

28 Can. J. Admin. L. & Prac. 55

Canadian Journal of Administrative Law & Practice

March, 2015

Article

An Ignis Fatuus? The Rule of Law in the Administrative Justice System

Ron Ellis^{al}

Copyright © 2015 by Thomson Reuters Canada Limited; Ron Ellis

This article argues that in the administrative justice system our courts are consciously reducing the rule of law to an illusion--an ignis fatuus. The author cites three particular events that have come to his attention recently-- a remarkable speech by the Chief Justice to the 2013 CCAT conference; the SCC's dismissal of an application for leave respecting the Saskatchewan Labour Relations Board's bias issue; and a 2014 decision of the Federal Court in Muhammad about the independence and impartiality of an administrative-justice adjudicator. The article is devoted principally to how the rule of law as we have known it was egregiously disregarded in Muhammad.

Dans cet article, l'auteur soutient que, dans le système de justice administrative, nos tribunaux réduisent consciemment la primauté du droit à une illusion--un feu follet. L'auteur cite trois événements précis qui ont été portés à son attention récemment, soit un discours remarquable de la juge en chef au congrès du Conseil des tribunaux administratifs canadiens (CTAC) en 2013; le rejet par la Cour suprême du Canada d'une demande de congé portant sur la question de la partialité du Saskatchewan Labour Relations Board, et une décision de la Cour fédérale, en 2014, dans l'affaire Muhammad sur l'indépendance et l'impartialité d'un juge administratif. L'article est consacré principalement à la façon dont la règle de droit, comme nous la connaissons, a été négligée de façon flagrante dans l'affaire Muhammad.

1. INTRODUCTION

“*Ignis fatuus*”: a fatuous fire; a deceptive goal or hope; a thing that misleads or deludes; an illusion.¹ Is that what the rule of law has become in the “administrative” part of Canada's justice system? Regrettably, there are good reasons to think so.

Those reasons were examined at length in the author's book *Unjust by Design: Canada's Administrative Justice System*² whose principal theme was that the rule of law requires adjudicators exercising judicial functions to be *56 independent and impartial, but in our administrative justice system they are neither.

And since the publication of that book in March 2013 there have been three events that have come to the author's attention that, on the one hand, confirm the book's diagnosis and, on the other, demonstrate the current courts' apparent conclusion that the rule of law's demand for independent and impartial adjudicators must not be allowed any meaningful role in the administrative justice system. Governments, the courts seem to have decided, are not to be embarrassed by any serious rule of law challenge to the dependent and biased status of their adjudicative tribunals even though it is those tribunals in which the majority of Canadian justiciable rights disputes now fall to be decided.

2. THE CHIEF JUSTICE'S SPEECH

The first of these three subsequent events was the remarkable speech of Chief Justice McLachlin to the Annual Conference of the Council of Canadian Administrative Tribunals (“CCAT”) in Toronto, on May 27, 2013.

In that speech, the Chief Justice, addressing the state of Canada's administrative justice system, approved--indeed praised--a system in which “the rights and wrongs of peoples' disputes with each other and with the state” are decided by government-appointed board members who are, she acknowledged, “accountable to no one but the government they hoped would re-appoint them”.³

The Chief Justice acknowledged that there may have been some fears about the fairness of such a system, but concluded:

If these fears have not been realized, if tribunals work within the rule of law and not outside it, it is because the courts took on the task of ensuring that administrative tribunals remain true to their fundamental mandates, both procedurally and substantively. In a word, it is because of judicial review.⁴

But, as we know, the principal standard of judicial review is reasonableness, and, as the Chief Justice has, in her CCAT speech, effectively confirmed, the fact that an adjudicative decision is made by what the rule of law in its original, robust form would recognize as a biased adjudicator is not regarded by the courts as grounds to question its reasonableness.

It is also not without significance that in signalling in her CCAT speech her *ex cathedra* approval of a justice system in which adjudicators are appointed to *57 short, fixed terms and their reappointments at the end of those terms are dependent on a government's arbitrary favour, the Chief Justice has overlooked or discounted the contrary judicial opinion of the Québec Court of Appeal.

That Court has decided that, where tribunal adjudicator appointments are for fixed terms subject to renewal, the adjudicators do not satisfy the *Valente* principles of independence unless they are the beneficiaries of an independent, objective, and fair, renewal process. This principle was first enunciated in 2001 by the Court of Appeal in a unanimous judgment written by noted administrative law scholar, René Dussault, J.A., in *The Attorney General of Québec v. Barreau du Montréal*⁵ and was recently confirmed in a unanimous judgment of the same Court, written by Marie-France Bich, J.A.⁶ The latter decision was issued in October 2013, about 4 months after the Chief Justice's CCAT speech. The Québec Court of Appeal does not apparently find the availability of the remedial virtues of judicial review as reassuring from a rule of law perspective, as does the Chief Justice.

3. SASKATCHEWAN LABOUR RELATIONS BOARD

The second significant event following the publication of *Unjust by Design* occurred on December 19, 2013, when a panel of the Supreme Court chaired by the Chief Justice dismissed an application for leave to appeal the Saskatchewan Court of Appeal's conclusion that in Saskatchewan's administrative justice system the modern rule of law can find no fault with a labour relations board that has been shown to be both dependent and biased. The Supreme Court found that conclusion to be of insufficient national importance to warrant its attention.⁷

4. MUHAMMAD

The third event is a 2014 decision of the Federal Court in which the *ignis fatuus* nature of the rule of law in the part of the administrative justice system under the care of the Federal Court is most ominously displayed. This was the decision of Strickland J. in *Muhammad v. Canada (Citizenship and Immigration)*,⁸ and the balance of this article is devoted to a close analysis of *58 how in that decision the rule of law was reduced to something that seemed to be there, was said to be there, but wasn't really. Justice Strickland's decision is especially worrisome because of the extent to which it relied on the decisions of other Federal Court judges who were clearly of the same mind.

In *Muhammad*, the Federal Court was judicially reviewing a Minister's Delegate's decision that Mr. Muhammad could be removed to his home country, Pakistan, “without risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment” (all hereafter joined together for convenience under the general label “risk of torture”).

The Minister's Delegate whose decision was the subject of the court's review was the final decider in the system that the Department of Citizenship and Immigration has established for adjudicating applications for a “Pre-Removal Review Assessment” (“PRR Assessment”). These are the last-ditch applications from individuals on the verge of being removed from Canada who claim they face a risk of torture if they are sent home.

The adjudicator whose decision was the subject of the review is referred to in the judgment as the “Minister's Delegate”; it was recognized, however, that she was not exercising a ministerial prerogative or discretion but, instead, adjudicating a factual issue in which the procedural fairness requirements of independence and impartiality were engaged.⁹ The issue was whether, on the evidence, on a balance of probabilities, there was a risk that Mr. Muhammad would be tortured if he were removed to Pakistan. And, of course, on that issue, whichever way the decision went it would be a life-altering decision.

To keep the administrative justice focus clear, the “Minister's delegate” will be hereafter referred to principally as the “adjudicator”.

(a) The *Muhammad* Issues

The Court acknowledged that the rule of law's principles of procedural fairness required that the adjudicator in *Muhammad* be independent and impartial.¹⁰ Thus, the issues the rule of law--the rule of law in its traditionally robust nature--presented for the court were these:

59 (i) *The Independence Issue

The rule of law's question here was: could the adjudicator's independence be reasonably seen to be protected by sufficient objective guarantees of the three essential conditions of independence defined by the SCC in *Valente*¹¹ --security of tenure, financial security, and administrative or institutional independence? Or, more simply, and to paraphrase the Supreme Court of Canada's statement of the issue in *Généreux* (of which much more later):

Under the structure of the system ... would a reasonable person have been satisfied that [the adjudicator] was independent [of the executive branch]?¹²

(ii) *The Bias Issue*

If the adjudicator's status were found to satisfy the conditions of independence, the traditional rule of law's question then becomes whether, notwithstanding her independent status, there were grounds for reasonably apprehending that the adjudicator would nonetheless not be impartial--i.e., for apprehending that she would be consciously or unconsciously biased.

(b) The *Muhammad* Proceedings

The pertinent proceedings began in 2011 when Muhammad, living illegally in Canada, had his name placed on the government's recently conceived “Wanted List” and, as a result, was discovered

and arrested.¹³ Being retained and about to be returned to Pakistan, Muhammad applied for a PRR Assessment arguing that he could not be removed to Pakistan because if he were, he would be at risk of torture, etc. If the PRR Assessment process led to a decision that on a balance of probabilities there was a risk he would be tortured in Pakistan, he would not be removed to Pakistan. Muhammad's right to protection as a refugee in those circumstances is subject to the further condition that there be no information that links him directly to any terrorist organization's crimes against humanity or any terrorist acts, or that is sufficient to establish that he is a danger to the security of Canada. In Mr. Muhammad's case it was the opinion of the Canada Border Services Agency that the evidence was not sufficient to establish any such links or to prove that he was a danger to Canada.¹⁴

The proceedings took a surprising turn when the Immigration Department's PRR Assessment Officer--who presided at the first stage in the PRR Assessment process--concluded not only that there was a risk of torture but *60 also that it had arisen principally from the applicant's name being placed on the government's Wanted List.¹⁵ The Wanted List had described him--and the others on the list--as being "the subject of an active Canada-wide warrant for removal" [because he has] "violated human or international rights under the *Crimes against Humanity and War Crimes Act*, or under international law".¹⁶

But PRR Assessment Officer decisions are not final decisions. The court characterized their status as essentially an opinion. The final decision was in the hands of the Citizenship and Immigration Department's "Minister's Delegates"--or, as I have chosen to call them, the "adjudicators"--after considering the evidence afresh.

The adjudicative decision under review in *Muhammad* was in fact a redetermination of an earlier adjudicative decision on the same issue. In the original decision, a different Minister's Delegate/adjudicator had also found there was no risk of torture. And on judicial review of that decision, the Federal Court had found the decision unreasonable for lack of sufficient justification and had sent it back for a redetermination by a different adjudicator.

(c) The *Muhammad* Argument

In this, the second of the two judicial review proceedings, the applicant argued that the redetermination decision was invalid because the adjudicator who made the decision was neither independent nor impartial. He also argued, in the alternative, that, like the first adjudicator's decision, this decision was also unreasonable.

(d) The *Muhammad* Outcome

Strickland J. ruled that the adjudicator was independent and that there were no reasonable grounds for apprehending bias. However, she also concluded that the redetermination decision was

unreasonable--again for lack of adequate justification. For that reason, the court sent the issue back for a second redetermination by a third, and again different, adjudicator. This article is concerned only with Strickland J.'s rulings on the independence and bias issues.

(e) The *Muhammad* Independence Issue

(i) *The Muhammad Independence Facts*

The facts, as found by the Court, that are relevant to the independence issue include the following.

The Minister of Citizenship and Immigration Canada--i.e., the executive branch--was the opposing party in the proceedings, and the management of that Minister's litigation in high profile cases is the responsibility of the *61 Citizenship and Immigration Department's "Case Management Branch", a responsibility that surprisingly includes not only managing the government's litigation opposing PRR Assessment applications but also supplying the adjudicators that hear and determine those applications.

The PRR Assessment adjudicators come from a group of Case Management Branch employees appointed by the Branch to the position of "Director, Case Determination". There are a number of such "Directors" and the Minister has delegated the power to adjudicate PRR Assessment applications to those Directors. This is why the adjudicator in this case is referred to in the judgment as the "Minister's Delegate".

The Case Determination Directors--one of whom was the adjudicator assigned to hear and decide the Muhammad application-- are supervised directly by the head of the Case Management Branch. They report to him personally and meet with him on a "regular" basis to "discuss operational matters and individual files" and he is the one who conducts their "mid-year and year-end performance reviews".¹⁷

There is no independent procedure for selecting the particular adjudicator to be assigned to a particular case. The adjudicators assigned to hear and decide Muhammad's case were the arbitrary choices by the adjudicators' supervisor--the head of the Case Management Branch.

In an affidavit filed in this case, the head of the Branch stated that he had "advised the Minister's Delegates [the Directors, Case Determination, in his Branch--the "adjudicators", as this author calls them] not to discuss their cases with him; that he has never discussed the contents of their decisions; and that his practice is to emphasize to the [adjudicators] that their decisions are theirs alone".¹⁸

(ii) *The Muhammad Independence Law*

(A) *Généreux*--The Case which is the Rule of Law's Dispositive Authority

The rule of law's principles of judicial independence as they apply to these facts are most relevantly seen in a 1992 Supreme Court of Canada decision in which the *Valente* principles of judicial independence were applied to a set of facts that are, in all relevant respects, indistinguishable from the facts in *Muhammad*.

The decision is *R. v. Généreux*.¹⁹ It is the decision in which the Supreme Court of Canada found that the traditional structures of the Canadian Army's General Court Martial proceedings contravened the judicial independence requirements spelled out in *Valente*. The decision overruled the Court's own *62 pre-*Valente* decision in *MacKay*²⁰ and led to a major restructuring of what had been a long tradition of executive-branch control of military justice.²¹

Généreux was not referenced in *Muhammad* but on the *Muhammad* facts it plainly should have been dispositive of the independence issue in favour of the applicant.

In *Généreux*, the applicant for judicial review was a soldier charged with a narcotics offence. The body opposing the applicant--i.e., the body that convened the court martial and prosecuted the applicant--was, the Court found, an "integral part of the military hierarchy". And because the Court also found that the senior members of the military hierarchy were "responsible to their superiors in the Department of Defence" the hierarchy was therefore, in the Court's view, "an integral part of the executive".²²

The management of the court martial proceeding was found by the Court to be in the hands of the Office of the Judge Advocate General, whose "close ties" to the "executive" were, in the Court's view, "obvious".²³

The "judge" in the case was the person designated as the "judge advocate". He was a military judge, which is to say, a military "legal officer" employed within the Office of the Judge Advocate General and designated by the Judge Advocate General to be a member of the Office's cadre of "military judges".²⁴

The selection of individual military judges to be the judge advocate in particular cases was, the Court found, the responsibility of the "executive"-- i.e., the Judge Advocate General.²⁵

Moreover, a military judge's performance was formally evaluated by his or her superiors, also part of the executive--an evaluation that "could", the Court said, "potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial" with the result that "the executive might effectively reward or punish an officer for his or her performance [as the judge advocate] of a General Court Martial".²⁶

(B) The *Généreux* Facts are the *Muhammad* Facts--a Perfect Fit

A comparative analysis of the two cases will show that the role played in *Généreux* by the Minister of Defence was played in *Muhammad* by the Minister of Citizenship and Immigration; the role of the military hierarchy in *Généreux* was played in *Muhammad* by the Department of Citizenship and Immigration; the role of the Office of the Judge Advocate General was played by the *63 Department's Case Management Branch, the role of the Judge Advocate General by the head of the Case Management Branch, and the role of the judge advocate--the judge--was played by the Minister's Delegate (the adjudicator) chosen by the head of the Case Management Branch from the Branch's cadre of adjudicators. In short, in both cases the applicant's interests were opposed by the executive branch and adjudicated by the executive branch.

(C) The *Généreux* Result

On these facts, the Supreme Court found in *Généreux* that none of the three *Valente* conditions of judicial independence--security of tenure, financial security, or institutional independence--could be seen to be satisfied. An exposition of the law of judicial independence, as the *Généreux* Court applied it to those facts, may be found in the majority judgment of Chief Justice Lamer.²⁷ Of special relevance to the *Muhammad* facts is the following reference in the Chief Justice's judgment to the Court's particular concern about the executive being free to choose arbitrarily the particular adjudicator to be assigned to a particular case.

(...) A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases. Nothing in what I have said here should be taken to impugn the integrity of the judge advocate who presided at the appellant's trial, nor to suggest that judge advocates in fact are influenced by career concerns in the discharge of their adjudicative duties. **The point is, however, that a reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. Any system of military tribunals which does not banish such apprehensions will be defective in terms of [the requirements of judicial independence] ...**²⁸

(f) The *Muhammad* Bias Issue

(i) *The Muhammad Bias Facts*

The facts in *Muhammad* as found by the Court that are relevant to the bias issue, as opposed to the independence issue, include the following.

(A) What the Adjudicator Knew

It was known within the Case Management Branch that if the Branch adjudicators were to agree with the **PRR** Assessment Officer's decision that Muhammad was not removable from Canada because he had been placed on the *64 Wanted List, the Minister of their department would suffer a significant political embarrassment. And this was the department in which the adjudicators (and their supervisor, the head of the Branch) were employed and in which they were all pursuing their public service careers.

The Minister had publicly defended the Wanted List against the very criticism that the PRR Assessment Officer's decision in *Muhammad* now showed to have been prescient--that is, that listing a person on the Wanted List would open him to a risk of torture and thus prevent his removal from Canada.²⁹

At the time she made her decision, the Department's adjudicator knew of the Minister's public support of the Wanted List and of his public defence of the List against the concern that it would create a risk of torture and effectively prevent persons listed from being removed from Canada.³⁰

(B) The Ill-Advised Meeting

The Wanted List is an enforcement tool devised and administered by the Canada Border Services Agency (CBSA). After the PRR Assessment Officer's decision in *Muhammad* was published, the "Director General of the CBSA's Border Operations" sought what is acknowledged to have been an unprecedented and, in Justice Strickland's words, an "ill-advised" meeting with the head of the Case Management Branch.

The applicant's counsel became aware of this meeting through an affidavit sent to him by a former director of enforcement with the CBSA in what one assumes was an act of whistleblowing. (This information came to light three weeks after the redetermination decision had been made and in time to be included as grounds for the bias claim in the judicial review application.)

Justice Strickland's own criticism of that meeting reads as follows:

The February 3, 2012 meeting was certainly ill-advised as it could easily be perceived as, and indeed may have been, an attempt to influence the decision-making process.³¹

The evidence of that meeting consisted of the whistleblower's affidavit and the affidavits subsequently filed in response by all the attendees and the cross-examinations on those affidavits.³² The evidence is described in paras 122 and 123 of the judgment.

The stated agenda for the meeting was: “Muhammad-- discussion on next steps”. The most important “next step” at the time would have been the final adjudication of the risk issue by a Case Management Branch adjudicator.

At the meeting, the CBSA's Director-General of Border Operations commented negatively on the Case Management Branch's lack of oversight of the PRR Assessment Officer's decision and expressed her concern about the *65 impact on the CBSA's enforcement mandate should the Officer's decision be confirmed by a Case Management Branch adjudicator thereby putting the viability of the Wanted List in question.³³

One of the senior members of the CBSA (the head of the CBSA's Case Management Division) who had accompanied her boss to the meeting conceded in her examination that she left the meeting confident that there would be “a good decision” for the CBSA in the *Muhammad* case.

(C) Evidence of a History of Bias in the Decision-making of the Case Management Branch's Adjudicators

The Court also had before it a Statutory Declaration by a lawyer with the applicant's counsel's firm in which he declared that where PRR Assessments were performed by Case Management Branch adjudicators in the context of security certificate cases, his law firm's experience was that those adjudicators “always”, and unreasonably, found that the applicants faced no risk of torture upon deportation:³⁴

Post Suresh, where either the PRRA assessment or the danger opinion was made in the context of Security Certificate Cases, the Minister's Delegate always found that there was no risk of torture faced by the individual named in the Certificate. All of the persons represented by my firm in this situation were subsequently

successful in obtaining stays of their removals from the Federal Court due to the unreasonableness of the Minister's Delegate's finding.

(ii) The Muhammad Bias Law

(A) Newfoundland Telephone

An authoritative statement of the bias principle and of the rule of law's standard test for bias as it applies to individual adjudicators appointed to administrative tribunals may be found in the Supreme Court's decision in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*:

The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. **As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.** To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is *66 whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.³⁵

(B) Wewaykum

The Supreme Court has addressed the law respecting the apprehension of bias most prominently in its 2003 decision in *Wewaykum Indian Band v. Canada*.³⁶ In that case, the appellant Wewaykum had applied to have a decision of the Supreme Court set aside on the grounds of an apprehended bias on the part of Justice Binnie. The bias apprehension was argued because of Justice Binnie's alleged prior "involvement" in the issue in the years when he was the Associate Deputy Minister of Justice--an involvement that Justice Binnie did not remember.

The Court took the opportunity occasioned by its consideration of the bias allegation respecting Justice Binnie to examine why it is that for an adjudicator to be disqualified on the grounds of bias the law does not require proof of actual bias but only proof that there is a reasonable *apprehension* of bias. It examined this question by asking itself what it was that motivated applicants to say they are not alleging actual bias but are just claiming an *apprehension* of actual bias?³⁷ And it identified three reasons for applicants typically not asserting actual bias.

The first reason arises, the Court noted, when it would be “unwise or unrealistic” for the law to require “proof of the real thing”. In those circumstances, the Court recognizes that “reasonable apprehension of bias” is a “surrogate” for actual bias³⁸

The second reason for applicants relying only on an apprehension of bias arises, the Court said, in the circumstances where the applicant may be prepared to concede that the judge *acted* in good faith but was nevertheless *unconsciously* biased. There is obviously no chance at all, the Court acknowledged, of proving an unconscious bias, but a judge who has one is nonetheless disqualified, and the only way to get at an unconscious bias is through proving a reasonable apprehension of bias.

The Court addressed the latter point particularly in the following passage:

(...) In *R. v. Gough*, [1993] A.C. 646 (H.L.), at p. 665, quoting Devlin L.J. in *The Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167 (C.A.), Lord Goff reminded us that:

Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to *67 affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.³⁹

The third reason the Court identified for an applicant claiming only an apprehension of bias is the recognition that looking for real bias is “not the relevant inquiry”.

The *Wewaykum* Court's summary of that principle appears in the following passage:

In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” (*The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person

properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough, supra* at p. 659, “there is an overriding public interest that there should be confidence in the integrity of the administration of justice”.⁴⁰

(C) Bias and the Standard of Proof

In *Wewaykum*, the Supreme Court also addressed the standard of proof issue in apprehension of bias cases:

... it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

The grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the “very sensitive or scrupulous conscience”.⁴¹

This author would note in passing that ruling out bias apprehensions of an objective observer when they are seen to be attributable to an overly sensitive or overly scrupulous conscience surely cannot justify substituting the apprehensions of an objective observer whose conscience is insensitive to the dangers of *68 adjudicator bias. Presumably what is wanted is the classic, reasonable person--one who is not overly sensitive but not unduly insensitive either.

Moreover, courts must expect the sensitivity to the danger of bias of any objective observer to be reasonably affected by his or her understanding of what is at stake. And it stands to reason that such an observer's sensitivity must be regarded as enhanced in the circumstance where the bias concerns are known to relate to an adjudicator entrusted with an adjudication in which a conscious or unconscious bias in favour of the respondent could result in the applicant being unjustifiably exposed to life-altering consequences such as, in this case, torture.

5. WHAT THE RULE OF LAW IN ITS ORIGINAL FORM WOULD HAVE SAID IN *MUHAMMAD*

(a) What the Rule of Law Would Have Said on the Independence Issue

Of the three conditions of judicial independence defined in *Valente*, it is perfectly apparent that the adjudicator in *Muhammad* could not satisfy the third one; and she only needed to fail one to be disqualified. Moreover, it is more than probable, though perhaps arguably not conclusive, that the adjudicator could not satisfy the first two conditions. On the equivalent facts in *Généreux*, the Supreme Court held that the judge advocate had satisfied neither of the first or second conditions.

The third condition of independence which the adjudicator plainly could not satisfy is what the *Valente* Court called variously “institutional” independence or “administrative” independence or “adjudicative” independence. Subsequently, it has been usually described as “administrative independence”. The requirement is defined in *Valente* at paragraphs 47 to 52. Its traditional expression is:

The third essential condition of judicial independence ... is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function.⁴²

And what the *Valente* Court had in mind when it referred to “matters of administration bearing directly on the exercise of its judicial function” clearly included the assignment of adjudicators to particular cases. The *Valente* judgment reads in part as follows:

Judicial control over the matters referred to by Howland C.J.O. [in the Court below] - **assignment of** judges, sittings of the court, and court lists - as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered **the essential or minimum requirement for institutional ... independence.**⁴³

*69 In *Muhammad*, this third rail of independence, as it were, was emphatically touched. The “assignment” of the “judge” was not under the control of an independent body but directly under the control of the executive branch itself.

Moreover, if one looks at the independence issue more generally, is it not just painfully obvious that from a rule-of-law perspective no one could say that this adjudicator was independent of the government? Consider:

- That the adjudicator was selected to be the adjudicator by the opposing party in the proceedings--that is, the government;
- That she is in fact an employee of that opposing party;
- That there are grounds for at least a reasonable apprehension that the government's satisfaction with her performance in adjudicating the same or similar issues in the past is likely to have influenced her selection to do so in this case;
- That her adjudicative career requires her to get adjudicative assignments from the government in future similar cases; and
- That an objective observer would reasonably perceive that the adjudicator would believe her career prospects to be in some degree contingent on the continuing approval of the government (as effectuated in particular through the vehicle of the Case Management Branch head's evaluation of her performance at six-month intervals).

(b) What the Rule of Law in its Original Form Would Have Said on the Bias Issue

On the bias issue, the rule of law in its usually robust form would have been satisfied that a fully informed objective observer would have had more than ample reasons to apprehend a conscious or at the very least an unconscious bias in this adjudicator.

The law as it appears in the passage quoted earlier from *Généreux* regarding the assignment of the judge advocate to a particular case by the “executive” applies at least equally to the selection of the adjudicator by the head of the Case Management Branch in *Muhammad*, and it is worth repeating:

(...) The point is ... that a reasonable person could well have entertained the apprehension that the person chosen as [the adjudicator] had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. Any system [of adjudication] ... which does not banish such apprehensions will be defective in terms of [the requirements of judicial independence] ... ⁴⁴

It is also important to remember that, on the facts in *Muhammad*, the objective observer would be taken to know that the person who selected the adjudicator is the person--the head of the Case Management Branch (“CMB”) *70 --who had been at the ill-advised meeting with the CBSA officials; a meeting that one of the CBSA officials conceded had left her with the impression that the CBSA could count on getting a “good decision” from the Case Management Branch adjudicators on the torture issue. ⁴⁵ The observer would also not miss the fact that the latter impression could only have been derived from the Case Management Branch head himself, the only member of the CMB at the meeting, the same head who had then selected the adjudicator to make that decision.

An objective observer also could not help but reasonably apprehend at least an unconscious bias from the circumstance of the adjudicator knowing that if she were to find that the placing of Muhammad's name on the Wanted List had created the risk of torture that would keep Muhammad in Canada she would be responsible for subjecting her Minister to political embarrassment.

The observer would also have reasonably apprehended that, even absent direct evidence to the contrary, the chances were good that the adjudicator would have learned of the “ill-advised” meeting of the Canadian Border Services Agency with her boss, and of the pressure emanating from that agency for the Case Management Branch adjudicators to reverse the Assessment Officer's decision.

All of that, the rule of law as we used to know it would have concluded, fully justified a finding that there were more than adequate grounds for a reasonable apprehension of conscious or unconscious bias.

6. WHAT THE *MUHAMMAD* COURT SAID

To understand how the rule of law was reduced to a fatuous fire in this case it is necessary to trace the court's reasoning process almost paragraph by paragraph. And at the outset one needs to note that the judgment is generally characterised by a persistent conflation of the issues of independence and bias and it is not always possible to distinguish the judge's views on independence from those relating to bias. There is also, both in Strickland J.'s reasons and in the reasons of other Federal Court judgments on which she relies, a general failure to appreciate that the law recognizes independence and impartiality (bias) as separate and distinct issues. In *Généreux*, the Supreme Court, noting the importance of the distinction between the two concepts, referenced *Valente*:

This Court has had the opportunity, recently, to define more precisely the content of the right to be tried by an independent and impartial tribunal. In particular, the Court has drawn a firm line between the concepts of independence and impartiality. In *Valente*, Le Dain J. described the fundamental difference between these concepts. He noted that although the basic concerns of independence and impartiality are the same, the focus of each concept is different (at p. 685):

*71 Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” ... connotes absence of bias, actual or perceived. The word “independent” ... reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.⁴⁶

(a) What the *Muhammad* Court Said on the Independence Issue

(i) Paragraph 127

The Court's analysis of the independence issue begins in paragraph 127, where the conflating of the independence and impartiality issues is evident and the issue of the standard of proof relative to allegations of a lack of independence as well as the proposition that “substantial deference” is owed to a government's choices in structuring its adjudicative functions are first referenced. (I will come back to the latter two issues further on in this article).

Say,⁴⁷ above, is relevant to this application. There, the federal government transferred the PRRA program from CIC to CBSA, then later transferred it back. The applicant in *Say* argued that while the program was located within CBSA, a question of institutional impartiality arose. Justice Gibson applied the test for a reasonable apprehension of bias as described in *Committee for Justice and Liberty*, above, and acknowledged that the requirements of procedural fairness, which include independence and impartiality, vary for different tribunals, as set out in *Bell Canada*, above, and stated:

[22] Against the foregoing, I will approach the allegations now before the Court of **lack of independence or impartiality, or institutional bias**, on a standard of reasonable apprehension of bias or lack of independence or impartiality, not viewed through the eyes of a person of “very sensitive or scrupulous conscience”, but rather taking into account the guidance from the Supreme Court of Canada as quoted above. That guidance directs me to bear in mind that grounds for a reasonable apprehension of bias **or perception of a lack of institutional independence** and impartiality *72 must be “substantial”. I am satisfied that this is particularly true on the facts of this matter where I am further satisfied that **substantial deference is owed to Government decisions that relate to appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.**⁴⁸

(ii) Paragraph 124

On the independence issue, Strickland J.'s judgment makes only a few references. Her conclusion is set out in paragraph 124 where she says: “the Applicant's argument that there is a lack of structural independence ... as a result of situating the Minister's Delegate in the CMB office cannot succeed”.

(iii) Paragraph 137

Justice Strickland first identifies the applicable principles of judicial independence in paragraph 137 in which the conflation of the independence issue with the bias issue is plainly seen. The paragraph reads as follows:

Where a substantial number of cases cannot be identified, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis (*Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 (CanLII), at para 196; *Lippé*, above). **Here, this involves a consideration of whether the Minister's Delegate lacked the hallmarks of independence, those being security of tenure, financial security and administrative control** (*Matsqui*, above, at para 73, 75), and whether there was a reasonable apprehension of bias or abuse of process as a result of [the Minister's] interest in the wanted list.⁴⁹

(iv) Paragraph 144

Strickland J.'s reasons for saying that the applicant's argument on the *independence* issue (as distinguished from the bias issue) “cannot succeed” are in fact limited only to the following findings in paragraph 144:

In *Mohammad*, above, the Federal Court of Appeal found that the adjudicator in that case, who was an immigration officer pursuant to the IRPA, had security of tenure, which is generally available to public servants. Similarly in *Dunova*, above, described in greater detail below, Chief Justice Crampton found that *PRRA officers are independent as they are members of the Public Service of Canada which is independent from the executive branch of government*. Here, the Minister's Delegate is also a member of the Public Service of Canada and therefore, by corollary, the same principles apply.⁵⁰

***73 Author's Comment on the Court's View on the Independence Issue**

With great respect, to hold that individuals who are employed in government departments are not part of the executive branch because of their status as members of the Public Service of Canada and for that reason are to be seen for rule of law purposes to be independent of the executive branch, and thus qualified by virtue only of that status to serve as administrative justice adjudicators, is to effectively trump the rule of law's principles as they relate to independence. In the author's understanding, it is axiomatic that the executive branch consists of the Prime Minister and Cabinet and the “administration”, with those in the “administration” being typically members of the Public

Service--presumably including in the *Muhammad* case both the adjudicator and the head of the Case Management Branch.

Justice Strickland did not address the financial security requirement but presumably she would have seen that too to be guaranteed by the adjudicator's status as a member of the Public Service of Canada. But to suggest that the adjudicator's security of tenure and financial status were guaranteed by her status as a member of the public service is to ignore the inevitable impact on her career as a public servant of the performance reviews performed twice a year by her superior--the head of the Case Management Branch. Justice Strickland does not address the implications of those reviews by the person who is responsible for managing the litigation of the Minister's high profile cases, but an objective observer would certainly reasonably perceive that the adjudicator could well believe that a decision in *Muhammad* that was seriously at cross purposes to her supervisor's and his branch's, and his Minister's interests could have significant career implications for her.

In any event, as indicated above, the executive branch's role in assigning the adjudicator to the case should have been enough to disqualify the adjudicator on the law's third condition of independence--that is, the administrative independence condition--and in particular on the grounds of the executive branch--who, in this case, is also the opposing party--selecting the judge--a circumstance to which Justice Strickland makes no reference.

To return briefly to the standard of proof issue as it relates to allegations of a lack of independence, it is important to note that in the *independence* jurisprudence--*Valente* and *Généreux*, etc--there is no mention that a high standard of proof must be met before a court would find an adjudicator not independent. Indeed, it would accord more with rule of law principles to argue that once an applicant has demonstrated a *prima facie* appearance of adjudicator dependency, the rule of law would then require the burden to shift to the government to satisfy the court to a high standard of proof that that perception is somehow unwarranted.

And, finally, Justice Gibson's holding in *Say*,⁵¹ as quoted with approval by Justice Strickland, constitutes a notable contribution to diluting the rule of law in *74 the administrative justice system to a mere illusion. Gibson J. holds that court review of the independence of government-designed adjudicative structures is to be constrained by the need for courts to accord "substantial deference" to governments in their choice of such designs, and by the requirement that the quality of independence is to be gauged through the eyes of an observer with a conscience in such matters that is not very sensitive or scrupulous.

(b) What the *Muhammad* Court Said on the Bias Issue Generally

The bulk of Strickland J.'s reasons are focussed on the bias issue--both the issue of institutional bias and the issue of this particular adjudicator's individual bias. Her reasoning on the bias issue is to be seen in paragraphs 126 to 156.

(i) Paragraph 126

In this paragraph Strickland J. cites Justice Cory in *R. v. S.(R.D.)*:

... the threshold for a finding of real or perceived bias is high ... the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and would be apprised also of the fact that impartiality is one of the duties the judges swear to uphold.⁵²

Author's Comment on Paragraph 126

In *R. v. S. (R.D.)*, the Supreme Court was dealing with an allegation of actual bias against a provincial court judge. And on the role of “tradition” in these matters a major point made in *Valente* is that the reliance on tradition as grounds for presuming judicial independence is not enough:

... while tradition reinforced by public opinion may operate as a restraint upon the exercise of power in a manner that interferes with judicial independence, it cannot supply essential conditions of independence for which specific provision of law is necessary.⁵³

And see more generally *Unjust by Design*⁵⁴ at pages 66-71.

It is also worth noting that when the adjudicator who is alleged to be biased is a provincial court judge, as was the case in *R. v. S. (R.D.)*, it is not unreasonable for a court to factor in--i.e., take judicial notice of--the tradition of independence and integrity associated with such judges. But what possible justification could there be for taking judicial notice of a tradition of independence in the case of the Minister's Delegates?

***75 (ii) Paragraph 128**

In this paragraph Strickland J. notes what Gibson J. found in *Say*, viz:

... that the only evidence adduced ... tending to support institutional bias or want of impartiality and independence was anecdotal at best ... **contrast the**

evidence that adjudicator training included the importance of impartiality and independence ... ⁵⁵

Author's comment on Paragraph 128

Here is the first indication of Strickland J.'s error in seeing evidence that the adjudicator believed herself to be independent and not biased as relevant to the independence issue.

Since *Valente*, this is clearly not the issue. An adjudicator cannot decide to be independent, and the fact that an adjudicator knows that he or she is supposed to be independent is immaterial; it is, as the Supreme Court emphasized in *Généreux* (see above), a question of his or her status--of whether his or her structural relationships with the government provide objective guarantees of independence. This point is made particularly in *Généreux*, in the passage quoted above, but also in the following passage:

The question raised in this appeal, however, is not resolved by this earlier case. First, the majority of this Court in *MacKay* seems to have applied a subjective test. It asked whether the Standing Court Martial actually acted in an independent and impartial manner. This is not, in light of *Valente*, the appropriate test. ⁵⁶

(iii) Paragraph 129

In this paragraph, still citing Justice Gibson in *Say*, Justice Strickland identifies the “structural independence and impartiality” issue as being whether “a fully informed person would have a reasonable apprehension that bias would infect decision makers in the PRRA program in a substantial number of cases”.

Author's Comment on Paragraph 129

Here the Court is again, contrary to rule of law principles, confusing the issue of independence with that of impartiality, and in this case with the issue of “*institutional bias*”. But it is clear that the institutional issue in this case was not institutional bias but institutional independence and the bias issue was whether the individual adjudicator in this case was consciously or unconsciously biased in *this* case.

****76 (iv) Paragraph 134***

Justice Strickland:

... given that an allegation of a lack of institutional impartiality is of such potential significance from *both an operational and a procedural fairness perspective*, the grounds to establish it must be substantial. The evidence adduced by the Applicant in this case is insufficient to meet this requirement and satisfy *his onus of demonstrating want of impartiality in a substantial number of cases*. The mere fact that the Minister's Delegate is situated in the CMB, particularly when considered together with the evidence concerning her relationship to and communications with both Mr. Dupuis and the Minister's Office, does not meet the onus.” (Emphasis added.)

Author's comment on Paragraph 134

For the evidence concerning the adjudicator's relationship to and communications with the head of the Case Management Branch see above. And, in light of that evidence, Justice Strickland must be seen here to be sweeping to a conclusion that, with respect, a close analysis of the evidence cannot fairly support. She is also imposing a standard of proof that the rule of law would not support and locating the burden on the applicant when principle would require the ultimate burden to be on the government.

(v) Paragraph 138

This paragraph quotes Justice de Grandpré's classic test for a reasonable apprehension of bias.

(vi) Paragraph 140

Strickland J.:

It is not disputed that there was considerable government interest in the CBSA's wanted list and that there were concerns about the implications of a positive risk assessment on the list. It is therefore certainly not outside the realm of possibilities that, given this interest, a decision-maker could be inclined toward a certain result *in the absence of sufficient hallmarks of independence*. (Emphasis added.)

Author's Comment on Paragraph 140

The rule of law in its original robust form would not allow a reasonable apprehension that a decision-maker would be inclined toward a certain result to be ignored only because the decision-

maker enjoyed sufficient hallmarks of independence. As noted above, the rule of law does not absolve independent adjudicators of bias concerns by the mere fact of their independence being guaranteed.

***77 (vii) Paragraph 141**

Strickland J.:

However, the Applicant has not put forth any evidence to demonstrate that the Minister's Delegate was not independent and impartial. **Absent evidence to the contrary, a decision-maker is presumed to be impartial** (*Mugesera, above*). Allegations of a lack of independence or a reasonable apprehension of bias are serious and cannot be based on pure speculation or limited evidence. **Here, the Applicant's submissions in this regard are also rebutted by the evidence of the Minister's Delegate, Mr. Dupuis and others.** (Emphasis added.)

Author's Comment on Paragraph 141

Again, one sees here the reference to “independence and impartiality” with the issue of independence being conflated with impartiality. With respect to the independence issue this statement of the law is not correct. After *Valente*, no adjudicator is *presumed* to be independent. And after *Valente* and *Généreux* the independence question is not whether the adjudicator *acts* independently, or sees herself to be independent, or whether she is treated by the government as independent. Independence is, as the Courts have made clear, a question of status, a question of the structure of the adjudicator's relationships to the executive branch, and whether a reasonable person would be satisfied that those structures not only objectively guarantee adjudicators their personal independence from the executive branch--that is, guarantee their personal security of tenure and financial security--but also guarantees that the “tribunal” over which they preside has institutional control over the administrative functions directly relevant to the adjudication process.

(b) What the *Muhammad* Court Said on the Issue of the Adjudicator's *Individual Bias*

Justice Strickland's reasons for finding that it was not reasonable to apprehend a conscious or unconscious bias on the part of the individual adjudicator in this case are to be found in paras. 145-156 and may be summarized as follows:

(i) *Re the Conflict between the Adjudicator's duty and her Minister's Interests*

On the argument that the adjudicator knew of the conflict between her possible duty as the adjudicator and the Minister's interest in the matter, the Court acknowledged that the evidence

might show the Minister to be biased on the issue, but did not prove that the adjudicator would be biased--“the presumption is that a decision-maker is impartial, absent evidence to the contrary ... [there is] no evidence the Minister's comments influenced [the adjudicator] ... “[the adjudicator's] **evidence was that she was not influenced and *78** that her position required that she ensure that not only she was not biased but also that she did not appear to be biased”.⁵⁷ (Emphasis added.)

(ii) Re the Ill-Advised Meeting:

Justice Strickland rejected the argument that the adjudicator must be seen to have been biased by virtue of her supervisor being present at the ill-advised meeting with the CBSA on the grounds that there was “no evidence in the record that [the adjudicator] was actually influenced [by the meeting] or that she deliberately acted unfairly in any way”. “There is”, the court said, “a significant link in the chain of events which is missing ...” ... “[there is] no evidence that the [adjudicator] ... was influenced by or biased as a result of the meeting” ... “no evidence that the concerns raised [in the meeting] were conveyed ... to [the adjudicator] ...”.⁵⁸

Author's Comments on the *Muhammad* Court's View on the Bias Issues

With great respect, none of these findings acknowledge in any appropriate way the applicable rule of law principles; the principles are either ignored or distorted. In stressing the lack of any evidence showing that the adjudicator was in fact biased or had deliberately acted in unfair way, and in relying on how the adjudicator had been trained, and on what she understood her responsibilities to be, the Court ignores all of the instructions on independence and bias in *Valente*, *Généreux* and *Wewaykum*.

The rule of law's bias issue is only the *apprehension of bias* viewed objectively; it is not relevant what the adjudicator thinks. And it is only an apprehension issue, and not a question of what the adjudicator thinks, for the three good reasons specified in *Wewaykum*: (1) because it is often unrealistic or unwise to expect proof of actual bias; (2) because one cannot prove an unconscious bias, even though the existence of one disqualifies an adjudicator; and (3) because the apprehension of bias is the only relevant inquiry since the relevant concern is the public's confidence in the administration of justice.

Justice Strickland's judgment on the bias issue fails to consider at all the obvious likelihood of an unconscious bias in these circumstances; does not in fact address what this adjudication looks like from a reasonable outsider's perspective; and ignores entirely how this decision might impact on the public's confidence in the administration of justice.

7. CONCLUSION

From the perspectives supplied by the *Unjust by Design* analysis, and by the Chief Justice's subsequent speech to CCAT praising a system of justice comprised of effectively biased and

dependent adjudicative tribunals, and by the Supreme Court's dismissal of the application for leave to appeal the *79 Saskatchewan Court of Appeal decision approving of a dependent and biased labour relations board, and by the egregious judgment of the Federal Court in *Muhammad*, one cannot help but conclude that, in the administrative justice system, the rule of law is, in point of fact, no longer wanted; its “fire” has been reduced or is being reduced to an illusion, to the *ignis fatuus* referenced in the title to this article, to something that appears to be there but isn't really.

And one more thing: what does it say about our administrative justice system, about our courts, that government lawyers would think it appropriate to design an adjudicative structure such as the one deployed in *Muhammad*--a structure that self-evidently makes a mockery of the rule of law--and then would have the face to defend that structure in court?

Is this where we are? Did Dicey and Chief Justice Hewart have it right after all?

Footnotes

- a1 S. Ronald Ellis, Q.C., lawyer, former academic, and former administrative justice adjudicator and administrator, author of *Unjust by Design: Canada's Administrative Justice System*, and the principal blogger at administrativejusticereform.ca.
- 1 Merriam-Webster.com; and the freedictionary.com.
- 2 UBC Press, Vancouver, 2013. *Unjust by Design* was one of five books on Canadian policy issues short-listed for the 2013 Donner Prize.
- 3 “Administrative Tribunals and the Courts: An Evolutionary Relationship”--Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada to the Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario, May 27, 2013 (emphasis added); see text associated with footnote 3 in the remarks. (The remarks as published on the Supreme Court website have no paragraph or page references.)
- 4 *Ibid.*
- 5 *Barreau (Montreal) c. Québec (Procureur général)*, 2001 CarswellQue 1950, [2001] J.Q. No. 3882 (C.A. Que.), leave to appeal refused 2002 CarswellQue 2078 (S.C.C.), reconsideration refused 2002 CarswellQue 2683 (S.C.C.).
- 6 *Assoc. des juges administratifs de la Commission des lésions professionnelles c. Québec (Procureur général)*, 2013 QCCA 1690, 2013 CarswellQue 9692 (C.A. Que.).
- 7 *SFL v. Saskatchewan (Attorney General)*, 2013 SKCA 61, 2013 CarswellSask 366 (Sask. C.A.), leave to appeal refused 2013 CarswellSask 866, 2013 CarswellSask 865 (S.C.C.). In the interest of full disclosure, the reader should be aware that the author was co-counsel for the applicant in the application for leave. The application for leave argument may be found at administrativejusticereform.ca in a post dated February 8, 2014 ([http:// administrativejusticereform.ca/sfl-v-sask-application-for-leave-arguments/](http://administrativejusticereform.ca/sfl-v-sask-application-for-leave-arguments/)).
- 8 *Muhammad v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 448, 2014 CarswellNat 2984, 2014 CarswellNat 1482 (F.C.) [*Muhammad*].
- 9 *Ibid.*, at para. 40-43.

- 10 *Ibid.* It should be noted, however, that if the nature of the structure in which her adjudicative role was located had led to the adjudicator being found to be either not independent or not impartial, the court would then have had to consider the applicant's constitutional arguments--notably in this case the requirement for an independent and impartial tribunal under s. 7 of the Charter. The structure in which the adjudicator was located had been established by statutory regulations and so any remedy for procedural fairness deficiencies in that structure would presumably have to be grounded in a conclusion that the structure was constitutionally invalid. The applicant argued the constitutional issue, but the court, finding that the adjudicator was both independent and impartial, had no occasion to address that issue.
- 11 *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673, 1985 CarswellOnt 948, 1985 CarswellOnt 129 (S.C.C.) [*Valente*].
- 12 *R. v. Généreux*, 1992 CarswellNat 668, 1992 CarswellNat 668F, [1992] 1 S.C.R. 259 (S.C.C.) [*Généreux*] at 286.
- 13 *Muhammad*, *supra*, note 8, at para. 4.
- 14 *Ibid.*, at para. 8.
- 15 *Ibid.*, at para. 7.
- 16 *Ibid.*, at para. 4.
- 17 *Ibid.*, at para. 115.
- 18 *Ibid.*
- 19 *Généreux*, *supra*, note 12.
- 20 *R. v. MacKay*, [1980] 2 S.C.R. 370, 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393, [1980] 5 W.W.R. 385, 33 N.R. 1, 1980 CarswellNat 213, 1980 CarswellNat 622 (S.C.C.).
- 21 See *Unjust by Design*, *supra*, note 2, 283.
- 22 *Généreux*, *supra*, note 12 at 302 and 309.
- 23 *Ibid.*, at 309.
- 24 *Ibid.*, at 299-300.
- 25 *Ibid.*, at 302.
- 26 *Ibid.*, at 300 and 306.
- 27 *Ibid.*, at 282-287.
- 28 *Ibid.*, at 303 (Emphasis added).
- 29 *Muhammad*, *supra*, note 8, paras. 95 and 119.

- 30 *Ibid.*, para. 121.
- 31 *Ibid.*, para. 153.
- 32 *Ibid.*, para. 11.
- 33 *Ibid.*, para. 122.
- 34 *Ibid.*, para. 135.
- 35 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 1992 CarswellNfld 179, 1992 CarswellNfld 170 (S.C.C.) at 636 [S.C.R.] (Emphasis added).
- 36 *Roberts v. R., (sub nom. Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 2003 CarswellNat 2822, 2003 CarswellNat 2823 (S.C.C.).
- 37 *Ibid.*, para. 62.
- 38 *Ibid.*, para. 63.
- 39 *Ibid.*, para. 65.
- 40 *Ibid.*, para. 66.
- 41 *Ibid.*, para. 76.
- 42 *Valente, supra*, note 11, para. 52.
- 43 *Ibid.*, at para. 49 (Emphasis added).
- 44 *Généreux, supra*, note 12 at 303.
- 45 *Muhammad, supra*, note 8, para. 123.
- 46 *Généreux, supra*, note 12, at para 37.
- 47 *Say v. Canada (Solicitor General)*, 2005 FC 739, 2005 CarswellNat 3720, 2005 CarswellNat 1510 (F.C.), affirmed 2006 FCA 422, 2005 CarswellNat 4271, 2005 CarswellNat 5289 (F.C.A.).
- 48 *Mohammad, supra*, note 8, at para. 127 (Emphasis added).
- 49 *Ibid.*, at para. 137 (Emphasis added).
- 50 *Ibid.*, at para. 144 (Emphasis added).
- 51 *Supra*, note 47.

- 52 *R. v. S. (R.D.)*, 1997 CarswellINS 301, 1997 CarswellINS 302, [1997] 3 S.C.R. 484 (S.C.C.) at paras. 111-113.
- 53 *Valente*, *supra*, note 11, para. 36.
- 54 *Supra*, note 2.
- 55 *Mohammad*, *supra*, note 8, at para. 128 (Emphasis added).
- 56 *Généreux*, *supra*, note 12, at para. 60. The earlier case referred to is the SCC decision in *MacKay* holding that the military's court martial structures were independent. *MacKay* was overruled by the *Généreux* Court on the basis of *Valente* having changed the law.
- 57 *Muhammad*, *supra*, note 8, para. 147.
- 58 *Ibid.*, para. 154.

28 CJALP 55