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Deliberative Secrecy and Adjudicative Independence: The *Glengarry* Precipice

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The decisions of the Supreme Court of Canada in Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 *and* Québec (Commission des affaires sociales) c. Tremblay *have now overtly sanctioned institutional decision-making processes in administrative tribunals. The rules of natural justice have been interpreted to accommodate the practical process needs of mass adjudication in specialized administrative tribunal settings. However, what the authors see as an otherwise positive development has had the dangerous side-effect of increased judicial scrutiny of these processes.*

The authors argue that the recent decisions of the Ontario Divisional Court in Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal) *have taken this scrutiny too far; have invaded the long-entrenched, common law sanctuary of deliberative secrecy on which the integrity of adjudicative decision-making by administrative adjudicators no less than by judges depends. The article takes issue with the Divisional Court's reading of* Tremblay *in this respect.*

The authors' thesis is that if, in this age of the institutionalization of administrative-tribunal decisions, the details of an administrative tribunal's decision-making processes cannot be left closed to court examination, such examination must be carefully controlled. They propose a protocol that would be judicially endorsed and that would reflect the fact that the integrity of administrative adjudication, as of judicial adjudication, continues to depend on the inviolability of the sanctuary for adjudicative decision-making which the principle of deliberative secrecy ensures.

'*Les décisions de la Cour suprême du Canada dans* Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 *et* Québec (Commission des affaires sociales) c. Tremblay *ont maintenant trop sanctionné les processus institutionnels de prise de décisions des tribunaux administratifs. Les règles de justice naturelle ont été interprétés pour accommoder le besoin de processus pratiques pour l'adjudication en masse par les tribunaux administratifs spécialisées. Néanmoins, ce que les auteurs perçoivent autrement comme un dévelopment positif a eu l'effet secondaire dangereux d'accroitre le contrôle judiciaire de ces processus.*

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Les auteurs soutiennent que la décision récente de la Cour divisionnaire d'Ontario dans Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal) *a amené ce contrôle trop loin; a envahi le sanctuaire de common law, établi depuis longtemps, de la délibération en secret sur laquelle dépend l'intégrité de la prise de décision par les juges aussi bien que les arbitres. Cet article remet en question l'interprétation de l'affaire* Tremblay *par la Cour divisionnaire d'Ontario à cet égard.*

Le thèse des auteurs est que si, à ce stade le l'institutionnalisation des décisions des tribunaux administratifs, les détails des processus de prise de décisions d'un tribunal administratif ne peuvent être laisser à l'abri d'un examen par la Cour, un tel examen doit être soigneusement contrôlé. Ils proposent un protocole qui serait approuvé judiciairement et qui réflèterait le fait que l'intégrité des décisions administratives, comme celle des décisions judiciaires, dépend encore de l'inviolabilité du sanctuaire de la prise de décisions qui est assurée par le principe du secret des délibérations.

1. INTRODUCTION

To the community of administrative justice adjudicators in Ontario the January 1993 decision of O'Leary J. in *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)*[1] came as a shock.

For the first time in common law history, adjudicators were being required to submit to examination under oath in a public forum respecting specifically the thinking which had gone into their decisions.

To people experienced with adjudicative processes in administrative justice system tribunals, the decision and its aftermath seemed to threaten both the effectiveness and the independence of the administrative-justice adjudication.

In a leading administrative law newsletter,[2] the moment was captured by the headline:

TRIBUNAL MEMBERS CAN BE FORCED TO TESTIFY

The decision emerged from circumstances centered on a written dissent in a decision of the Ontario Pay Equity Hearings Tribunal. The matter involved the Glengarry Memorial Hospital and the Ontario Nurses' Association. The dissent written by the employer member of a tripartite panel of the Tribunal, contained unprecedented allegations concerning events within the Tribunal involving possible violations of the principles of natural justice.

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1 (1993), 9 Admin. L.R. (2d) 61, 99 D.L.R. (4th) 682 (Ont. Div. Ct.).

2 *Reid's Administrative Law* (April 1993).

The allegations read as follows:

> Since the matter was heard over six months ago, I believe there have been events which call into serious question whether the parties' rights to natural justice have been respected.
>
> . . .
>
> I have raised these issued within the Panel and the Tribunal, however, it is apparent that the question cannot be resolved satisfactorily, in my view.
>
> . . .
>
> Further, it may well be that, notwithstanding the seriousness of my concerns, it would be inappropriate and wrong in law for me to discuss the bases for my concerns in this decision. This arises out of my Oath of Office and my obligations to confidentiality as an adjudicator. This further calls into question whether the parties' rights are being respected, as well as my own independence as an adjudicator.
>
> . . .
>
> I apologize to the parties for the inconvenience this will cause and the injustice they will feel. I have been left with no choice.[3]

Glengarry Memorial Hospital was the unsuccessful party to the proceedings, and upon receipt of the dissent it applied to the Ontario Divisional Court for judicial review of the majority's decision. It relied, inter alia, on unspecified breaches of the rules of natural justice.

The initial evidence filed in support of Glengarry's application took the form of an agreed statement of facts. However, the hospital, seeking concrete evidence as to the substance of the unspecified breaches of natural justice referred to in the dissent, sought to examine the employer member. What the member felt himself to be prevented from disclosing in his dissent was to be discovered through viva voce testimony under oath.

The prospect of the employer member being examined in the proceedings raised, of course, the spectre of the other members of the panel and perhaps other members of the Tribunal having also to be examined in defence or clarification of the matters to be dealt with in the employer member's testimony.

A summons for the attendance and examination of the employer member having been issued, the Tribunal and the respondent Ontario Nurses' Association, defending the confidentiality of the decision-making process and the finality of the decision, applied to quash the summons.

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3 Above, note 1 at 684 (D.L.R.).

O'Leary J., sitting as a single judge of the Divisional Court, dismissed the application to quash and authorized a very broad scope for the question to which the employer member was to be subjected. The passage which adjudicators find especially disturbing reads as follows:

> For the reasons given by Gonthier J. in *Tremblay*[4] the questions to be put to [the employer member of the panel] on his examination *cannot be limited to the deliberative process but must encompass the deliberations themselves both of [the employer member] and the members of his panel.*][5] [Emphasis added.]

The passage is especially disturbing because not only was it the second time in 6 months that the Divisional Court had allowed adjudicators to be summoned and examined concerning an adjudicative decision,[6] but here, for the first time, the Divisional Court was saying explicitly that the right of examination extended beyond the deliberative process to the deliberations themselves.

On an application by the Tribunal and the Ontario Nurses' Association ("ONA") to a full panel of the Divisional Court to overturn the order of O'Leary J., the Court directed that the order be varied to the effect that the dissenting panel member be examined only as to the *procedures* followed by the Tribunal. However, it also ordered that he could be examined "regarding the adequacy of the materials since furnished" as evidence of the reasons for the concerns referred to in his dissent.

The latter decision is reported in *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)*.[7]

The "materials since furnished" were an extensive set of documents from the Tribunal's files which, following O'Leary J.'s decision, the Tribunal had voluntarily filed with the Court. They included the Panel Chair's drafts of the decision, the Panel Chair's hand-written notes, the employer member's written complaints and criticisms of the Tribunal's procedures, and transcripts of the internal discussions between the Tribunal Chair and the three panel members concerning those complaints. This unprecedented public disclosure of adjudicative files was an attempt by the Tribunal to forestall the examination of its adjudicators.

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4 *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952, 3 Admin. L.R. (2d) 173, 90 D.L.R. (4th) 609.

5 Above, note 1 at 705 (D.L.R.).

6 See also decision of Steele J., sitting as a single judge of the Divisional Court, in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1992), 6 Admin. L.R. (2d) 318, 95 D.L.R. (4th) 56 (Ont. Div. Ct.), rev'd (1994), 16 O.R. (3d) 698 (Div. Ct.).

7 (1993), 99 D.L.R. (4th) 706 (Ont. Div. Ct.)

The volunteer disclosure had not, however, satisfied the Court. Southey J., speaking for the Court, noted that

> [c]ounsel for the Tribunal is unwilling or unable to file an affidavit of [the employer member] stating that the material provides a sufficient record of the basis for his statement, despite the undertaking of counsel for the hospital that he would not cross-examine [the employer member] on such affidavit,[8]

and held that, in those circumstances, before dealing with the application for a judicial review, "it must hear from [the employer member] regarding the adequacy of the materials furnished."

This variation in O'Leary J.'s order removed the explicit permission to extend the examination to the deliberations themselves, and, at the time, the adjudicator community took some comfort from this aspect of the decision.

However, as a practical matter, Southey J.'s decision set up an examination agenda which in all the circumstances could hardly avoid ultimately encompassing the details of the deliberations.

The filed materials showed, for example, that, following an investigation of the employer member's complaints by the Tribunal Chair, the Chair and the Tribunal as a whole had concluded that his concerns were not justified. As the employer member subsequently issued the dissent notwithstanding that finding and in violation of the Tribunal's procedures, the Tribunal Chair had in due course asked the Minister of Labour to have the member's appointment revoked. Following an investigation by the Minister, a settlement was reached and the employer member left the Tribunal.[9]

These events had all occurred prior to the Court's decision to hear from the member regarding the adequacy of the materials filed by the Tribunal, and it must have been apparent to the Court that an examination of the member on that subject in those circumstances must almost inevitably lead to a full review of his and his fellow panel members' deliberations regarding their adjudicative decision. It would also have been clear that such testimony would almost certainly force the Tribunal or ONA to summon and examine the other panel members concerning their deliberations. Any rebuttal or clarification of the employer member's testimony would depend on such further testimony.

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8 Ibid. at 707.

9 The latter facts may be found recited by Carruthers J. in a decision in a related matter: *Welland County General Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 10 Admin. L.R. (2d) 232 (Ont. Div. Ct.).

In the event, none of these examinations actually took place. To prevent the destructive and unseemly public examination and cross-examination of its adjudicators concerning their deliberations, the Tribunal arranged to settle the evidence issue by opening its full files for the period in question to the scrutiny of counsel for Glengarry, and agreeing to file additional written material selected by Glengarry counsel.

Glengarry accepted this proposal, and thereby spared the administrative justice system the full rigour of the sorry spectacle otherwise implicit in the Court's order.

The disclosure was nevertheless unprecedented in its extent, with the principle of deliberative secrecy being well and truly violated.

The results may be seen in the ultimate decision of the Divisional Court on the judicial review application itself. It is a decision of a full panel of the Divisional Court (Hartt, Southey and H.J. Smith JJ.) released December 23, 1993.[10] The Court's reasons were delivered by Heather Smith J.

Judicial review of the panel's majority decision had been sought on two grounds: first, that on an issue involving the Tribunal's jurisdiction the panel had been wrong in its interpretation of the statute, and, second, that the decision-making process disclosed as a result of the employer member's allegations had been in breach of the principles of natural justice as set out in the *Consolidated Bathurst* decision of the Supreme Court of Canada.[11]

Glengarry was successful on the first ground and the Tribunal's decision has been quashed, although at the time of writing it is understood that ONA has applied for leave to appeal the Court's decision in that respect.

However, because of its general importance, the Court also gave full consideration to the second ground for the application. In a fully reasoned decision in which the nature of the Tribunal's decision-making processes was fully reviewed, the Court concluded that in pursuing that process in the *Glengarry* case neither the Tribunal nor the majority members of the *Glengarry* panel had breached any principles of natural justice. The Court found, in effect, that the dissenting member's concerns were unjustified.

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10 (1993), 1 C.C.E.L. (2d) 248, 4 P.E.R. 87 (Ont. Div. Ct.).

11 *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, 68 D.L.R. (4th) 524.

Lending, as it does, further important support to the burgeoning law concerning the legitimacy of processes designed to institutionalize administrative tribunal decisions,[12] this is a result that Ontario tribunals will welcome. However, an extraordinary price has been paid.

Perusal of the facts recited in the Court's reasons – facts available to the court only as a result of Tribunal disclosures made necessary by the court orders concerning the summoning of the employer member – makes the extraordinary cost to the independence and autonomy of administrative-justice adjudication in Ontario clear.

In point of fact, the mental deliberations of all three members of the *Glengarry* adjudicative panel were exposed and reviewed. The following single sentence from the judgment makes that clear.

> The materials submitted by the Tribunal also set out the chronology of the decision-making process, *including the various positions taken by the panel members at the time of each draft.*[13] [Emphasis added.]

The concept of deliberative secrecy for administrative adjudicators has been ripped apart in the *Glengarry* proceedings, and, in the respectful submission of the authors, the Divisional Court decisions which have led to this result show a distressing lack of concern as to their inevitable impact on the independence and autonomy of administrative-justice adjudication in Ontario, and scant regard for the previously entrenched common law principle of deliberative secrecy.

In this article, the authors review the law relating to deliberative secrecy as it applies to adjudicator members of administrative tribunals; highlight the dangers inherent in the *Glengarry* decisions; and suggest a solution.

The article proposes a judicial strategy for responding appropriately to the courts' need to investigate potential breaches of natural justice in tribunal decision-making processes, while not endangering the confidentiality of an adjudicator's own deliberations. The strategy is designed to avoid the unseemly and destructive business of unilateral initiatives by disgruntled colleagues opening an adjudicator's mental processes to partisan review in a public forum.

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12 See Ellis, "Comments on the Institutionalizing of Tribunal Decisions" in *Administrative Law: Principles, Practice and Pluralism* (Toronto: Carswell, 1993) (Special Lectures of the Law Society of Upper Canada, 1992) 357.

13 Above, note 10.

A collateral issue considered in *Glengarry* (and in *Ellis-Don*) is the effectiveness of a statutory immunity for tribunal adjudicators against being compelled to testify. In both cases, it was held that in the circumstances of those cases the statutory immunity was not effective. The authors are not, however, particularly concerned with that point. The more important questions are the sanctity at common law of the secrecy of an adjudicator's deliberative processes, the extent to which that long-standing and fundamental principle has been eroded by these recent decisions, and what needs to be done about it.

Consideration of the statutory immunity issue has been relegated to the end of this article in order not to obscure the central importance of the common law questions.

2. THE COMMON LAW POSITION

(a) The Sanctity of a Judge's Deliberative Processes

The *Glengarry* decisions effectively mandated an inquiry into the thought processes of the three adjudicators on the *Glengarry* panel, and possibly of other members of that Tribunal, for the purpose – effectively – of determining what motivated each of the adjudicators to arrive at their respective decisions. Such an inquiry is unprecedented in English/Canadian law.

Admittedly, the principle is particularly clear with respect to judges. The principle that judges may not be called upon to explain their decisions was recently affirmed by the Supreme Court of Canada. In *MacKeigan v. Hickman*[14] a majority of the Supreme Court rules that the constitutional principle of judicial independence shields judges from being required to testify either as to the reasons for their decisions or as to the administrative or institutional aspects of the judicial process connected with their decisions.

In *Hickman*, the principle was held to shield the Chief Justice of the Nova Scotia Court of Appeal from any inquiry into the reasons underlying his assigning, to the Court of Appeal panel that was to hear the Donald Marshall appeal, a judge who had been the Province's Attorney General at the time of Marshall's trial and conviction. At the time of that assignment, Marshall's trial and convictions, under the auspices, of course, of that Attorney General, had already been the subject of considerable public controversy.

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14 [1989] 2 S.C.R. 796, 41 Admin. L.R. 236, 61 D.L.R. (4th) 688.

The secrecy of a judge's deliberative process – the fact that a judge's decision-making takes place within a sanctuary of confidentiality safe from prying eyes – has always been regarded as an essential element of judicial independence, and has been held to require extending to judges unqualified protection from having to justify, defend or explain a judicial decision. This freedom from scrutiny – this principle of sanctuary for the decision-making process – enables judges to reflect on the evidence without restriction, to draw conclusions untrammeled by any concern of subsequent disclosure of their thought processes, and, where they are so inclined, to change these conclusions on further reflection without fear of subsequent criticism or of the need for subsequent explanation.

It should be noted especially that, in *Hickman*, the Supreme Court was faced with a dilemma similar to that faced by the Ontario Divisional Court in *Glengarry*. In *Hickman*, the competing policy interest was the need to get to the bottom of certain appearances of judicial impropriety. The price for doing so would have been a precedent-setting breach of the judge's heretofore impenetrable decision-making sanctuary. In the majority's view, the price was too high; at the cost of frustrating any public resolution of the appearances of impropriety, it opted in favour of preserving the sanctuary. The pre-eminence of the sanctuary principle – if it may be so labelled – could hardly have been made plainer.

In *Glengarry*, the competing policy interest was the need to get to the bottom of an especially provocative allegation of a possible breach of the principles of natural justice and, here too, the price of doing so was clearly to be a significant breach of the decision-making sanctuary – in this case, the part of the sanctuary that protects tribunal adjudicators.

In *Glengarry*, the interests competing with the sanctuary principle were *not* intrinsically more important than the competing interests in *Hickman*. The completion of a judicial investigation into a claim of a breach of the principles of natural justice by an administrative tribunal in a civil proceeding is surely not inherently of more pressing public interest than the completion of an investigation into circumstances which to many gave the appearance of a judicial biased act by a chief justice of a provincial court of appeal in a criminal matter.

But in *Glengarry*, the Ontario Divisional Court sacrificed the adjudicative sanctuary, almost as a matter of course. Looked at back-to-back, *Hickman* and *Glengarry* seem to send the message that the sanctuary principle is much less important for tribunal adjudicators than it is for judges, thus marking the first time that the common law has permitted a significant distinction to be drawn between judges and other adjudicators with respect to the importance of deliberative secrecy.

(b) The Sanctuary Principle and Administrative Tribunal Adjudicators

It is true that adjudicator members of administrative tribunals have not been accorded the unqualified protection from inquiry into their decision-making processes that judges enjoy. However, the scope of permitted inquiry has always been very limited and, until now, has never extended to the secrecy of the deliberative process itself.

As *Glengarry* makes clear, what has put the sanctuary principle in jeopardy for administrative adjudicators is the recent decisions of the Supreme Court of Canada in *Consolidated Bathurst* and in *Tremblay*.[15]

These two decisions dealt with the need for court supervision of the growing institutionalization of the decision-making processes in administrative tribunals. And, perhaps particularly in *Tremblay*, the possibility seems to have been raised – but not there, in point of fact, realized – of the courts effectuating that supervision by broadening the scope of possible inquiry into a tribunal's decision-making processes to the extent of even including an examination of a tribunal adjudicator's actual deliberative process.

It is the destructive potential of the breach of the sanctuary principle arguably contemplated in *Tremblay* that has come home to roost in *Glengarry*.

(i) *The sanctuary principle prior to Consolidated Bathurst/Tremblay*

One of the early and leading cases on the sanctity of a tribunal adjudicator's decision-making process is the decision of the House of Lords in *Buccleuch (Duke) v. Metropolitan Board of Works*.[16]

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15 Above, note 4.

16 (1872), L.R. 5 H.L. 418.

In that case, the award of a statutorily appointed arbitrator was appealed, and the appellant summoned and examined the arbitrator at trial. The arbitrator was questioned on three matters: the issues he considered, how he constituted the award, and the basis of his findings regarding the individual components of the award. On appeal, the admissibility of this testimony was challenged.

The House of Lords agreed that the arbitrator was a competent witness. It treated the issue as a matter of competence rather than compellability, and suggested in passing that judges are not considered competent to testify about their decisions.

(The justification for finding the arbitrator to be competent was not clearly articulated, although the Court indicated that it was then a common practice for an arbitrator to swear and affidavit as to what took place before him and then to be examined on it. This may have arisen from the absence of official transcripts of such proceedings.)

In any event, the decision of the House of Lords specified clearly that the acceptable scope of examination of the arbitrator must be limited to matters which establish that the issues before him were matters within his jurisdiction. It held that there can be no inquiry into what passed through his mind before he formed his conclusions.

In so holding, the Court quoted with approval the following opinion of a lower court judge in the case (Baron Cleasby), who, in elaborating upon the distinction between a legitimate inquiry into the issue of the arbitrator's understanding of his jurisdiction and the improper examination of the arbitrator's thought processes, had stated:

> The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow any one to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a Judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing that can contradict or explain it.[17]

Thus the sanctity of the deliberative process has been explicitly endorsed by the House of Lords in words that brook no distinction between judges and members of inferior courts or tribunals, but reflect

17 Ibid. at 434.

instead an appreciation that deliberative secrecy is fundamental to the integrity of adjudication, at whatever level.

This view was affirmed in 1951 by the English King's Bench Division in its decision in *Ward v. Shell-Mex & B.P. Ltd.*[18] A workers' compensation claimant had sought to summons a member of a statutory medical board which had examined him. The purpose of the summons was to have the board member explain the decision of the board. The Court, applying *Buccleuch*, held the member's evidence to be inadmissible. It noted that, despite the fact that the doctor had been appointed to the tribunal because of his medical expertise, his evidence was not to be regarded as that of an expert witness, but as the opinion of a statutorily appointed adjudicator. As such, the opinion of the doctor was presumed to be reflected in the award, and could, therefore, not be the subject of any examination.

The issue first came before the Ontario Divisional Court in *Agnew v. Assn. of Architects (Ontario).*[19] In that case, the Court refused to permit the members of a professional licensing tribunal to be examined on the substance of their decision denying an application for a licence. Campbell J. quashed the summons, stating that as regards deliberative secrecy there is no distinction to be drawn between a judge and a member of an administrative tribunal. The following is the pertinent passage:

> The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.
>
> Apart from the practical consideration that tribunal members and judges would spend more time testifying about their decisions than making them, their compellability would be inconsistent with any system of finality of decisions. No decision and *a fortiori* no record, would be really final until the judge or tribunal member had been cross-examined about his decision. Instead of review by appeal or extraordinary remedy, a system would grow up of review by cross-examination. In the case of a specialized tribunal representing different interests the mischief would be even greater because the process of discussion and compromise among different points of view would not work if stripped of its confidentiality.[20]

Campbell J. indicated that the legitimate scope of examination of a tribunal member is restricted to matters which do not touch on the decision process. He would even appear to exclude an examination of tribunal members as to matters which go to the issue of jurisdiction, as

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18 [1952] 1 K.B. 280, [1951] 2 All E.R. 904.

19 (1987), 30 Admin. L.R. 285, 64 O.R. (2d) 8 (Div. Ct.)

20 Ibid. at 14 (O.R.).

he suggests that current administrative tribunal practice permits a determination of the issue of jurisdiction without resorting to an examination of tribunal members under oath.[21]

In summary, it is apparent that prior to *Consolidated Bathurst* and *Tremblay*, the common law principle of sanctuary from inquiry for the mental part of an adjudicator's decision-making process applied as much to the decision-making of members of administrative tribunals as it did to that of judges.

However, it must be acknowledged that none of these cases dealt with the examination of tribunal members in circumstances in which a breach of natural justice is alleged and examination of the adjudicator is the only means by which the alleged breach can be investigated. And it is this particular problem which confronted the Court in *Glengarry* and which fell to be addressed for the first time by the Supreme Court of Canada in *Consolidated Bathurst* and, subsequently, and most particularly, in *Tremblay*.

(ii) *Consolidated Bathurst/Tremblay*

The particular context in which the issue arose in these two cases involved the increasingly overt resort by tribunals to institutionalized decision-making processes, and the corresponding increased need of the courts to supervise the risks to the principles of natural justice inherent in such processes.

In *Consolidated Bathurst*, the Court had affirmed the legality of a tribunal's institutional, consultative process designed to foster consistency and quality in decision-making within the tribunal as a whole. In doing so, however, it was necessary for the Court to specify the limits to such processes. It ruled that, while such processes may be designed to influence an adjudicator's decision, they may not be of such a nature as to "constrain" or appear to "constrain" his or her decision-making – they must, for instance, be voluntary.

It also held that in order to respect the rights of parties to meet the case against them, evidence and findings of fact should be excluded from institutional discussions and no new law or policy issues should be considered by the decision-maker as the result of such processes without giving the parties an opportunity to make submissions on such issues.

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21 Ibid. at 16.

Obviously, the principle that adjudicative decision-making takes place within a protected sanctuary is implicitly threatened by the need to investigate such distinctions as these. That implicit threat was quick to take on concrete form.

In *Tremblay*, the Supreme Court found itself faced with applying the *Consolidated Bathurst* limits. And Gonthier J.'s judgment on behalf of the Court does indeed make it clear that the process of administrative-justice decision-making may attract heightened judicial scrutiny because of the requirement to reconcile the institutional, adjudicative-process needs of administrative tribunals with the basic principles of natural justice. He stated:

> The institutionalization of the decisions of the administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rules of natural justice. The institutionalized consultation process involving deliberation is the subject of rules of procedure designed to regulate the [tribunal's] "consensus tables" process. Paradoxically, it is the public nature of these rules which, while highly desirable, may open the door to an action in nullity or an evocation [this case, it may be noted, originated in Quebec]. It may be questioned whether justice is seen to be done. Accordingly, the very special way in which the practice of administrative tribunals has developed requires the court to become involved in areas into which, if a judicial tribunal were in question, it would probably refuse to venture.[22]

Gonthier J. went on to look to the Court's judgment in *Hickman*[23] for the proposition that the constitutional status of the judiciary would preclude any comparable scope of inquiry into the decision-making processes of judges. But neither he nor the judgments in *Hickman* make clear what there is about the constitutional status of judges that makes a difference in this respect. The Constitution establishes the structures for ensuring judicial independence but is not explicit concerning the freedom of judges from inquiry into their deliberative process by other judges.

The sanctuary principle is a common law principle that reflects the appreciation that deliberative secrecy is of the essence of any adjudicative process. And, as we have seen, on the main point it has always been applied equally to judges and administrative tribunal adjudicators. It may be thought that it has been so applied for the very good reason that deliberative secrecy is as much of the essence of tribunal adjudication as it is of judicial adjudication. As Mr. Justice

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22 Above, note 4 at 618 (D.L.R.)

23 Above, note 14.

Campbell observed in *Agnew*, "the mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge."[24]

To recognize this is not to equate tribunal members with judges, nor to suggest that tribunal members should enjoy the same constitutional status as judges. It is simply to say that the absence of constitutional status is not itself a reason for sacrificing the deliberative secrecy of tribunal adjudicative proceedings; that, in effect, the sanctuary principle as it relates to administrative-justice adjudication is also a principle of natural justice and one that is so important to the fundamental integrity of an adjudicative process that it warrants the same preeminent role over other principles of natural justice as was accorded to it in *Hickman*.

In addition to the constitutional considerations mentioned in *Hickman*, Gonthier J. also referred to the fact that scrutiny of a tribunal adjudicator's decision-making processes may also be especially warranted by reason of the fact that decisions of tribunal adjudicators are not usually subject to appeal, but may only be examined by the courts in the context of a judicial review. He stated:

> Additionally, when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission [in this case], that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine, *inter alia*, the decision-maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All of these events accompany the deliberations or are part of them.
>
> Accordingly, it seems to me that by the very nature of the control exercised over their decisions, administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. *Of course, secrecy remains the rule, but it may none the less be lifted when the litigant can present valid reasons for believing that the process did not comply with the rules of natural justice.*[25] [Emphasis added.]

Whatever one may think of the relevance of this basis for distinguishing between judges and tribunal adjudicators with respect to deliberative secrecy, one cannot help but note that it entirely fails to even raise the question of the relative weight that should be given from a public policy perspective to the competing public interests in deliberative secrecy on the one hand and a judicial review's need to

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24 Above, note 20.

25 Above, note 4 at 619 (D.L.R.).

examine the decision-making process on the other. The judgment seems simply to assume that the latter interest must govern.

In *Hickman*, for instance, the review in question there also could not – by its very nature – proceed without breaching the sanctity of the judge's decision-making process. And there the review was blocked and the potential damage to the system's credibility absorbed because the public interest in the later was seen to be greater than it was in the former.

No similar analysis appears to have been done in *Tremblay*.

In any event, one of the members of the Social Affairs Commission in the *Tremblay* case was actually examined as to the treatment of that case post-hearing, and his testimony revealed to the Court's eye unacceptable institutional constraints on the decision-making process. The Court found that there were overtones of compulsion in the Commission's post-hearing consultation procedure which gave the appearance of compromising the adjudicative independence of the hearing panel and thus breached the rules of natural justice. The Commission's decision was quashed.

In light of *Tremblay*, it is now clear that members of administrative tribunals indeed do not enjoy the same degree of protection from examination of their decision-making processes as is enjoyed by judges. It appears that at least the questioning of a tribunal adjudicator as to what kind of post-hearing consultation may have taken place, and as to the existence of any objective evidence of constraint on the member to decide in a particular way, is now permissible.

It now, for example, seems at least possible that, in circumstances of sufficient suspicion, a tribunal chair may expect to have to answer questions concerning his or her choice of panel members which in *Hickman* the Supreme Court held could not appropriately be asked of the Nova Scotia Chief Justice in respect of the Panel in the *Marshall* appeal.

However, it is not clear that *Tremblay* actually contemplates probing the state of a tribunal member's mind and the evolution of his or her thinking. As previously indicated. O'Leary J., of course, thought it did. He stated:

> In my view, Gonthier J. was not saying that a member of a tribunal could be examined only as to the process followed by the tribunal in arriving at a decision. He stated quite clearly that the member could be questioned as to his very deliberations, as to why he decided as he did, for the processes "accompany the deliberations or are a part of them."[26]

26 Above, note 1 at 704 (D.L.R.).

And, as previously quoted:

> For the reasons given by Gonthier J. in *Tremblay*, the questions to be put to [the employer member] on his examination cannot be limited to the deliberative process but must encompass the deliberations themselves both of [the employer member] and the members of his panel.[27]

But, for those who have personal experience of the adjudicative role in administrative tribunals, this conclusion seems, with respect, quite plainly untenable from a public-interest point of view. For it remains a fact that deliberative secrecy is fundamental to the integrity of any adjudication process.

Indeed, as previously suggested, an adjudicator's assurance of deliberative secrecy may itself properly be regarded as a pre-eminent principle of natural justice. For it seems to these authors that nothing is more calculated to throw doubt on the objectivity and independence of an adjudicative decision than circumstances in which adjudicators know that subsequently, under cross-examination in a public forum, they may well be called upon to defend the decision and explain the mental processes that produced it. And, because of their limited terms of appointment and their need to eventually resume non-adjudicative careers, administrative-justice system adjudicators are even more vulnerable to this type of pressure than judges would be.

Therefore, it is clearly not the interests of adjudicators that are most fundamentally at stake here. Parties to tribunal adjudications have a very basic interest in cases being decided in an unconstricted atmosphere.

Thus, it is essential to ask whether the law exposing adjudicators to this kind of examination is, indeed, as clear as O'Leary J. suggested. In the authors' submissions, it is not.

To begin with, on this point the opinion of the Supreme Court in *Tremblay* is not binding authority, even if O'Leary J.'s view of that opinion is correct. The witness examined in *Tremblay* was in point of fact not asked questions that sought to penetrate the sanctity of any deliberative process and the right to ask such questions was not in issue in that case. To the extent that Gonthier J.'s comments are to be taken to have derogated from the sanctuary principle as it applies to the deliberative processes of individual tribunal adjudicators, they are obiter.

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27 Above, note 5.

But it is also not clear that in point of fact Gonthier J. intended such a derogation. A closer examination of Gonthier J.'s reasons indicates that he distinguishes between the deliberative processes of the *tribunal* – the institutional processes – and the deliberative processes of the individual adjudicator – the personal mental processes, and appears to hold that individual adjudicators could not be examined with respect to the former but not with respect to the latter.

In commenting on the Commission des Affaires Sociales' opposition to having one of its members testify, Gonthier J. said this:

> In my opinion, the objections made by the Commission should be dismissed. *The questions raised by the respondent did not touch on matters of substance or the decision-makers' thinking on such matters. These questions were directed instead at the formal process established by the Commission to ensure consistency in its decisions. They were concerned first, with the institutional setting in which the decision was made and how it functioned, and second with its actual or apparent influence on the intellectual freedom of the decision-makers.* This distinction was noted by Dugas J. during the interrogatories themselves.[28] [Emphasis added.]

The implication is that objections of a tribunal to any inquiry which did touch on "matters of substance or the decision-maker's thinking," as opposed to the tribunal's process, would have been successful. It was only after this observation that Gonthier J. made the statement relied on by O'Leary J., and quoted above.

These passages must be read together, and doing so makes it clear, the authors suggest, that they do not advocate an exploration of a tribunal adjudicator's personal mental processes. The first passage suggests that the substance of the adjudicator's decision and the mental evolution of that decision are beyond the bounds of acceptable scrutiny. And in the second passage, although Gonthier J. mentions "the internal aspect of that process," he may be seen to be referring to aspects internal to the *institution*'s decision-making process, not the individual's. The examples he cites – i.e., the dictates of a third party and a policy directive – are consistent with this reading as they refer to objective influences on an adjudicator that are internal to the institution's decision-making process but external to the adjudicator's.

It is possible for a court to deal with allegations that an adjudicator has abdicated his or her responsibility by succumbing to the dictates of a third party or by blindly applying a tribunal policy, without actually examining the adjudicator's thought processes. The com-

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28 Above, note 4 at 618 (D.L.R.).

mon law concerning bias and conflicts of interest establishes that, when questions of this nature are raised, the issue is only the appearance of things; the substance is not important if the appearance is wrong, and if the appearance is not wrong, there should be no occasion to examine the substance.

Thus an examination of the propriety of a tribunal's decision-making process can be pursued, as a bias question is always pursued, without impinging on the secrecy of the individual adjudicator's deliberative process.

Of course, not all aspects of the decision-making process may lend themselves so easily to such a distinction. Generally speaking, the distinction between the objective, outer process of decision-making and its inner substance is somewhat artificial. As O'Leary J. says, the one "accompanies" the other.

However, in the authors' view, as a means of protecting deliberative secrecy by specifying a limit to the range of acceptable judicial inquiry, this distinction is one that must be maintained. It enables the process of necessary judicial review to go forward while preserving the secrecy of the deliberative processes of individual adjudicators.

Thus, in *Glengarry*, if the comments of the dissenting employer member of the panel were to be seen to create sufficient suspicion concerning the propriety of the tribunal's decision-making process to require an investigation by a court, an examination of the complaining adjudicator which does not go beyond ascertaining the objective events on which he bases his concerns may well provide a sufficient basis for a court to satisfy itself on the natural-justice issue.

Nothing in *Tremblay* has altered the need for tribunal adjudicators to carry out their adjudicative tasks free of the prospect of being requested to specify how outside influences actually impacted upon their decisions or of being called to account for the developments in their thought processes or for the reversals of opinion which are frequently an integral part of the making of a final decision. Indeed, in our view, the public policy considerations that led the Supreme Court in *Hickman* to insist on the inviolability of the sanctuary principle even at the cost of leaving public suspicions concerning judicial impropriety at the Court of Appeal level in Nova Scotia unresolved, would amply justify continuing to provide adjudicators as well as judges with the protection of an *unqualified* rule of deliberative secrecy.

But in *Tremblay* the Supreme Court has in fact authorized some departure from that rule – not, the authors have argued, to the extent

approved by O'Leary J., but to some extent, nonetheless – and it is now important to define the limits of that departure and to devise a method for administering the examinations of adjudicators which may now be expected to follow. Since the courts now seem to be in this business, it is essential, the authors would respectfully suggest, that they now develop a court-sanctioned protocol for dealing with it.

3. A PROTOCOL FOR ADJUDICATOR EXAMINATIONS

In the author's submissions, a court-sanctioned protocol governing the examination of adjudicators ought to include the following elements:

1. *Acceptance* that the principle of sanctuary for an adjudicator's personal deliberative processes remains valid even with respect to administrative justice system adjudicators, and that any examination of an adjudicator that is authorized must have as its governing condition the inviolability of that principle.
2. *Acceptance* that the sanctuary principle renders evidence that would threaten deliberative secrecy inadmissible. (Questions prohibited would include questions concerning the merits or nature of an adjudicator's decisions or the deliberative processes by which their decisions were reached, or the level of influence on their deliberations of any external communications or events.)
3. *Acceptance* that, in the case of multi-member tribunals and multi-member adjudicative panels, this rule of inadmissibility would extend to evidence concerning the content of communications amongst or between panel members or tribunal colleagues.
4. *Acceptance* that questions would be permitted that are directed to establishing the objective events of a decision-making process, or the nature of the authorized components of the institution's specified decision-making process.
5. *Acknowledgement* that there will be cases where, without evidence that is inadmissible under this protocol, it may be impossible for a court to be satisfied that questions concerning possible breaches of the principles of natural justice have been resolved, and *acceptance* that when, as in *Hickman*, such an investigation appears blocked by the inability to ask the prohibited questions, then, as in *Hickman*, the public interest in the inviolability of the adjudication sanctuary will always justify the frustration in a particular case of an investigation into any alleged or suspected breach of the principles of natural justice.

6. *Acceptance* that from a public-policy perspective, investigations of the decision-making processes of a tribunal in a particular case are inherently undesirable. They interfere with the finality of the tribunal's decision and have generally disruptive, and potentially destructive effects.
7. *The adoption*, therefore, of a "presumption of propriety" which would prevent party-initiated investigations of a tribunal's processes going forward in the absence of demonstrated, substantial grounds for concern, and which, before a summons is issued, would require a complaining party to establish the need for the examination of that witness against a standard appropriate to the nature and purpose of that presumption.
8. Finally, *the acceptance* of a "principle of minimal intrusion" which would require a complaining party to demonstrate that documentary evidence of a decision-making process is clearly insufficient before permission to examine a tribunal staff member or adjudicator would be given.

It is submitted that the foregoing is merely a codification of the approaches that have in fact been taken in respect of such matters prior to *Glengarry*, or *Ellis-Don*, including in *Tremblay*.

4. STATUTORY IMMUNITY

The issue of statutory immunity from compulsion to testify arises in *Glengarry* because, like most similar statutes, the Pay Equity Hearings Tribunal's statute contains an immunity clause. The clause in question reads as follows:

> 31. Except with the consent of the Hearings Tribunal, no member of the Hearings Tribunal, employee of the Commission or person whose services have been contracted for by the Commission shall be required to testify in any civil proceeding, in any proceeding before the Hearings Tribunal or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

In light of what has gone before respecting the common law principle of deliberative secrecy, it is important to appreciate at the outset that the presence of such statutory protection is not reflective of any legislative concern about possible limitations in the common law principle of deliberative secrecy when applied to tribunal adjudicators.

The clause providing the Pay Equity Hearings Tribunal's members and staff with immunity from being compelled to testify in other

proceedings is modelled after similar clauses now found in virtually all tribunals' statutes. The legislative history of this type of provision shows that it originated in a recommendation of the Royal Commission Inquiry into Civil Rights (otherwise known as the McRuer Commission).

It is evident from the Royal Commission's Report that this recommendation was not intended to protect the privacy of the tribunal staff or adjudicators. It was intended, instead, to protect the participants in tribunal proceedings from having their private information – obtained by the tribunal's staff and adjudicators through the tribunal's state-authorized invasions of their privacy – being available for other purposes in other proceedings. An analysis of that history may be seen in the Workers' Compensation Appeals Tribunal *Decision No. 915*.[29]

Nevertheless, while these provisions were not developed for the purpose of bolstering the efficacy of the common law principle of deliberative secrecy, they do present a statutory hurdle to anyone seeking to summons an adjudicator for any purpose and thus are capable of providing some further protection of the confidentiality of the adjudicative process.

The existence of this statutory immunity from testifying raises the question, of course, of whether such immunity operates where a breach of natural justice is alleged,and the only means of assessing the allegation is through the testimony of a witness to whom the immunity provision applies.

In *Glengarry*, O'Leary J. asked whether such immunity could indirectly shield a tribunal from judicial review and thereby raise the status of the tribunal to that of a superior court under section 96 of the *Constitution Act*.[30]

He noted the parallels with the judicial treatment of privative clauses. In *Crevier v. Quebec (Attorney General)*[31] the Supreme Court of Canada held that any attempt by provincial legislatures to protect provincial tribunals from judicial review on matters of jurisdiction would contravene section 96.

O'Leary J. applied the *Crevier* principle to the immunity from testimony clause and held that the clause must be read down so as not to permit it to block a court's investigation of an alleged breach of natural justice.

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29 (1987), 7 W.C.A.T.R. 1 at 248-250.

30 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

31 [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

Essentially, the same issue arose in the motion before Steele J. of the Divisional Court in *Ellis-Don Ltd.*,[32] also referred to in the body of this article.

In the latter case, the applicant claimed that a finding of fact in a draft decision of the Ontario Labour Relations Board was changed following a consultation of the full Board, resulting in the release of a decision unfavourable to the applicant. In its application for judicial review, the applicant brought a motion to compel testimony from the Chair, Vice-Chair and Registrar of the O.L.R.B. relating to the post-hearing treatment of the case. Steele J. granted the motion, holding that a statutory provision granting immunity from compulsion had to be read subject to the demands of natural justice. His order has been appealed and at the time of writing had not been resolved.[33]

Although the constitutional dimension was not explicitly adverted to in *Ellis-Don*, the reasoning is similar to that of Mr. Justice O'Leary in *Glengarry*, namely that a statutory, testimonial privilege cannot be relied on to obstruct the process of a judicial review of an alleged breach of natural justice. If the examination of a tribunal member is indispensable to a full hearing on an issue of that nature, then the member must be examinable – regardless of any statutory immunity.

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32 Above, note 6.

33 The order of Steele J. in *Ellis-Don* has now been successfully appealed. In a decision of a full panel of the Divisional Court (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994), 16 O.R. (3d) 698 (Div. Ct.)), it was held that the common law requirements of natural justice are subject to legislative exception. Specifically, the Court found that the immunity from testimony conferred on O.L.R.B. members and employees by s. 111 of the *Ontario Labour Relations Act* precluded Ellis-Don from attempting to establish a breach of natural justice by summonsing and examining Board members and officials.

The decision reviews a number of cases which deal with statutory immunity clauses. Interestingly, in setting out the underlying purpose in safeguarding deliberative secrecy in a tribunal setting the Court quoted extensively from *Agnew v. Assn. of Architects (Ontario)*, which, as indicated above, was decided on the basis of common law immunity from compulsion to testify and not on the bases of statutory immunity.

Ellis-Don clearly endorses the validity of statutory immunity clauses in prohibiting an exploration of possible breaches of natural justice through the examination of adjudicators. However, an issue which is not addressed in that case is the one raised by O'Leary J.'s analysis in *Glengarry*, which relies on *Crevier*. This approach treats immunity clauses as analogous to privative clauses and therefore subject to being read down on constitutional grounds if an issue of natural justice is at stake. Finally, it should be remembered that there are instances, as in *Tremblay*, in which statutory immunity will not serve to protect adjudicators for the simple reason that the tribunal's statute does not contain an immunity clause.

The point made by O'Leary J. is that a breach of natural justice may be seen to constitute an excess of jurisdiction on the part of the tribunal. And, if an examination of the tribunal member or hearing panel is the only means by which the question of a breach can be determined on judicial review, then to the extent that the statutory immunity acts as an obstacle to a full hearing of the matter, the statutory provision thwarts the principle established in *Crevier* and effectively insulates the tribunal from review on an issue of jurisdiction.

In those circumstances, the immunity from testimony clause has the effect of a privative clause and may be expected to receive the same treatment as a privative clause – that is to say, it will be read down so as not to oust the court's jurisdiction to judicially review the tribunal's decision on an issue that goes to the tribunal's jurisdiction.

In the authors' respectful view, that analysis is not without weight. However, whatever view is taken of the efficacy of statutory immunity from testifying, the fundamental issue that remains is what questions the common law principle of deliberative secrecy will permit an adjudicator to be asked once any statutory bar to his or her *compellability* has been removed.