administration functions as running between administrative functions of a purely executive nature at one end and those administrative functions that are "closest" to tribunal *judicial* functions at the other.

A clear recognition and acceptance of the distinctions between judicial functions of tribunals, and administrative and quasi-judicial administrative functions of tribunals, as those distinctions existed on the cusp of the *Coopers and Lybrand/Nicholson* era can be seen in Mr. Justice Pigeon's majority judgment in the Supreme Court's 1976 decision in *Howarth*. [12] That judgment dealt with the then newly enacted s. 28 of the *Federal Court Act* which had inaugurated a Federal Court of Appeal jurisdiction to review certain decisions of Federal boards, commissions, or other tribunals. At issue was whether s. 28 authorized the Court of Appeal to review a National Parole Board decision revoking a parole. Justice Pigeon described s. 28 as distinguishing between (1) *"judicial* decisions" by Federal tribunals and (2) *"administrative orders* [by Federal tribunals] required by law to be made on a judicial or quasi-judicial *basis*". [13]

Pre-*Nicholson*, the content of the fair process required of a tribunal exercising a quasi-judicial administrative rights-determining function depended on the nature of the tribunal, the nature and seriousness of the potential impact of the decision, the circumstances in which the decision fell to be made, etc. However, there would always be at least a requirement that parties likely to

be affected by the decision be given reasonable notice that a decision was contemplated and of the issues, and that there be some kind of a "hearing" in which the parties would have a reasonable opportunity to respond to the issues. This "hearing" was not typically the fullblown, court-style hearing; it might not have to be held in public; in some circumstances a mere exchange of correspondence sufficed.

***293** In *Nicholson*, [14] tired of courts having to deal with the angels-on-the-head-of-a-pin arguments about whether an administrative, policy-driven rights decision was purely administrative or might be quasi-judicial, Chief Justice Laskin, following an earlier lead of the U.K. courts, now held that all administrative rights-determining functions, whether they were purely administrative or quasi-judicial would henceforth be governed by the principles of procedural fairness with their compliance with those principles always open to judicial review. Thus, at this point, the technical need for the "quasi-judicial" concept as the common-law's stratagem for opening the door to judicial review of non-judicial, administrative decisions disappeared.

Unfortunately, Chief Justice Laskin took the opportunity provided by *Nicholson* to also rule out any need to distinguish between tribunal administrative rights-determining functions and tribunal judicial functions. This is not surprising because in *Coopers and Lybrand*, [15] a decision issued before *Nicholson* but in the same year, we find Justice Dickson speaking for the whole court, and saying flatly (and in conflict with the Court's previous views as exemplified in *Howarth*) that "judicial decisions [are] those made by the courts, and administrative decisions [are] those made by other than courts ..." and, as well, that "government ministries and agencies carry out a different form of work then that done by the courts ... Their primary concern is with policy objectives, rather than adjudication inter partes, ..." [16]

The latter is a description of "government agencies" that ignores the existence of tribunals such as the worker's compensation appeals tribunals, the landlord and tenant boards, the social benefit tribunals, etc. etc., whose primary concern *is* with adjudication *inter partes*.

And, so, in the process of ridding the Canadian common law of the courts' dependence for their judicial review jurisdiction on the artificial distinction between purely administrative functions and quasi-judicial administrative functions, the *Nicholson* court, and the jurisprudence that followed it, seemed to have also eliminated the distinction between tribunal *administrative functions* and tribunal *judicial functions*. The following is one of the oft-quoted passages from Chief Justice Laskin's majority judgment in *Nicholson*:

> What rightly lies behind this emergence [of a general notion of fairness] is the realization that *the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult*, to say the least; and to endow some with

> procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281. [17]

See also the conclusion by Justice L'Heureux-Dubé, speaking in 1990 for the ***294** majority of the Supreme Court, in *Knight v. Indian Head* that, "[t]here is no longer a need, except perhaps where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions". [18]

In considering the modern implications of a failure or refusal to distinguish between tribunal administrative functions and tribunal judicial functions, it is important to remember that, pre-*Nicholson*, what the principle of procedural fairness required of a tribunal that was identified as exercising a quasi-judicial administrative function was principally focused on the *process* of decision-making, not on the status of the decision-maker. And decision-makers exercising quasi-judicial functions were always administrative bodies and, while they might be independent, by definition they could not be disinterested, not impartial.

The concept of impartiality has two components -- independence and disinterest. A tribunal or its members cannot be seen to be impartial unless it or they are independent, but independence is not enough. A demonstrably independent tribunal cannot be seen to be impartial unless it is also clear that it and its members are disinterested in the outcome -- that there are no grounds for a reasonable apprehension of bias. And while administrative bodies exercising quasi-judicial administrative functions may have one of the components of impartiality because they may be thought to be independent, they are missing the second component because they are not in law unbiased -- not disinterested.

Take, for example, energy boards. Energy boards and their management and members are charged with the responsibility for making the energy sector work effectively, efficiently, and fairly in the community's interest. That is their mission. They are professionally committed to meeting those goals and will, as individuals and as an organization, be judged on how well those goals are achieved. Therefore, in the consideration of any rights issue -- in considering, for example, whether or not to grant an application for a gas-marketing licence -- these boards and their members must be seen to have their own institutional interests at stake, to be implicitly in the position of defending or promoting those interests. To put it in the vernacular, both the applicant, and the board, have a dog in the hunt.

Like a general contractor in a large construction project deciding whether or not to accept a particular tender from, say, one of several contending paving contractors, energy boards are both

the decider and a party. They have both the community's -- i.e., their "owners"' -- interests and their own interests to consider; they are not adjudicators of other people's rights but managers of their own -- and their principal's -- interests. So, for administrators exercising administrative rights-determining functions of a quasi-judicial nature, the process had to be fair, but the content of the fairness requirement varied in the manner described above, and it had to accommodate the fact that the decisions were policy-driven and the deciders were invariably, by definition, not impartial.

Thus, while the courts' tactical need for distinguishing between purely administrative rights-determining functions and quasi-judicial administrative rights-determining functions evaporated with *Nicholson*, the law continued -- and continues -- to have important substantive reasons for distinguishing between tribunal *administrative* functions, whether they be purely administrative or quasi-judicial ***295** administrative, and tribunal *judicial* functions. These reasons are, I argue, principally the need to distinguish between administrative -- that is, policy-driven -- rights-determining functions that, subject to statutory override, must be exercised in conformity at some variable level with the principles of procedural fairness but do not require -- or typically have -- impartial deciders, and those, not administrative but judicial, rights-determining functions that, if the integrity of our justice system is to be respected, must be exercised in conformance with at least the core rules of natural justice by deciders who are impartial, with both the process and the impartial status of the deciders protected from statutory override by the constitutional requirement of judicial independence.

If we lived in an ideal, administrative law world, then, after *Nicholson*, the concept of a "quasi-judicial" rights-determining administrative function -- no longer needed as the legitimizing cover for judicial review of administrative, rights-determining functions -- would have been decorously retired to the status of a historical footnote and we would have heard nothing more about it. But, no, in the aftermath of *Nicholson*, the "quasi-judicial" label, let loose by Nicholson from its traditional common law moorings, was still to be found floating in un-amended pre-*Nicholson* legislation and the courts were called upon to continue to assign some meaning to it. [19]

And this dissonance between a common law that seemed now to have no further rational use for the "quasi-judicial" label and statutes, like s. 28 of the *Federal Court Act*, that still required the courts to ascribe some meaning to it, led eventually to the quasi-judicial label metamorphosing into a label of convenience for any quasi-judicial *or* judicial function exercised by non-court tribunals, and to its now ending up as an historically anomalous and constitutionally flawed label for any tribunal whose main function is *either* judicial or quasi-judicial (in the original sense of the term).

Thus, now, both the Canadian Human Rights Tribunal and the Canadian Nuclear Safety Commission are referred to as "quasi-judicial" tribunals and the understanding of "quasi-judicial" as connoting a non-judicial *administrative* function requiring a *somewhat* judicial process disappeared, and in the administrative law context "quasi-judicial" appears to have become the new "judicial". The Cuckoo chick has pushed the legitimate heir out of the nest.

This conflation of judicial and quasi-judicial tribunal functions into the one quasi-judicial category is a doctrinal error that is fraught with dangers for a rational and constitutionally sound law of administrative justice. But it is not a surprising development because it has long been foretold by the Canadian courts' traditional failure to distinguish with care between administrative tribunals that are regulatory agencies exercising administrative functions that may or may not be of a quasi-judicial nature and administrative tribunals that are judicial tribunals exercising judicial functions -- a failure that continues even as I write.

It is a long standing tradition. Most of you will remember Chief Justice Laskin's majority judgment in *National Energy Board* -- the Marshall Crowe ***296** case[20] -- where Laskin characterized the Board's hearing addressed to the issue as to which contractor should get approval for building the McKenzie Valley natural gas pipeline as an "adjudication" and, in finding that Crowe must step down as chair of that hearing because of a perceived bias, applied bias principles appropriate for a judicial function A particularly arresting example may be seen in the 1992 judgment of the Supreme Court in *Newfoundland Telephone*[21] in which the Court characterizes as "adjudication" a hearing-based exercise of what was clearly a regulatory function by Newfoundland's Board of Commissioners of Public Utilities. The Board was obviously a regulatory agency and the issues it was considering was whether recent increases in the salaries and pensions of the Newfoundland Telephone Company's senior executives should be allowed as costs that could be appropriately included in the cost structure the Company was entitled to rely on in justifying rate increases. These were not, by any stretch of the imagination, justiciable issues. The question for the Board of Commissioners in that case could not rationally have been what "the law" intended. The Board was tasked with deciding what was advisable the interest of its clients -- the people of Newfoundland and its own interests, and it allowed the salary increases but disallowed the pension increases. Nevertheless, the Court identified that hearing as "adjudicative" and, as in the National Energy Board case, applied a standard of impartiality relative to the exercise of a judicial function.

More modern evidence of that failure to distinguish between regulatory agencies and judicial tribunals may be found in the Supreme Court's observation in *Paul*,[22] in 2003, that *"administrative tribunals"* are part of the justice system -- not just adjudicative tribunals or judicial tribunals, but apparently all administrative tribunals are part of the justice system. I doubt very much whether energy boards or the CRTC can appropriately or usefully be said to be part of any "justice system", although workers compensation appeals tribunals certainly are.

You can see this tradition also at work in the Supreme Court's confirmation in its recent decision in *Conway*[23] that any tribunal with the authority to decide questions of law has the implicit jurisdiction to decide *Charter* issues and to award remedies for *Charter* breaches. It is surprising that no thought appears to have been given in *Conway*, as in *Paul*, as to whether the nature of the *Charter* jurisdiction might be different as between tribunals exercising administrative functions

and tribunals exercising judicial functions; whether, for instance, the fact that, inherently, the former will always be engaged in defending their own institutional obligations and interests makes them ideal arbiters of the *Charter* rights of others.

***297** When one considers the provenance of the "quasi-judicial" label as a name for administrative functions that merely resemble judicial functions and for the "somewhat judicial" process that the courts imposed on administrators exercising such functions, it is clear that its current application to tribunals exercising what are in fact judicial functions will eventually cause trouble.

The courts' post-*Nicholson* eradication of the distinction between judicial, rights-determining functions, and administrative, rights-determining functions creates problems for the theory and law of administrative justice that the courts have not foreseen and have yet to face. Both the common law rules of natural justice and the constitutional requirements of judicial independence (as they will eventually have to be recognized) require that any non-court person -- or institution -- exercising a *judicial* function be demonstrably impartial -- i.e., be and be perceived to be both independent and unbiased.

But, in the past, before *Nicholson*, in dealing with bodies exercising administrative rights-determining functions for which the label "quasi-judicial" was originally coined -- for example: boards of health, university boards of directors, municipal councils, regulatory agencies -- the courts never addressed the issues of the independence of those bodies and only rarely considered whether they could be perceived to be impartial. In their review of the exercise of quasi-judicial functions, the courts' concern was focused, as we have seen, on the *process* of decision-making -- on fair notice and opportunities to respond that were comparable to hearings, etc. -- not on the status of the deciders.

And that made perfect sense since, as I have said, pre-*Nicholson*, tribunals seen to be exercising quasi-judicial rights-determining functions were always administrators of one kind or another who would rarely meet the structural criteria of judicial independence and, because of their administrative agenda and assigned policy missions, could never be seen to be disinterested. They could be expected to treat people *fairly* -- and that is what the courts were looking for -- but they inevitably had a mandated *bias* and their decisions were policy-driven.

The long-term, administrative justice system implications of the courts' conflation of quasi-judicial and judicial tribunal functions have so far been flying below the radar. This has been possible because, as far as the *common law* of judicial independence is concerned, the standard of independence has been held since *Valente* [24] to be contextually variable and is tailored by the courts to fit the practical independence requirements of any rights deciders whether they are exercising judicial or quasi-judicial functions. For functions that are truly quasi-judicial in the original sense,

the standard of independence is set lower, and for those that are now called quasi-judicial but are in fact judicial, the standard is set higher.

This stratagem works as far as the common law of independence is concerned, but it is constitutionally unsound -- other than courts, it is only tribunals exercising judicial functions in the traditional sense of the term that qualify as being constitutionally ***298** required to be independent.[25] Thus, when it comes time for the Supreme Court to decide whether a particular tribunal's statutory, rights-determining function brings it within the constitutional requirements of judicial independence -- and it is inevitable that that time will come for most tribunals -- the court will once again have to distinguish between rights-determining functions that are truly judicial and those that while somewhat resembling a judicial function are in fact administrative. In that exercise, the fact that in *Bell*, and elsewhere, the court is now applying the "quasi-judicial" label indiscriminately to both seems to present a considerable danger of confounding the analysis.

Confusing judicial rights-determining functions with quasi-judicial administrative rights-determining functions is even more serious, however, when it comes to the principle of impartiality. One can conceive of varying degrees of structural, judicial *independence*, but with respect to an adjudicator exercising a judicial function there will either be grounds for a reasonable apprehension of bias or not, and quasi-judicial rights deciders in the traditional sense of the quasi-judicial concept can almost never be perceived to be impartial. Even if they have structural guarantees of independence, in exercising their rights-determining function they, like energy boards and other regulatory agencies, will inevitably be understood to be appropriately defending their own interests, to be both decider and party.

Thus, the application of the "quasi-judicial" label indiscriminately both to bodies exercising true, judicial rights-determining functions, like the Canadian Human Rights Tribunal or residential landlord and tenant tribunals, and to bodies exercising somewhat judicial but administrative, rights-determining functions for which that label was originally coined, such as energy boards, means either that impartiality will no longer be a requirement for the former or it will be a new requirement for the latter. Since the rule of law will rule out the first possibility, and common sense the second, it is apparent that the courts' application of the quasi-judicial label even to bodies exercising what are in fact judicial functions is simply a mistake that will have to be fixed. The Cuckoo chick needs to be evicted from the administrative *justice* nest.

Footnotes

a1 Speech presented at the CCAT Conference, "Mapping New Frontiers -- The Good, The Bad and The Ugly of Administrative Justice" in Calgary, May 2012, in the workshop, "New Frontiers of Administrative Justice Research". The paper is based on a section in the author's forthcoming book, *Unjust by Design -- Canada's Administrative Justice System*.

1 [2003] 1 S.C.R. 884, 2003 CarswellNat 2428, 2003 CarswellNat 2427 (S.C.C.) [*Bell*].

2 As set out particularly in *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 1981 CarswellOnt 623F, 1981 CarswellOnt 623 (S.C.C.).

3 Bill 160 -- *The Saskatchewan Human Rights Code Amendment Act, 2010*.

4 S. Ronald Ellis and Mary E. McKenzie, "Ocean Port or the Rule of Law? The Saskatchewan Labour Relations Board" (2009) 22 Can J Admin L & Prac 267.

5 *Unjust by Design -- Canada's Administrative Justice System in Canada*, to be published by UBC Press and scheduled for release in March 2013.

6 *Reference re: Public Sector Pay Reduction Act (P.E.I.)*, s. 10; *Reference re: Provincial Court Act (P.E.I.)*; *R. v. Campbell*; *R. v. Ekmecic*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3. [P.E.I. Reference].

7 *Ontario Deputy Judges Assn. v. Ontario (Attorney General)*, 2011 ONSC 6956, 2011 CarswellOnt 13192 (Ont. S.C.J.); affirmed 2012 CarswellOnt 7932 (Ont. C.A.).

8 *Collavino Brothers Construction Co., Re*, [1979] 1 S.C.R. 495, 1978 CarswellNat 568, 1978 CarswellNat 257 (S.C.C.).

9 *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311, 1978 CarswellOnt 609, 1978 CarswellOnt 609F (S.C.C.) (*"Nicholson"*).

10 Report No. 1, Vol.1 (1968) (Chair: James Chalmers) [*McRuer Report*] at 120-123.

11 *Ibid.*, at 29 (Emphasis added).

12 *Howarth v. Canada (National Parole Board)*, [1976] 1 S.C.R. 453, 1974 CarswellNat 377F, 1974 CarswellNat 377 (S.C.C.).

13 *Ibid.*, at 471. (Emphasis added).

14 *Supra* note 9.

15 *Supra* note 8.

16 *Ibid.*, at 500.

17 *Nicholson, supra* note 9 at 325 [Emphasis added]. See also *Knight v. Indian Head School Division No. 19*, 1990 CarswellSask 408, 1990 CarswellSask 146, [1990] 1 S.C.R. 653 (S.C.C.), at 669 [S.C.R.] (*"Knight"*).

18 *Ibid., Knight*.

19 See, in particular, *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, 1989 CarswellNat 877, 1989 CarswellNat 701 (S.C.C.).

20 *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369, 1976 CarswellNat 434F, 1976 CarswellNat 434 (S.C.C.) (*"National Energy Board"*).

21 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 1992 CarswellNfld 170, 1992 CarswellNfld 179 (S.C.C.) (*"Newfoundland Telephone"*).

22 *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 CarswellBC 2433, 2003 CarswellBC 2432, ¶22 (S.C.C.).

23 *R. v. Conway*, 2010 SCC 22, 2010 CarswellOnt 3848, 2010 CarswellOnt 3847 (S.C.C.) (*"Conway"*).

24 *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673, 1985 CarswellOnt 948, 1985 CarswellOnt 129 (S.C.C.) -- the decision which established the modern definition of judicial independence as it applies to tribunals.

25 See e.g. *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 CarswellAlta 916, 2003 CarswellAlta 915 (S.C.C.) at para. 20: "... The scope of the unwritten [constitutional] principle of [judicial] independence must be interpreted in accordance with its underlying purposes. In this appeal, its extension to the office held by the respondents *depends on whether they exercise judicial functions* that relate to the bases upon which the principle is founded ..." [emphasis added].

25 CJALP 289

End of Document