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Article

Appointments Policies In The Administrative Justice System Lessons From Ontario Four Speeches

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The topic is appointment policies in light of Ontario's current experience. The speeches were provoked by concerns about policy regression. The subjects include: implications of "idiosyncratic removals" of adjudicators by arbitrary use of the re-appointments power; the case for chair-centred appointment regimes and for merit-based and competitive selection processes; the problems with an "our-neutrals-for-their-neutrals" policy; the delusional nature of the "we-only-appoint-qualified-people" defence; the dark possibility that quasi-independence might be all that is wanted; and whether there is, indeed, any principled basis for reconciling short-term government appointments with the imperatives of a justice system? There are also references to an important address by Ontario's Chief Justice.

*206 1. INTRODUCTION

In the Spring and Summer of 1997, the Government of Ontario made a number of decisions involving the re-appointment or non-re-appointment of incumbent adjudicators and the appointment of new adjudicators at the Ontario Workers' Compensation Appeals Tribunal (WCAT) and the Ontario Labour Relations Board (OLRB). [1] The pattern of these decisions evidenced appointment policies that were radically new, and to this writer, very disturbing.

During the period these decisions were being announced, the writer's status was that of the outgoing and then former Chair of WCAT. After his departure from the Tribunal in July, 1997, his attempt to raise these concerns privately with the government were ignored, and on September 24, 1997, in a speech to the Workers' Compensation Section of the CBA-O, entitled *A System in Jeopardy*, the writer brought them publicly to the profession's attention. For convenience, that speech will be referred to in this paper as the "jeopardy" speech.

The jeopardy speech made something of a splash within the Toronto administrative law bar, and over the ensuing three months the writer was asked to speak to professional audiences about appointments policies on three separate occasions.

Late in November, the Honourable Roy McMurtry, Chief Justice of Ontario, gave a major address at COBA (SOAR's annual Conference of Ontario Boards and Agencies). That address included significant comments on independence and appointments issues in the ***207** administrative justice system. In the course of those comments, some reference was made to the writer's jeopardy speech. The reader will find significant passages from the McMurtry address incorporated in the fourth speech set out below.

The Chief Justice's address served to alert the Toronto print media, and thereafter both his and the jeopardy speech received coverage in both the *Toronto Star* and the *Globe and Mail*.[2] This coverage provoked a more extended discussion of these issues within at least the broader legal community in Toronto.

At the time of writing this introduction (in March, 1998), there is evidence that the Ontario Government may be re-thinking its appointments policies. On the second day of the COBA conference, the Chair of the government's Agency Reform Commission[3] announced that the Commission would now be adding the appointments-policy issues to its review agenda. Subsequently, the Commission received numerous submissions on that topic including ones from the CBA-O and from SOAR. The Commission is to report in April, and it is now expected that the report will include recommendations concerning Ontario's appointments policies.

However, whatever now happens in Ontario, in the writer's opinion the issues brought to the fore by the appointments policies that have prevailed in Ontario since June of 1995 should be of enduring fundamental interest to all Canadian administrative justice systems. ***208** The writer is indebted to the editors for accepting his proposal that the Journal publish this set of four speeches provoked by those policies.

This paper reproduces the speech manuscripts, somewhat polished, with repetitive material removed. Some footnotes have been added.

2. AN ADMINISTRATIVE JUSTICE SYSTEM IN JEOPARDY: ONTARIO'S APPOINTMENT POLICIES

Speech to the Workers' Compensation Section of the CBA-O September 24, 1997[4]

It is my intention to speak this evening about the policies respecting the appointment, and the re-appointment, of adjudicators in Ontario's administrative justice system.

I will begin with the re-appointments policy reflected in the recent re-appointment decisions at the Workers' Compensation Appeals Tribunal (WCAT) and at the Ontario Labour Relations Board (OLRB). That policy is fundamentally different from anything that has been seen before in Ontario, and it is a policy that, in my respectful opinion, is incompatible with the judicial integrity of the administrative justice system.

For reasons that I do not need to go into here, an unusually large number of WCAT adjudicators' terms expired in May and June of this year. My recommendations as Tribunal Chair concerning their re-appointments were dealt with by the government during those two months — the last two months of my term as WCAT Chair. [5]

I propose to confine my remarks to the re-appointment decisions respecting vice-chairs, both full and part-time. The issues respecting the appointment and re-appointment of side members are somewhat different and certainly more complex and they will have to ***209** be left for another day, as will the special issues respecting the appointment and re-appointment of agency chairs.

If you had been keeping track of the OIC appointments at WCAT, you would know that in the last two rounds of re-appointments — on May 28 and June 25, respectively — the terms of a total of seven, part-time vice-chairs and four, full-time vice-chairs were up for renewal. Each of these individuals was, in my opinion, an excellent adjudicator.

In the first round of decisions, the terms of five of the part-time vice-chairs and three of the full-time vice-chairs were renewed for three years. However, two of the part-time re-appointments were refused, and, most significantly, the re-appointment of one of the full-time vice-chairs was limited to an unprecedented term of “not more” than 12 months. No reasons for these decisions were given and I know of nothing that would explain them.

Subsequently, the government reconsidered its decision respecting one of the part-time vice-chairs and re-appointed that individual to a new three-year term. Also, in due course, the other part-time vice-chair was appointed to another agency. The discriminatory decision respecting the one, full-time chair remains, however, in place.

A month later, re-appointment decisions were issued in respect of five vice-chairs at the Labour Relations Board — three full-time and two part-time.

Three-year re-appointments were issued for two of the three full-time vice-chairs but re-appointment of one was refused. Both part-time vice-chairs were also refused reappointment.

In short, in a move that I believe to be unprecedented in the Board's history — a move not dictated by any need for downsizing — experienced vice-chairs were summarily dismissed from the Board's service.

Some may question my use of the word “dismissal” when what occurred can be seen to be merely a refusal to renew a limited-term appointment. But in the context of an agency in which regular renewal of appointments is not only an entrenched tradition but also an essential and integral element of the agency's operational environment, characterizing an unexplained refusal to renew the term of a particular adjudicator as a dismissal is, in my view, correct usage.

Outside the government's appointments apparatus, no one appears to know why these decisions were made. I, personally, know ***210** of no grounds in terms of merit, or performance — or time in the position — that would explain the refusals and discrimination that occurred at the Tribunal.

I am not, of course, as familiar with the OLRB situation, but it was not in this instance, as it had been in an earlier round of re-appointments, a case of having to make choices in a downsizing situation (the vacancies created by the non re-appointments were filled by new appointments). And, from their public reputations as adjudicators, it is impossible for an outsider to see what grounds could have existed for removing this particular group of adjudicators from the Board.

That the dismissed Labour Board adjudicators were all vice-chairs who had formerly practiced on the union side of the labour bar might have been seen by some as a clue. However, that was also true for one of the vice-chairs who was re-appointed. And, of course, it has been a tradition at the Board for new vice-chairs to be appointed from amongst the ranks of either the union or management side of the labour bar.

Previous involvement with either unions or the worker side of the workers' compensation bar was also not a point of distinction at the Tribunal.

And at the Board, as at the Tribunal, an examination of the OIC appointments record will show that the overall time-in-the-position was not a common point of distinction between those selected for re-appointment and those selected for dismissal or discriminatory treatment.

I would also mention that for those whose terms were not renewed, virtually no notice was given; five weeks, I understand in the Board's case, seven days in the Appeals Tribunal's case. People with several years of honourable, even exemplary, service with the Tribunal or Board found themselves suddenly, unexpectedly and inexplicably dismissed, with no financial package to tide them over while they coped with re-orienting their careers and finding other sources of livelihood.

Many of you here to-night — I don't know, perhaps, most of you — may be thinking: is this not just a case of a new government exercising a government's untrammeled appointments prerogative and taking steps to create spaces for the appointment of “their own people” — to coin a phrase? Obviously, it is unpleasant for the individuals affected but is there anything wrong with it in principle? And did not ***211** these individuals in fact sign up for such treatment when they

accepted their first appointment and became an Order-in-Council appointed adjudicator? Is this not what the patronage system of OIC appointments is all about?

As you may know, I have a problem with the premise underlying such questions — that is, that, even with respect to adjudicators in quasi-judicial agencies, a patronage system of appointments is at least inevitable, if not, indeed, correct. But I am not here to joust at windmills. So, let me respond here to those questions on the footing of accepting that we are irretrievably lumbered with that system.

And may I begin by suggesting, ever so gently, that, if a government gives the appearance of using its re-appointments power to *screen out* individual adjudicators who have for reasons personal to them become unpopular with the government, that that would *not* be seen as business as usual in an administrative justice system, even given a patronage system of appointments.

In fact, we do not know why the government has chosen to select some of the vice-chairs at WCAT and the Board for discriminatory treatment. However, the government has left us to draw our own conclusions. And since there is no reason to think that considerations of relative merit entered into the decisions, and since other bases for distinction cannot be discerned, the conclusion that presents itself is that the government has indeed used its re-appointments power to screen out particular adjudicators who are, for reasons personal to those adjudicators, unpopular with it or its supporters.

And, of course, whatever the government's actual motivation, it is the appearance that has been left which presents the problem.

Naturally, it would be a rash person who would venture to suggest that in the checkered history of appointments in this Province, no precedent could be found for the use of the re-appointments power as a screening mechanism. But if one looks at the history of the Labour Board, one will, I believe, find no occasion in the memory of current practitioners when re-appointment decisions of this nature were made, and I can personally testify that in the 12-year history of the Appeals Tribunal through two changes in government prior to this one, no decisions of that nature ever occurred. I believe the same record would be found, at least prior to 1995, at the Ontario Municipal Board, at the Securities Commission, at the Energy Board, etc.

***212** I am not, of course, suggesting that there would have been no occasions in the administrative justice system in the past for the re-appointment of adjudicators to be refused. Certainly, re-appointments have been refused.

Not frequently, but on occasion, re-appointments have been refused on the recommendation of an agency Chair because of an individual's failure to meet agency performance requirements or because of a Chair's felt need to change the mix of experience in his or her agency. Such decisions, however, would inevitably involve advance notice to the adjudicator of the Chair's intentions in that regard.

Many of you will also be aware of the policy, adopted by the Liberals in 1986, and accepted and applied by the NDP government, that no person should serve more than a total of six years in any OIC-appointed position. As a matter of practice, that policy was not applied to every agency — not, I understand, to the Labour Board, and I know as a fact not to WCAT. But it was applied to some. And, in the latter part of the NDP government's term — when, in the course of time, that rule finally came home to roost — adjudicators reaching the end of their second three-year term in some agencies were refused re-appointment pursuant to that policy. However, from an independence perspective, this policy was not objectionable since everyone knew the reasons for the refusals to re-appoint.

As far as I am aware, the present government has not adopted a policy of limiting overall service in a given position to a particular number of years. And, as I have noted, any feeling that in these recent decisions the government may have been applying some ad hoc policy of that kind is refuted when one compares lengths of service of those re-appointed and of those dismissed or discriminated against.

Some of you may also recall the mass termination of the Chair and members of the Liquor License Board by the Ontario Liberal government when it first came to power. This was an instance of an incoming government's strong disapproval of the operations of an agency leading to the mid-term termination of a group of incumbents

But, in that case, the terminations were attributable to a known policy. The reasons for the decisions were known; they were certainly known to the individuals concerned, and to the agency chair and to their colleagues within the agency. Most importantly for the integrity of the system, all were treated the same.

***213** The government's approach to making space for “their own people” evidenced in the recent decisions at the Tribunal and the Board, if that is, indeed, part of what lies behind these decisions, may also be usefully contrasted with another approach that the incoming Liberal government took in 1986 when it sought radical reform of an existing agency.

At that time, the Social Assistance Review Board (SARB)was seen by the new government to be, from the perspective of fair process and impartial decision-making, a problematic agency. It was widely believed that SARB had been a particular victim of the previous government's patronage system of appointments. At the time, the adjudicator appointments at SARB were all part-time, for terms, I believe, of three years.

The Liberal government's reform policy at SARB involved moving to a board comprised of full-time adjudicators, to be selected pursuant to a public, competitive appointments process, utilizing widespread advertising of the positions and structured interviews including written tests. A new

Chair was appointed and she played a principal role in the selection process. Fifteen hundred people applied for the positions and 90 were interviewed

What happened to the incumbent SARB adjudicators is the relevant question in this context. How did the Liberal government make room in 1985/86 for these new appointees? The answer is that the incumbents were all given several months notice that at the end of their terms they would not be re-appointed. They were also invited to apply in the meantime for the new full-time positions and to compete for appointment to those positions along with other applicants. I am advised that only a few took up that invitation, but amongst those who did, two were successful and were appointed to new, full-time three-year terms.

The Liberal government's approach to reforming the SARB agency is an approach that is, I would respectfully suggest, appropriate. It involved fair process, reasonable notice, transparent reasons, and, most importantly, equal treatment for all.

As I have indicated, the particular difficulty with these recent re-appointment decisions at WCAT and the Board, apart from the process and notice problems, is that some individuals are being selected for discriminatory treatment respecting their re-appointments for reasons that are not being disclosed and which, one is left to assume, are personal to them.

***214** The primary concern with the policy evidenced by these decisions should not, in my opinion, be the unfairness to the individuals in question, although, in my view, that unfairness is, indeed, palpable, and quite indefensible. The primary concern should be, as I have indicated, the threat the policy presents to the judicial integrity and legal viability of the administrative justice system.

If re-appointments are to be refused against the advice of an agency chair, the fraught questions are: Whose advice is being taken? What information is being relied upon?

Many of you here will know that the nature of these recent re-appointment decisions has triggered speculation as to which adjudicative decision or decisions of a particular vice-chair doomed his or her re-appointment, or which of the losing parties would have had sufficient clout with the government's appointments apparatus to block that re-appointment. To hear this speculation is to know that something fundamental has gone wrong. In my 33 years at the bar as counsel and adjudicator, 11 of them as a management labour counsel, I have never been privy to anything remotely similar.

So, no, this is not business as usual. And, no, there is no basis for saying that these individuals signed on to be treated in this manner when they accepted their first appointment.

Now, I am not suggesting that an incoming government cannot refuse re-appointments for the purpose of making space for its own appointments. That is not what I am saying. I will shortly

address the question of whether it is appropriate that it should do so, but that is not the point at this juncture.

There are a number of strategies for creating vacancies that an incoming government might adopt that would present no legal problem. I have referred to two different strategies used by the Liberal government in 1985/86. Another possibility would have been to give reasonable notice that none of the incumbent vice-chairs at WCAT or the Labour Board would be re-appointed at the end of their current terms; or that no adjudicator with more than 6, 9, or 12 years would be re-appointed when their current terms expired. I personally would not have recommended either of those policies, and you will find my reasons for that view in my 1994 paper on Administrative Justice System Reform and the Terms of Appointment Policy.[6] And, of ***215** course, a decision to terminate all or a significant number of incumbent vice-chairs would, naturally, raise other issues. But those would be reasons or issues of a strategic or political nature. No one could take exception on legal grounds.

The strategy for refreshing an agency's roster of adjudicators recommended in the paper I just mentioned, is for a government to give an agency Chair appropriate notice that in its view the average years of service of incumbent agency adjudicators chairs is too high, and direct him or her to reduce that average to some lower specified level, leaving it to the Chair to decide how to select the vice-chairs who would have to be refused re-appointment in order to create the vacancies needed to meet that target. This strategy envisages reasonable notice and a fair termination package for the outgoing adjudicators.

But none of these strategies were resorted to in this case.

To come to the essential point, it is my submission that, in an agency environment where re-appointments are a necessary and integral part of the system, a government's assertion of the right to use its re-appointments power selectively for the purpose of screening-out individual adjudicators for undisclosed reasons apparently personal to them is, and must be, fundamentally incompatible with the principles of natural justice.

The law on which I rely for that submission is straightforward to the point of being trite. The applicable principles may be stated as follows:

> 1. Issues involving legal rights and obligations can at law only be validly determined by adjudicators who are independent and impartial, and whose circumstances do not provide any reasonable basis for an informed observer to think otherwise.

> 2. The confidence of the adjudicator, *and of the parties*, that the adjudicator is free to make a decision in their case *without fear of personal consequences* is a fundamental prerequisite for any independent and impartial adjudication.

My point is not that the government's re-appointment decisions at the WCAT and the Labour Board were beyond its legal powers to make. Neither do I say that the re-appointments policy ***216** evidenced by those decisions would be *ultra vires* of the government's authority.

(I *am* of the view that the circumstances in which these decisions were made may well have created fair-process obligations with which the government may well have failed to conform, but I do not propose to deal with that issue here.)

The fact that adjudicators have been appointed pursuant to a valid exercise of the executive power is not an answer to concerns about bias and independence. To cite a straightforward example, if an adjudicator happens to have a direct financial interest in the outcome of a case to which he has been assigned, he will not have effective legal authority to decide that case even though his OIC appointment as an adjudicator is valid.

My point is that it is, I believe, easily possible to argue that the nature and pattern of the government's current round of re-appointment decisions are such as to reasonably suggest to adjudicators in Ontario's administrative justice system agencies — and, at least as significantly, to the parties that appear before them — that Ontario adjudicators no longer have reason to be confident that they can make their decisions without fear of personal consequences.

There are, I would submit, ample grounds to support the following reasonable apprehension in the mind of an informed and objective observer. That is, that adjudicators interested in re-appointment will take from these recent re-appointment decisions the message that since they may no longer depend on ability and good performance and the professional support of their chair to ensure their re-appointment, it will now be prudent not to allow their decision-making to seriously inconvenience the government or its supporters. And even if adjudicators themselves do not, in fact, take that message to heart, it will certainly be argued that it is too much to expect parties to be confident that they have not done so. The current speculation as to what decision or decisions doomed the current round of victims speaks for itself in that respect.

The perceived threat of reprisals through the exercise of the re-appointments power is likely, it can also be argued, to be particularly effective because of an adjudicator's perception of special, personal vulnerability caused by the government's demonstration of its intent to use the power in a punitive way — giving no notice and offering no termination package despite an adjudicator's years of honourable service.

***217** Faced with such arguments, a court would, in my respectful submission, have both the jurisdiction and the duty to hear those arguments and to rule not only on the perceived independence of individual adjudicators in such an environment but also on the perceived institutional independence of an agency operating in such an environment. And this would be true notwithstanding the technical validity of the appointments themselves.

It is my own opinion that such an argument would be accepted — I cannot, frankly, myself, imagine that it would not be. And, in law, it would not matter that one might recognize the strong likelihood that in fact, faced with the moment, most adjudicators — certainly my former colleagues at WCAT — would choose to make the right decision and risk the consequences. A system that in respect of contentious issues is seen to rely for impartial decision-making on an adjudicator's willingness and ability to heroically disregard perceived risks to his or her own personal interests is not one, I would respectfully suggest, that would be seen to meet any acceptable standard of independence.

I know from conversations with various people in the past two months that the validity of this rather apocalyptic submission concerning the impact on the judicial integrity of the system, of a government using the re-appointments power for the purpose of screening adjudicators, is likely to be viewed by many, perhaps, indeed, most in this audience, with skepticism, at best. No doubt, outrage will be found in some quarters. You will appreciate, however, I hope, that it is not a submission that I would have made in this professional, and public, forum without considerable soul searching and unless I felt deeply that these concerns were valid.

And, furthermore, I am afraid that, after careful consideration, I have concluded that I must also summon the temerity to suggest, as respectfully as possible, that failure to see the systemic problem inherent in the use of the re-appointments power for the purpose of selectively screening the Province's adjudicators against unknown criteria must reflect acceptance of a seriously diminished view of what is meant by the word justice in the administrative justice system — and of what it takes to maintain vigorous, independent quasi-judicial agencies.

You will appreciate, I hope, that this is not a comfortable speech for me to be making. Unfortunately, I found myself somewhat uniquely placed to understand the implications of what has happened, ***218** and with, as well, the special advantage of having no appointment, or client, to risk in speaking up. I was moved to come here tonight to give this speech when I found myself confronting in those circumstances the classic questions: If not now, when? If not me, who?

I may also tell you that I have been encouraged in this mission — if that is the right word — by the example of another ex-chair in surprisingly analogous circumstances. I refer to Mr. William Outerbridge, Chair of the National Parole Board from 1978 to 1990, who also left the chair position after 12 years of what was regarded as a stellar performance — a 12-year period during which the Parole Board decisions were *not* the stuff of lurid headlines.

Shortly after Mr. Outerbridge left the Parole Board in 1990, he too was invited to participate as a panel member at a conference. Fortunately, his remarks were recorded by the press.

The subject matter of Mr. Outerbridge's talk on that occasion, and the events that in due course followed that speech, provide an appropriate lead-in to my second topic of concern to-night: *the diminished role of agency chairs in the appointment and re-appointment of adjudicators*.

The intention of this government to downgrade the role of chairs in the appointment and re-appointment process were first publicly discernible last November when the Chair of the Government Task Force on the Review of Agencies, Boards and Commissions, told the COBA conference (in response to a question from the floor of the conference) that "I personally do not favour recommendations from chairs. I think that is an inappropriate source of decision-making." [7] The application of the policy reflected in that comment is now being commonly encountered throughout the system.

(I pause here to note that it would be foolhardy for anyone to make sweeping statements about what is or is not part of a government's appointments policies. The policies are not available to the public and, in my experience, not applied evenly in any event. Relations between individual chairs and their particular host Ministers and Ministries are so variable that it is impossible to say that any particular approach will be uniformly applied. I know for certain that the recent, new full-time appointments at WCAT were made without ***219** consultation with the Chair, and I am aware of numerous other situations in which an agency chair's previous role in appointments has been either eliminated or substantially downgraded. Whether it is true for all, I do not know.)

Mr. Outerbridge was bold and direct in describing what was clearly an outrageous abuse of the government's appointment powers. The Globe and Mail's report reads in part as follows:

> May 9, 1990 — Ottawa: "Dangerously inexperienced appointees have been foisted upon the National Parole Board by federal governments that saw the board as an excellent pork barrel, former parole board chairman William Outerbridge said yesterday.. ... [T]he governments showed less and less interest in seeking his aid to secure qualified "street wise" board members who could solidly appraise criminal offenders. ... The growing supply of positions and the generous salaries made the jobs too attractive as rewards to pass up, Mr. Outerbridge said. ... 'Not infrequently ... it was necessary to transfer seasoned members between regions ... to attempt to retain a minimum level of perceived competence', he said. 'The larger the board grew, the less was I consulted on appointment needs and the more predictable the products of the process became ...' Mr. Outerbridge said he found the lack of qualifications among appointees particularly distressing considering

> that a great many of the 30,000 decisions the board made every year have serious consequences for the public and for the inmate. [8]

The Outerbridge precedent for frank talk from an outgoing chair, while supportive for those of us who follow, is not, I regret to say, very promising in terms of outcome. The egregious abuse of the appointments process in his agency on which he blew the whistle at that conference, was a one-day news item — on a back page — and then promptly forgotten by all concerned. And, not surprisingly, the abuse he described did not end. The consequences were predictable.

Less than four years later, on January 6, 1994, the Toronto Star had occasion to publish the following account of those consequences:

> January 6, 1994 — Ottawa — "Solicitor General Herb Gray is promising sweeping reforms to the National Parole Board following a scathing report on the freeing of a sex offender who later murdered ***220** a Regina woman. Two political appointees to the Board failed to assess the risk to the public ...." [9]

Two months later, the shadow of the public wrath occasioned by the highly publicized National Parole Board failures had occasion to fall on an analogous decision-making process in Toronto. An application by an involuntary patient in the Penetanguishene Mental Health Centre to have his involuntary status reviewed was declined on the grounds that the likely result of a relapse by the patient would be serious bodily harm to the patient's victims. In his written reasons, the Review Board Chair was moved to add the following final paragraph — a cry for help that has regrettably not been heard. The paragraph reads:

> ... it is clear that there has been enormous pressure on all of the institutions and professionals involved in this matter to conduct themselves in a manner that will not attract public criticism. Public interest in this issue is both understandable and justifiable. At the same time, we believe that it is perhaps time to take steps to ensure the integrity of our democratically established institutions and processes by ensuring that decisions are made according to legal and professional criteria, not overt public pressure or a desire not to be subject to reprisals or criticism. [10]

Nine months later, another Globe and Mail report described the so-far final sequel to the events put in train by the abuse of the appointments process so frankly described by Mr. Outerbridge. The report reads:

> October 1994 — Ottawa — "Members of the National Parole Board will soon be facing annual reviews of their performances after facing criticism for releasing inmates who later committed violent crimes. The reviews are part of an effort by the board's new chairman, Willie Gibbs, to re-establish confidence in it. ... He was picked to take over the quasi-judicial body in August to re-place Michel ***221** Dagenais, a Conservative appointee who resigned in the spring amidst controversy over the actions of paroled convicts." [11]

It is apparent to me, as it was to Mr. Outerbridge, that the destruction of the National Parole Board's competence was directly attributable to the removal of the Chair's role in the appointments and re-appointments process. And, recently, public attention has been drawn to two other examples of what happens when a chair's power to manage is emasculated. The highly public travails of the Canadian Aviation Safety Board of a few years ago which ultimately lead to its demise, and the infamous debilitating stalemate at the Canada Labour Relations Board have both been described by Michel LeFrancois in his article: *Powers of Management of the Federal Administrative Tribunal Chair: Their Impact on Discipline and Independence of Members*, recently published in the Canadian Journal of Administrative Law and Practice. [12]

You will forgive me, if I cannot in these circumstances forego mentioning the now trite aphorism: that those who do not know or remember their history are destined to relive it.

George Thomson, now the Deputy Minister of Justice, had it right, in my respectful submission, when, in a speech to the COBA Conference in 1992 when he was Deputy Minister of Labour in Ontario, a speech concerning in part the responsibilities of chairs and in part the responsibilities of governments, he said this:

> If ... [a government] appoint[s] persons the Chair is not recommending, or if the Chair is not seen to be involved in the selection of the appointments, you totally compromise the Chair's ability to carry out the responsibilities I have earlier suggested are in the hands of the Chair. ...

And lest there be any mistaken understanding on this topic, let me be clear that it is a fact that at the Appeals Tribunal and, I believe, at the Labour Board, the practice has always been that the government only appointed vice-chair candidates approved by the agency chair. Not all candidates who were recommended were appointed, but none were appointed who did not have the chair's prior approval. And, of course, the chair's recommendations concerning re-appointments were followed as a matter of routine.

***222** In my 12-year experience at the Tribunal there was only one exception. It happened, as I recall, in 1986, and it involved the appointment of an employer member, not a vice-chair.

I want to pause here and make it especially clear that I do not say that appointments made without consultation with an agency chair cannot be good appointments. The one I just mentioned turned out to be an outstanding appointment. And we will all be personally aware of a number of appointments by this government that judged against any criteria may be seen to have been excellent. And no doubt the recent appointments will prove to be of that quality, as well.

But, that, you will understand, is not the point.

There are several problems with leaving agency chairs out of the selection processes. Mr. Thomson mentioned one of them: the compromising of the chair's ability to manage the Tribunal and to meet his or her responsibilities as a chair. And I have referred to the National Parole Board, the Canada Labour Board, and the Canadian Aviation Safety Board as evidence in support of that proposition — evidence, one should note, that is just the evidence that happens to be currently accessible from public sources.

Agency chairs are responsible for building and leading integrated adjudicative institutions devoted to establishing and maintaining institutional standards of excellence in process, decision-making and decision-writing, and committed to the efficient production of a congruent and useful jurisprudence. On the basis of my own experience, I cannot imagine how those responsibilities can possibly be met without the chair having, and being seen to have, effective control over the appointment and re-appointment of the agency's adjudicators.

Imagine for yourself the disarray in a law firm, if its partners were appointed or dismissed by decision not of the firm but of, say the Law Society, or in a corporation if its President was known to have no say in the hiring or firing of his or her senior vice-presidents.

The second problem presented by the removal of the chair from any effective role in appointments or re-appointments is that such a policy also effectively removes the agency's special requirements from consideration in the selection process. Where a government denies agency chairs a significant role in the evaluation of a candidate's qualifications what it must be taken as saying is that it does not consider that agency's particular requirements to be relevant to the selection process. Only the

chair can bring to the selection ***223** process an informed understanding of the agency's unique requirements. And, if an agency's particular requirements are considered not to be relevant or important, what does a government mean when it says that it is committed to appointing only qualified candidates? Qualified in what sense? Judged against what criteria?

A third difficulty has to do with the independence problem that arises when it is known that the Chair cannot make his or her recommendations concerning re-appointments stick. (And this, of course, is a reprise, from a particular perspective, of my earlier submissions on re-appointments.) In my view, the institutional independence of an agency must find its principal embodiment in the independence and credibility of the chair, and, in particular, in that chair's capacity to protect individual adjudicators from the reverberations emanating from unpopular decisions. Once it is clear that that capacity is gone, then individual agency adjudicators will see themselves as being on their own, and, on their own, they will understand there can be no protection against the fall-out from unpopular decisions.

And, finally, who will governments find to appoint as chairs once it is clear to all that chairs are not to have a significant role in the selection process, or a final say on the re-appointment questions? You may recall the Ontario Parole Board chair fired brutally and publicly by the NDP government for a decision of a Parole Board panel on which he did not sit, arising from a lack of information over which he had no control. [13] The dangers in accepting, in areas of inherent controversy, public responsibilities for which there are no commensurate powers will be well understood by serious people.

I now turn to the final subject on my agenda this evening. That subject is the understanding as to the nature of administrative justice agencies that is reflected in the “our-people-for-their-people” appointments strategy. I refer to the appointments strategy based on what seems to have rapidly become the conventional wisdom that incoming governments may be expected, as a matter of course, to make room for their own adjudicator appointments by removing incumbent adjudicators, whether or not there are any problems with the incumbent's performance.

***224** It would appear that is the understanding of the nature of administrative justice agencies which we have seen implemented in the recent decisions at WCAT and the OLRB.

As we know, supporters of the legitimacy of the our-people-for-their-people appointments strategy often look for justification to the conventional wisdom about the United States practice. It is widely understood that in the United States, when a new President is elected, hundreds of agency chairs and members automatically resign and are replaced by the new President's supporters.

However, in considering the validity of the our-people-for-their-people strategy in the Ontario context, it is necessary to recognize that there are fundamental structural differences between the

U.S. agency system and Ontario's administrative justice system that, in point of fact, render any such comparison invalid.

In the first place, U.S. agencies have typically a significantly more direct role in the making of policy than is the case with Ontario agencies. The statutes of U.S. agencies typically delegate to the agency direct legislative powers. In effect, the regulation power that in Ontario is almost always exercised or controlled by the responsible Minister and the Cabinet, is, in the United States, typically exercised by the agency. With agencies exercising policy powers of that sort it is, of course, obvious that such agencies must be in the hands of supporters of the current President.

In the second place, and most importantly, the political appointees who are changed with every change of President, are not for the most part adjudicators. The American federal administrative agency system generally separates policy making from the adjudication of disputes involving individual rights and obligations. The adjudication is performed by a separate, professional cadre of career "Administrative Law Judges", selected and appointed by a central professional organization — The United States Office of Personnel Management — through a highly structured competitive selection process, which includes written examinations, amongst other things. The Administrative Law Judges are not political, or patronage, appointees and they are not changed when a new government comes in. In fact, they are appointed for life, given effectively the same tenure as is accorded to U.S. Circuit Court Judges.

Americans would be horrified at the suggestion that agency adjudicator positions should be the subject of political or patronage appointments.

***225** Thus, in point of fact, the American system is not a relevant precedent for Ontario's system of patronage appointment of adjudicators. Indeed, it is a precedent that would strongly support major reform of the Ontario system.

There is also a tendency to think of the our-people-for-their-people appointments strategy as having always been regarded as legitimate in Ontario. But what in fact is the Ontario history? Well, of course, the strategy was unknown in Ontario prior to 1985. While that is not very helpful as a precedent — in the 43 years before 1985 the question never came up — still it is not unimportant to appreciate that we are talking about a phenomenon that is not more than 12 years old.

As we have seen, beginning in 1985, the incoming Liberals engaged in wholesale changes in particular agencies which they saw as presenting major problems. I have mentioned the Liquour License Board and SARB and there may have been others. Presumably, we would all agree that any new government must be able to apply its appointments powers to the correction of what it sees to be real problems. The Liberals also introduced the six-year maximum term which was a policy that will have served to free up some positions on some agencies for Liberal appointments.

However, the Liberal government was interested in competitive selection processes run principally by the agency chairs. Accordingly, those appointments were not appointments of "our people" in the usual patronage sense of that term. In any event, with respect to WCAT and the OLRB, under the Liberals, the ours-for-theirs strategy never made an appearance.

The ours-for-theirs strategy first really came to life in Ontario with the election of the NDP government. As far as I recall, in the case of the NDP the focus of the strategy was principally on agency chairs. And it was under the NDP that the strategy made its first appearance in the labour field. I refer here to the unexpected change of the Labour Relations Board chair that occurred shortly after the NDP formed the government. [14]

***226** However, except in the cases in which the 6-year rule was applied, to which I referred earlier, I am not personally aware of any instance of incumbent, non-chair adjudicators being dismissed or refused an expected re-appointment to make way for the NDP government's appointments. And, with a few notable exceptions, in the filling of vacancies the NDP government by and large continued the Liberal's competitive selection policy for adjudicators, including, usually, the active involvement of agency chairs.

The Workers' Compensation Appeals Tribunal appointments were not affected by the ours-for-theirs strategy during the term of the NDP government. And, as I have said, during that government's term, as with the Liberal and Conservative governments that preceded it, all vice-chair appointments were recruited and selected by me — with the help I may say, in the latter years, of recommendations from internal, Tribunal selection committees.

I should also mention here, that the Tribunal also escaped the ours-for-theirs strategy in the first round of new WCAT appointments under the new Conservative government. In the Fall of 1995, the new government appointed a number of new part-time vice-chairs to WCAT. These were individuals which I had selected for recommendation for appointment pursuant to a structured, competitive selection process that had been completed just as the new government was being sworn in. Those were appointment recommendations that were accepted after the Minister of Labour's staff had carefully scrutinized the candidates' resumes and the selection process.

So the ours-for-theirs appointments strategy is not a tradition to be respected for its age alone.

Is it a strategy that can be justified as a matter of principle?

For the cynical amongst us, the one reason for the strategy that tends to loom largest is the unique value of agency adjudicative positions as rewards for a government's political supporters.

Nevertheless, I like to think that in the case of adjudicative positions, if a government's need to have rewards to give out were the only justification for that strategy, it would not in fact have

survived this long — just as it has not survived in the judicial justice system. Once seen to be supported solely by the rewards motive, the strategy's unacceptability would have become clear.

The National Parole Board example notwithstanding, in a right-thinking world, how could it not be regarded as a shameful and ***227** unethical abuse of entrusted powers for a government to reward friends by appointing them to determine other people's legal rights?

In fact, I believe the principal reason the so-called patronage aspect of appointments in the administrative justice system has survived is because we have all accepted that there is more than just the concept of rewards behind that approach to those appointments. Those responsible for the design and operation of administrative justice agencies — politicians of all parties, the bureaucracies in the Ministries and in the agencies, and the professional cadres of lawyers and advocates who service the agency clients — have consistently defended a government's right to puts its own people in agency adjudicative positions. The basis of that view has been that agencies are instruments of government policy and must be responsive to government policy perspectives.

However, from the perspective provided by the recent experiences with the Conservative government's appointments policies, it becomes apparent that the thinking on that point has not been sufficiently focused. The difficulty is that agencies which are seen from the government perspective as instruments of government policy are, from their clientele's perspective, instruments of justice. And while the our-people-for-their-people appointments strategy may be understandable when viewed from the instrument-of-government-policy perspective, it becomes highly problematic when viewed from the instrument-of-justice perspective.

Where that strategy inevitably takes one from a justice perspective, was recently and vividly brought home to me by a comment alleged to have been made by an unidentified employer's workers' compensation manager, apparently shortly after the announcement of the change of chairs at WCAT. I have it second or third hand so I cannot vouch for its accuracy. However, even if the reported comment is apocryphal the attitude it captures is, it would appear, not an uncommon one. "Now", the manager is reported to have said, "we get to replace *their neutrals with our neutrals*."

Their neutral with our neutrals! What a cynical, bankrupt view of administrative justice that comment reflects! It conveys the conviction that administrative justice adjudicators are inevitably biased in favour of one side or the other, that there is no such thing as an impartial adjudicator, and that one of the issues at stake in any Provincial election is deciding who gets to bend the agencies their way.

***228** Is this what we have finally accepted? The legitimacy of overtly biased adjudication of individuals' legal rights and obligations? Do we really see administrative justice agencies like WCAT and the OLRB as only facades of justice, having the guise of instruments of justice devoted to impartially determining and enforcing rights and obligations, but being really instruments designed to constrain those rights and obligations within limits convenient to the government of

the day? Is this where our continued tolerance of patronage in the appointment of administrative justice adjudicators has taken us? Is this the system that we are proud to serve?

Of course, we have always believed in the role of agencies as true instruments of impartial justice. However, we have too little considered the inherent fundamental conflict between that role and the instrument-of-government-policy role. Furthermore, in the protection of the agencies' justice role we have relied too much on the rhetoric of independent decision-making and turned too seldom to realistic, protective structures.

What we have seen displayed in the appointments decisions at WCAT and at the Labour Board over the past three months is, I would venture to suggest, the ultimate ascendancy of the understanding of agencies as only instruments of government policy. And the resulting push of that understanding to its ultimate logical ends has trampled the soft conventions that have until now served to shelter and legitimize the agencies' role as also instruments of justice. The "soft" conventions to which I refer are: (1) respect for the neutrality of the Chair position; (2) the deference to the Chair's recommendations on new appointments; and (3) the practice of allowing chair-recommended re-appointments to go ahead as a matter of course.

This is an understanding of administrative justice agencies which ignores the justice component and, taken to its limits, it is an understanding which, of course, cannot tolerate an objective appointments or re-appointments process. It is an understanding, therefore, that rules out the role of an agency chair in that process. It is also one that dictates the use of the re-appointments process for the purpose of screening out adjudicators who are seen to have taken the official rhetoric about their independence too much to heart in matters involving issues too close to a government's own interests.

In my respectful submission, the understanding that administrative justice agencies are, at bottom, only instruments of government policy is not one that this society can long tolerate. Apart ***229** from the very serious practical question of how in the long term one avoids the devastation to the efficiency and effectiveness of administrative justice agencies that must inevitably follow the entrenchment of a revolving-door, full patronage appointments environment (when each incoming government is expected to take its turn in applying the ours-for-theirs appointments strategy), there is, most importantly, the credibility problem.

To know that we are, all of us, already in serious trouble in the latter regard, one need only to have sat and watched the Question Period in the House in recent weeks and seen the jeering disdain from the opposition benches for any suggestion that workers and unions could reasonably be asked to rely on impartial decisions from government-appointed agencies for protection against the various threats to their interests which they perceived in Bill 136.

And one now sees that attitude — that same message — emerging in many places. The possibility that the government-appointed tribunals provided for in the new *Tenant's Protection Act* might

be expected to act impartially between tenants and landlords is being dismissed as a joke by the leaders of tenant organizations — to take just one other example.

In my submission, we are approaching a tipping point in the administrative justice system — to borrow a concept from the epidemiologists. The tipping point in the epidemiologists' world is the point at which an ordinary and stable phenomenon like a relatively benign and manageable disease — like, if you will, the patronage system of appointments as we have previously known it — can abruptly collapse into a crisis of epidemic proportions. We are, in my view, already teetering on the tipping point with respect to the administrative justice system as we proceed with making the possibility that any government administrative justice agency could be relied on to dispense impartial justice a wholly absurd idea in the eyes of the public.

Once we reach such a point, it will thereafter be difficult, in my submission, to restore such agencies' credibility as instruments of justice.

By way of final summary, may I just repeat the main points. It is my submission that the government's use of the re-appointments power to screen adjudicators against unknown criteria puts adjudicators and agencies in conflict with the principles of natural justice; that the undermining of the chair's role in the appointments ***230** process is wrong-headed and fraught with peril for the future viability of agencies; and that an our-people-for-their-people appointments strategy, and the understanding of the role of agencies which that strategy reflects, will prove, in due course — probably sooner rather than later — to have been in point of fact incompatible with the continued role of agencies as credible instruments of justice.

In conclusion, may I just make my final point. These are not just problems, in the case of WCAT, for workers, or in the case of the OLRB, for unions. They are problems for all those concerned with a well-ordered, fair and just society, and who recognize the necessity that society have access to credible administrative justice adjudication.

In my submission, it is time for the Ontario Bar — management and employer side lawyers as well as worker and union side lawyers, and, indeed, all lawyers — to recognize that it is necessary that the Bar's unified voice, in favour of a fundamental structural reform of the appointments process compatible with the survival of a credible administrative justice system, now be heard. What is required, in my view, at this moment — just to complete the evening with one more possibly quixotic submission — what is required, is a Royal Commission on the Appointments Process in the Administrative Justice System.

Thank you for your patience in hearing me out.

3. LAW UNION CONFERENCE, PANEL PRESENTATION

November 15, 1997

Many of you, I expect, will be aware of my speech on this topic at the Workers' Compensation Section of the CBAO in September. I do not intend to give that speech again, if for no other reason than that time does not allow it. On that occasion, I spoke for about an hour from a prepared text.

However, the information in that speech, and the points I made there, provide much of the premise on which what I do have to say this afternoon is based. Accordingly, I propose to begin by giving you a thumbnail sketch.

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Judith McCormack is about to publish an excellent article on the appointments issues, and she has been kind enough to give me an advance look. The article focuses at one point on the difficulty of ***231** reconciling the government's need for accountability respecting issues handled by administrative justice agencies, and the agencies' role from the perspective of the agencies' clients as instruments of justice.

I agree with most of the article. However, the time may have come to ask whether, in point of fact there is any practical way to effectively reconcile, from a *justice* perspective, the inherent conflict between, on the one hand, the interests of the government of the day (and of its operational Ministries) in what administrative justice adjudicators decide — the basis for the government's need for accountability — and, on the other hand, the roles which that government and those ministries play in the appointment and re-appointment of those same adjudicators.

In short, in my view, the difficulty in reconciling the government's need for “accountability”, with the agency clients' need for justice — the reason it is so difficult to conceive of an effective means of reconciliation — arises from the fact that a structure involving a government with strong interests in the outcome of adjudicative decisions having discretionary powers to appoint and re-appoint the short-term adjudicators making those decisions, may not in point of fact *be* reconcilable with the needs of a justice system on any principled basis.

If one were to look hard at the past experience with the system, one would be likely to find, I believe, that in point of fact in Ontario the administrative justice system has only *ever* worked where governments have chosen not to exercise these powers, but have effectively delegated the selection and re-appointment decisions to the agency chair and have made what everyone understood were de facto tenured appointments.

The OLRB is such a case. WCAT is such a case. The Ontario Securities Commission, the Ontario Municipal Board, the Ontario Energy Board, and the Environmental Assessment Review Board, are as well.

On the other hand, when one thinks of the agencies which have been acknowledged to be dysfunctional — SARB in its bad days, for instance — one will see, I believe, that they are instances where the government was in fact exercising these powers by selecting adjudicators itself, not respecting the Chair's role, etc.

May we have, in point of fact, an administrative justice system structure that is *inherently*, fatally flawed?

***232** The current government has pushed that structure to its logical limits, overriding the soft conventions — respect for the neutrality of the chair, deference to chair recommendations on appointments and routine acceptance of chair recommendations on re-appointments — which have traditionally served to draw the sting from the government's conflicted position by effectively neutralizing its actual role in the appointments and re-appointments decisions.

These soft conventions have now been shown to be insufficiently robust for an environment of polarized politics.

In insisting on exercising all the powers the structure gives it, this government has pushed the structure's fundamental flaw to the forefront for all to see and, from a justice perspective, it seems just not to be an acceptable picture.

It is in my view, past time that we fixed the structure and made it one in which the needs of justice and a government's legitimate need to influence an agency's policy stance are truly reconciled on a principled footing. (At the very least, and in the short run, we need to find some way to get those soft conventions re-installed.)

How can we do that? Well, we will certainly have to be prepared to think new thoughts.

Bertrand Russell is reported to have said on some forgotten occasion:

> I think the essence of wisdom is emancipation, as far as possible, from the tyranny of the here and now.

If we were to emancipate ourselves from the tyranny of the here and now respecting appointments and re-appointments, we might consider whether government appointment and re-appointment of administrative justice system adjudicators is in fact an essential feature of an administrative justice system, notwithstanding that governments have been making such appointments for about fifty years.

We do not have far to look for precedents for non-governmental appointments. Take the United States, for instance. In the U.S. federal system, the counterparts of our administrative justice system adjudicators are appointed by The United States Office of Personnel Management pursuant to a statute-specified, competitive selection process. And, of course, in Ontario, we know that Insurance Commission arbitrators — whose responsibilities are really ***233** indistinguishable from WCAT vice-chair responsibilities — are simply hired by the Insurance Commission.

Naturally, such a devolvement of the appointments powers would destroy the government's ability to influence agency decisions. Accordingly, in the cases where such influence over agency decision-making can be shown to be necessary and legitimate — and I believe we all acknowledge that there are such cases (although, I also believe that we think there are more of such cases than an actual analysis would in fact discover) — we would have to devise other channels — overt channels — through which such influences can be appropriately exercised. But such channels can also be easily envisioned. [15]

I do not intend to specify a particular restructuring design today, time does not permit. I look forward, however, to the discussion.

4. THE ADMINISTRATIVE LAW, LABOUR LAW, AND WORKERS' COMPENSATION SECTIONS OF THE CBA-O

SPEECH TO A JOINT MEETING ON THE APPOINTMENTS ISSUE

November 25, 1997

Many of you, I expect, will be aware of [the jeopardy speech] on the subject of appointments. I do not intend to give that speech again. However, the conclusions in that speech are, I feel, especially important to this evening's topic, and I will take a proportion of my allotted time reviewing those.

I want to begin this evening, however, by addressing a prior question, a question on which we do not traditionally spend any time, assuming that everyone knows the answer. The answer to this question is, however, the essential backdrop against which any discussion of appointments must take place, and I am not perfectly sure that there is a consensus concerning that answer. I refer to the *quality* of independence that we want for administrative justice adjudicators.

A couple of weeks ago, the media was keeping us all posted on the Louise Woodward case — the U.K. nanny convicted by a ***234** Massachusets jury of the murder of an infant left in her care. As we know, before the sentencing, counsel for Woodward had applied to the trial judge to set the conviction aside, and, while the judge considered that application, media coverage of the widespread criticism of the murder conviction ran rampant.

So pressing was the public outcry, that in his reasons for his decision on defense counsel's motion the trial judge thought it necessary to clarify his response to this public pressure. In the process, he fashioned what struck me to be an eloquent and admirable statement of the quality of independence required of a judge. He said this: [16]

> The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible, inexorable, and deaf: inexorable to the cries of the defendant; "deaf as an adder to the clamours of the populace". His words ring true, 227 years later. Elected officials may consider popular urging and sway to public opinion polls. Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists, and talk shows. In this country we do not administer justice by plebiscite. A judge in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; indeed, whether or not his decision seems a surrender to the prevalent demands.

My prior question is this: if we would agree that this statement fairly expresses the quality of independence expected of a judge, do we also think that it fairly expresses the quality of independence we expect and require of an administrative justice adjudicator? Or, is there some lesser degree of independence that is wanted or expected in the administrative justice system?

Madame Justice Rosalie Abella with her usual turn of phrase and wit, in a speech to the CCAT Conference many years ago asked whether, since agencies [she was then the Chair of the OLRB] had been labeled by the courts as "quasi-judicial", might they also be thought of as quasi-independent.

In Ontario, I believe there have always been places in our system in which one could expect to find a rarely spoken but strongly felt intuitive view that *quasi*-independence is all that is wanted; places ***235** where it is deemed essential to have agency decision-makers in a status that leaves them sensitive at a visceral level to their ultimate vulnerability to some personal consequences if they take their nominally independent status too much to heart; places where the resistance to the discredited idea of fully tenured appointments has more to do with intuitive discomfort with the prospect of truly unrestrained independence of adjudicators, than with the other functional or operational concerns that are typically marshaled against that concept.

These places may be found, I believe, within the bureaucracies of ministries whose own decision-making is supervised by agencies, amongst the ranks of Ministers responsible for law and policy interpreted by agency decisions, and within industries regulated by agencies

Are they right in this? Are the ringing words of a John Adams in a murder trial out of place in a workers' compensation case? In a labour case? In a welfare case? In a securities case? Do we really want WCAT members, OLRB members, SARB members, OSC members, to be “deaf as adders” to the clamours of the populace, to the views or interests of the industry, of the Ministry, of the Minister or of the Premier? (Not counting, of course, those interests or views that are relevant to the decision being made and which the parties to the proceedings have had an opportunity to address.)

In my view, it is self-evident that we should want and do need decision-makers with that quality of unflinching independence — who, on factual finding and on interpretations of the law, are prepared to go, as the SOAR Model Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals requires, “wherever the evidence and law fairly takes them”, who are willing, as the trial judge says in *Woodward*, to follow their conscience “whether or not they are countering the manifest wishes of those they serve”.

In my view, on any list of priorities for an administrative justice system, accountability must stand a distant second behind independence.

Those are my views, and, I am now pleased to be able to report, apparently also the views of the Chief Justice of Ontario, who in his speech last week at COBA referred to independence in decision-making as “undoubtedly the most important principle in the justice system”, by which from the context it is clear he meant to include the *administrative* justice system.

***236** Those are my views, and the views of the Chief Justice, but do they represent a consensus? Are they your views?

In fact, I am not at all sure that there is a consensus on this question, and the point I am making is that before one can have a useful debate about the issues pertaining to appointments and re-appointments, it is necessary to be clear as to whether those debating these issues share common views about the quality of independence that is required.

I propose now to revisit the submissions made in my [jeopardy] speech.

.....

In whatever structure of appointments proposed, one can assume, I believe, that the principle of *tenured* appointments will not be acceptance. But in the absence of tenure, independent decision-making requires, in my view, as a minimum, a commitment to financial security for adjudicators. In my 1994 paper on Administrative Justice System Reform and the Term of Appointment Issue, I spoke to that need as follows:

> In the writer's view, it is also essential that the system's term-of-appointment policy provide, as a minimum, a structure of employment that will give, and will be seen to give, chairs and members viable security against the potentially negative career implications of controversial decisions.
>
> If we cannot contemplate offering the protection of tenured appointments, then, if our commitment to independent decision-making is to be at all meaningful, we must at least provide for a sufficient, financially secure period of career transition at the end of an appointment. This, in the writer's opinion, is the key. For it is in the degree of a chair's or member's confidence in their prospects for reasonable, post-term financial security that one will find their true capacity for independent, in-term decision-making.
>
> Accordingly, underlying the following policy suggestions is the conviction that, for adjudicators not re-appointed to their positions, a viable, term-of-appointment policy must provide — as a matter of right — a significant, predetermined, salary and benefits separation package that is sufficient to ensure financial security for the time it may reasonably take an ex-adjudicator to re-orient his or her career in the face of possibly alienated governments and/or disgruntled ***237** former colleagues or clients. [17]

Finally, may I commend for your consideration and for consideration by the three sections, SOAR's discussion paper on Principles for Appointments. It is a detailed proposal concerning the principles that ought to govern the appointments process, and it has been produced by a select, SOAR Working Committee whose members represented a range of interests. [18]

5. DRAMATIC DEPARTURES IN APPOINTMENTS POLICIES

PRESENTATION TO THE LAW SOCIETY OF UPPER CANADA CONTINUING LEGAL EDUCATION ADMINISTRATIVE LAW

DRAMATIC DEPARTURES IN A DOWNSIZING STATE

December 12, 1997

You have heard from Mr. Guzzo[19] about the work of the Agency Reform Commission. I should like to compliment Mr. Guzzo and his Commission on the quality of the Commission's Consultation Paper. It seems to me to be an excellent, balanced statement of the ***238** issues and of the possibilities that arise in the contemplation of reform in respect of agency process and procedures and agency administration. It is a document that with respect to that area of reform should prove to be of enduring value.

However, for a Commission devoted to reform of the regulatory and adjudicative agency system there are, in my view, two significant omissions. The Consultation paper concerns itself not at all with the issue of the independence of agencies, and makes no reference whatever to the appointments process.

The latter omission was expected since it had been known within the agency community that the appointments process had been excluded from the Commission's agenda. Fortunately, however, as Mr. Guzzo has indicated this morning, the appointments process has now been added to the Commission's agenda and the Commission is currently welcoming submissions on that subject. This announcement was made by Mr. Guzzo at the COBA Conference on November 21.

It is not surprising to see the appointments issue added to a reform agenda that is pre-occupied with performance and performance evaluation and with finding ways to do the work of the agencies more efficiently. Mr.Guzzo made the essential point at the COBA Conference when, in announcing the Commission's intention to now address the appointments issue, he referred to an aphorism used by a hockey coach of his acquaintance.

The coach's observation, as I recall Mr. Guzzo's rendition, was something to the following effect:

> If you've got the talent, it doesn't matter what the system is; if you don't have the talent, it doesn't matter what the system is.

Finding, attracting and keeping the talent has to be a primary goal of any reform of Ontario's administrative justice system.

The title of today's conference is “Administrative Law — Dramatic Departures in a Downsizing State”. Departures in the appointments policies to which I will be referring, while dramatic, have little, I think, to do with the downsizing of a state. Indeed, from a downsizing perspective they seem counterintuitive. If one were looking for ways to cause agencies to be more efficient and smarter,

the departures in the appointments policies reflected in recent appointment and re-appointment decisions would not be, I would respectfully suggest, the way one go about it.

***239** On September 24, I spoke to the Workers' Compensation Section of the CBA-O on the issues which I saw arising from the nature and pattern of government decisions concerning appointments and re-appointments at WCAT and at the OLRB during the spring and summer of 1997. A copy of that speech will be found in the conference materials. I will not be giving that speech here, but I will be making some references to it.

.....

To understand the scope and implications of the dramatic departures in the appointments policy since the change of government in June, 1995, it is necessary to have some appreciation of the departure point — what that policy looked like under previous governments.

In the first place, it is important to appreciate the significant progress that had been made towards a merit-based, *competitive* appointments regime in the Province of Ontario's administrative justice system in the decade prior to June of 1995. And, in that respect, I would commend to you an article by Judith McCormack, former Chair of the OLRB, entitled, *The Price of Administrative Justice*, to be published soon in the Canadian Labour and Employment Law Journal, [20] in which the history of that development is described in some detail.

Of course, in Ontario, there have always been some agencies (and in this respect I can only speak with personal knowledge about two agencies: the OLRB and WCAT) where there has always been a *de facto*, merits-based appointments strategy. The OLRB is the senior agency and the one with which probably the majority of people are most familiar and so I would invite you to have that Board in your mind's eye as I describe this traditional strategy.

The strategy consisted first of the selection as agency chair of a person who was well-regarded within the constituencies serviced by the agency as a knowledgeable and especially competent lawyer active in the agency's field of responsibility and in whose ability to perform the role of a neutral adjudicator the constituencies would have general confidence. His or her selection was made by the responsible Minister and the Premier's Office on the advice of the Deputy Minister after a process of informal consultation with the leading members of the agency's client constituencies.

***240** Then, with the Chair in place, the appointment of the other neutral adjudicators in the agency and their re-appointment was simply left to the judgment of the Chair.

His or her recommendations for appointment were not always accepted. Occasionally, the Minister or Premier's office would take exception to a particular recommendation. However, that was a rare event. And, when it happened, the Chair would be asked for another recommendation. No one

was appointed who had not been recommended by the Chair. And, by reason of the confidence which the agency's client constituencies had in the Chair's judgment and neutrality, and of the Chair's intimate understanding of those constituencies, people appointed pursuant to the Chair's recommendations by and large were found to be acceptable.

One must acknowledge, of course, that this was not a *competitive* selection process. Positions were not advertised, job descriptions were not made available, and people who became candidates for the positions were by and large people whose professional abilities happened to come one way or another to the Chair's attention.

However, this selection process *was* a merit-based system. Chairs learned very quickly how much trouble a mediocre talent or a closed mind in these positions could make for the Board and for the Chair. The Agency's reputation, the Chair's own reputation, as well as his or her hope for a quiet life, all depended on the quality — and the neutrality — of the people chosen for appointment to these positions. There was very little the Chairs regarded as more important than ensuring the quality of the appointments to their boards.

There was, of course, room in this appointments regime for some patronage influence. From time to time, the Chair would be advised by the Minister's office, or the Premier's office, or by the Deputy Minister of the name of a person who was interested in an appointment and whose credentials appeared to make them a candidate for appointment to the Chair's agency. The Chair would include these names on his or her list of potential candidates and when a vacancy arose would consider those names along with others.

I have no doubt that on occasion, when on the merits it was a relatively close call, a Chair would think it propitious to be able to recommend a name that had originated from those sources. However, those influences were very low key, and the predominant influence ***241** was the Chair's preoccupation with ensuring highly qualified appointments.

So far, I have been referring to the traditional practices respecting the selection and appointment of new people to vacancies on the Board. With respect to *re*-appointments, the tradition was *very* straightforward. The Chair's recommendations on re-appointments were simply always accepted. Furthermore, the experience was that, with this focus in the original selection process on merit, the Chair rarely had occasion to recommend against re-appointment.

As we know, prior to the downsizing at the Board in 1996, people appointed to the OLRB who, in the Chair's view, were meeting the Board's needs could expect to continue in their positions until they chose to leave, and many stayed until retirement age. These were, in fact, *de facto* tenured appointments.

It may also be noted that, prior to 1991, the tradition respecting the Chair was that once appointed he or she remained in the position until he or she decided it was time to do something else or was offered a different appointment.

Those of us old enough to remember the performance of the OLRB, or to have known of its reputation, through the '50s, '60s, '70's and '80's and those who are familiar with its work in the '90s, will readily confirm, I believe, that it has always been an agency whose objectivity was implicitly trusted and whose competence and wisdom was widely admired — in both the labour and management communities — even if, from time to time, particular decisions were criticized on their merits by one side or the other. It is also an agency with which it appears the governments of the day rarely had any serious difficulty.

WCAT is the other agency that I can personally confirm operated under this Chair-centred appointments regime, and while it is obviously impossible for me to be objective on the question of the extent to which that regime worked in WCAT's case, I believe there is objective evidence to suggest that under that regime the agency also earned a reputation for integrity and competence in both the worker and employer communities.

This Chair-centred model of an appointments regime is a model that bears emulating, in my opinion.

It was a regime that depended on what I have referred to in [the jeopardy speech] as three “soft conventions” — “soft” because they have not proven to be tough enough to survive a polarized ***242** political environment. The three conventions which I have already described were: (1) the government respecting the neutrality of the Chair's position, (2) the government deferring to the Chair's appointment recommendations, and (3) the government accepting as a matter of course the Chair's re-appointment recommendations.

It is these three conventions that effectively finesse the structured dependency of the Board that is otherwise inherent in the government's discretionary power to appoint and re-appoint the Board's neutral members.

Motivating the government's acceptance of these three conventions was, of course, the implicit acknowledgment that the Labour Board, while an instrument of government policy, was also an instrument of justice, and that both as an instrument of justice and as an instrument of policy it worked only to the extent that it was seen to be independent of the government and the government's supporters.

Regrettably, prior to 1986, this Chair-centred appointments regime pertained only to a handful of Ontario agencies. The Macaulay study of the system discloses that the majority of chairs were *not* consulted about appointments. And there were a number of agencies in which the worst excesses of

the patronage system of appointments were always thought to have had full sway. During my years as a storefront legal clinic lawyer, the Social Assistance Review Board (SARB) was considered, for instance, to be one prime example of this abuse of the patronage system.

One of the disadvantages of the non-competitive nature of the selection process in the Chair-centred appointments regime that I have just described, and of the reliance solely on agency chairs for the selection of people to be appointed to these agencies, is that, of course, the Chairs instinctively looked with most favour on people most like themselves — at that time, white males in the back half of their careers.

Moreover, one of the special advantages that the three soft conventions I have mentioned had going for them prior to 1985 was that they had never been tested by a change in government. The Conservative's 43 year reign never presented an occasion for a new government to contemplate what if anything should be done about *de facto* tenured appointees appointed by an outgoing government.

This, of course, first changed in 1985 when the Liberal-NDP coalition government came to power.

***243** That government, whose appointments policy was directed by Heather Peterson, had, as I came to understand them, four principal strategic goals as far as appointments to the regulatory and adjudicative agencies were concerned. One was to ensure the quality of appointments, the second was to change the face of the agencies to accord with the multi-cultural face of Ontario, the third was to particularly emphasize gender balance in the agencies, and the fourth goal which would serve the first three was to open the appointments process to the population at large.

That government also had a general respect for these agencies as instruments of justice, as did its successor, the NDP, and from 1985 to 1995 we experienced a steady extension of the application of the three conventions that traditionally had governed the OLRB, including, of course, the continued honouring of those conventions at the OLRB and at WCAT. This trend had been helped by the Macaulay Report's recommendation that consultation with Chairs should be an integral part of the appointments process across the system.[21] Some Ministries' opposition to a leading role for the Chair in the appointments process proved intractable, but in most Ministries a leading role for chairs in the appointment and re-appointment process became the norm.

Indeed, in the latter part of this decade a commitment to consultation with the agency chair before any appointments were made became a formal provision of a number of agencies' Memorandum of Agreement between the agency chair and the responsible Minister. This formal commitment was also included in the NDP's agency reform project's draft model memorandum which was one of the reform projects under way at the time the government changed again.

To make space for appointments that would serve its goals of changing the face of the agencies, the Liberal government adopted a formal, six-year maximum service policy. Pursuant to that policy, people who had served six years in an OIC position were not entitled to any further re-appointment.

This was a departure from the previous tradition of unlimited re-appointments subject to Chair recommendation, and one that, in my view, was a serious mistake from the agencies' perspective. However, ***244** it was not a limitation that undermined the independence of agencies since it was an objective rule, applicable to all. It is true that some agencies were exempted from the rule — the OLRB and WCAT, for two — but where the rule was applied, it was, for the most part, applied equally to all members of the agency.

The spread of the Chair-centred appointments regime also coincided with the beginnings of a *competitive* selection process.

With respect to agencies which the Liberal government saw as in need of major reform, more sweeping strategies were adopted and some of these you will find described in [the jeopardy speech]. For the Liberals, the flagship agency for these new approaches was the Social Assistance Review Board (SARB) and, there, it introduced, a formal, merit-based competitive selection process — the first, as far as I know, in Ontario history.

A job description was developed, and the positions were widely advertised in the multi-cultural media as well as in the mainstream media. The selection of people to be appointed to the positions were made through structured interview processes including written tests in which the Agency Chair was a principal participant. The Chair was not, however, the only participant. The interviewing committee included a representative from the Premier's Appointments Secretariat, a government human resources representative, and a person from another agency who was seen to bring a more objective agency perspective. Fifteen hundred applications were received, and 90 people were interviewed.

Of most importance was the fact that the government was committed to appointing the people selected by the committee. This was not, to the best of my understanding, a case of the Committee sending a list of recommended names to the Minister with the Minister reserving the right to reject names on the list or to ask for more names.

This competitive selection process was not formally imposed on other agencies. However, with this example in view, with the encouragement of the Appointments Secretariat, and with the example of a growing number of their colleagues in the administrative justice system, many of the other agency chairs began to resort to a similarly structured process. They did not, as far as I know, often duplicate the general advertising of the positions. (Although, this was not unknown. The OLRB, for instance, began advertising vacancies in its vice-chair positions in 1992.) Nevertheless, they took informal steps to make the agency's constituencies aware of vacancies and of the chair's

general ***245** interest in learning the names of potential candidates. The Premier's Office was also especially proactive in seeking out potential candidates from the various ethnic communities. All names put forward were then included in the selection process.

This move to *competitive*, merit-based selection processes continued through the regime of the NDP, and by 1995 the people appointed to fill vacancies on most of the major regulatory or adjudicative agencies were being selected on this basis. This was true at WCAT, at the OLRB, at SARB, at the Liquour Licence Board, at the Energy Board, at the Assessment Review Board, etc.

This was a major, historical reform with immense promise for the quality of our administrative justice system. Regrettably, it is one which seems largely to have gone unnoticed. Now, two years after the 1995 election, this reform has melted away.

Let me give you a detailed account of one of these competitive selection processes with which I am particularly familiar. In the Fall of 1994, it became apparent that there would be a number of vacancies to fill amongst the ranks of WCAT's part-time vice chairs — five vacancies in all. I advised the Premier's Office, the Minister's Office, the Deputy Minister and all of the union and worker and employer representatives on WCAT's Advisory Group of my intention to recruit up to five new part-time vice-chairs and asked for names of anyone whom they might see to be a potential candidate. By this time I was also receiving on a regular basis unsolicited applications from within the professional communities.

By the time we began the selection process, we had 90 candidates. We established a two-person selection committee — myself and a senior, part-time, female vice-chair. Through a review of the resumes we reduced the number to 60 candidates who had the credentials we were looking for. Those 60 people we interviewed in individual interviews that lasted an hour and half to two hours.

To prepare for that interview and as a basis of evaluation we asked each candidate to complete a take-home, time-limited exam involving the writing of a six-page decision on the basis of a fact situation that we gave them. We also gave them hypothetical, applicable law. We had stipulated that knowledge of workers' compensation law, while desirable, was not a condition of appointment, and we did not want to advantage those candidates with knowledge of the law.

***246** Before the interview, my colleague and I both marked the take-home exam. We then used the candidates written decision as the principal focus of the interview discussion. After each interview, we rated each candidate against a standard set of criteria, allotting number ratings in each criteria. When we had identified the best 10, we then interviewed their references. Only then did we identify the five we would recommend.

Prior to June 1995, and the election of the Conservative government, this was the type of selection process that was becoming commonplace — not uniform — but commonplace, and, increasingly, the norm in Ontario's administrative justice system.

Regrettably, it was not, however, true that the governments had abandoned the patronage approach to appointments. Neither the Liberals nor the NDP were prepared to commit publicly to a formal, competitive selection policy for adjudicative and regulatory agencies, and during both the Liberal and NDP regimes there were a handful of occasions where the governments felt the need to exercise their appointment prerogatives in pursuit of patent patronage goals. But these occasions were seen by those within the agency community as notable exceptions to what was rapidly becoming the norm of a merit-based, competitive selection process.

Unfortunately, in the absence of any explicit government appointment policy publicly commiting to merit-based competitive appointments, these exceptions were seen by those outside the community, and not privy to the new approach, as confirmation that it was business as usual in the patronage business. And, in due course, it became apparent that all those who accepted appointments to these agencies during this period had continued to be tarred with the patronage brush. The fact that their appointments had no political overtones but had resulted from their entering and winning a highly competitive, professional selection process made no difference.

That was the situation that prevailed in June 1995 when the government changed again. Since then everything has changed. What we are seeing today is the application to all Ontario agencies of an old-style patronage appointments regime, a regime that was and is commonplace with respect to many Federal agencies and one which we are told is found in most other Provinces. It is, however, a regime which many Ontario agencies have been free of for a number of years, and which some agencies, the OLRB and WCAT in particular, have never before experienced.

***247** It is important to acknowledge that this patronage policy is not based simply on the government's wish to use these appointments as rewards for its friends and allies. In the natural course of the application of this policy, many friends and allies do get rewarded by an agency appointment. However, that does not appear to be the primary, underlying motivation. Neither does it involve necessarily a disregard of qualifications. Many excellent appointments have been made, and the government continues to say that it is committed to appointing only qualified people.

What has changed fundamentally is the prevailing philosophy respecting administrative justice agencies. The Premier's office, where the controlling minds in the appointments apparatus are to be found, sees all of these agencies first and foremost as only instruments of government policy. The agencies' role as instruments of justice is now being disregarded.

The Premier's office does not appear to believe that there is such a thing as neutral adjudication. It appears to have embraced the concept of “our” neutrals and “their” neutrals to which I refer in my [jeopardy] speech. It has demonstrated that it regards anyone appointed to an agency adjudicative position by a previous government — particularly anyone appointed by the NDP — as “their” neutrals. And they appear intent on replacing such appointees as quickly as consideration of

efficiency concerns will permit, with “our” neutrals — that is, with friends of this government, to use the government's own terminology.

The necessary corollaries of that shift in philosophy include dispensing with the conventions which heretofore reconciled the conflict between the government's appointments powers and the agency's need for independence from the government — the conventions to which I have earlier referred: respect for the neutral role of the agency chair, deference to the chair's recommendations in the appointments process, and unquestioned acceptance of Chair recommendations concerning re-appointments. Three of these are now gone, or are substantially undermined.

This change in the appointments philosophy may be traced in a number of events which have left a public record.

The SARB appointments in October 1995 were the first public indication of the new government's approach to appointments. Four new members were appointed to SARB without any consultation with the agency chair. Three of these appointees had previously run ***248** unsuccessfully for election under the Progressive Conservative banner. They replaced four members who had been appointed through the competitive selection process previously described, but whose re-appointments had been refused because the Ministry of Community and Social Services had required a downsizing of SARB's budget.

These appointments were the subject of a number of exchanges during Question Period in the Legislature but the indication of the government's philosophy on the role of agencies may be seen most clearly in the following response by the Minister of Community and Social Services as reported in Hansard on October 11, 1995:

> These appointments were done on the basis of principles not politics. We wanted individuals who would take a tough stand on welfare and welfare fraud.

The Premier's comment, as reported in the Globe and Mail on October 12, is equally instructive. Mr. Harris is reported to have said, with reference to one of the appointees, that she had been selected not because she was a Conservative but because she agreed with the government's position on welfare. The Globe and Mail's direct quote was: “Whether she's a Tory or not is not as important as her belief that welfare should be a hand-up.”

Most of you here will probably also know of the various appointments-related controversies that arose with respect to OLRB appointments prior to the August 1997 re-appointments decisions to which my [jeopardy] speech refers. They have been the subject of recent court decisions. See

Hewat v. Ontario [22] and, also, *S.E.I.U. v. Ontario Realty Corp.* a decision of Lederman J., dated September 5, 1997, which is, I think, so far unreported. [23]

The latter case is particularly interesting as perhaps some indication of the type of challenge that we may expect to see more often under this new appointments regime. It arises out of an application by Local 204 of the Service Employees International Union to the OLRB asking the Board — that is, the whole Board, all of its members — to resile from hearing the union's complaint against the government. This application had been brought on the grounds that the environment created by alleged instances of government political ***249** interference or threatened interference in the Board's appointments had given the union reasonable cause to believe that the Board would be unable to impartially decide a union complaint against the government.

Along the same lines was a recent application to a judge of the Ontario Court General Division for judicial review of a decision of the License Suspension Appeal Board. The case is *Muscillo Transport Ltd. v. Ontario (Licence Suspension Appeal Board)*. The decision of Madame Justice Chapnik dismissing the application was released July 23, 1997. [24]

In *Muscillo*, the License Suspension Appeal Board had confirmed an order of the Registrar of Motor Vehicles canceling the operating permits for all trucks owned by the applicant trucking companies. All of these companies were owned by the Muscillo family. As the Court found, the precipitating incidents for the Registrar's action in canceling the permits had been two accidents involving the applicants' trucks in August, 1996. One had been particularly tragic, involving a runaway gravel truck owned by Muscillo Transport Limited crashing through a townhouse, killing a woman and injuring her two sons in the basement of their home.

Muscillo applied to have the Court set aside the Board's decision on the grounds, *inter alia*, of a reasonable apprehension of bias arising from the presence on the Board's hearing panel of a member who had been appointed to the Board in January 1996 on the recommendation of the Minister of Transport. The applicant argued that the Minister had a special political interest in having the Registrar's decision in this matter upheld. And, in the circumstances where the panel member in question had been the membership secretary in the Minister of Transport's own Riding Association until, as the court found, six weeks before the Panel began hearing the applicant's appeal, the applicant asked the court to find that there were reasonable grounds for doubting the impartiality of the hearing panel.

The application was not successful. However, the decision of Madame Justice Chapnik provides a very useful review of the applicable jurisprudence. That she may not have been personally entirely satisfied with where she thought the existing law took her on this occasion may also be seen from the fact that she saw fit to include in her reasons excerpts from three different reports respecting the ***250** appointments issues. One was from the 1968 report of the McRuer Commission, another from the CBAO's submissions to the Premier of Ontario in 1988, and the third from the 1990

Canadian Bar Association Task Force Report on the Independence of Federal Administrative Tribunals and Agencies in Canada.

The passage she quoted from the 1988 CBAO submissions to the Premier of Ontario reads as follows:

> It is beyond the scope of this committee to decide when matters should shift from a government department to a tribunal. But this committee believes strongly that once government has elected to establish a tribunal and entrust adjudicative authority to that tribunal, it is obligated to the public to *appoint members of that tribunal without regard for partisan considerations and provide those members with terms and conditions of employment that ensure that well-qualified individuals are willing and able to serve*. (The emphasis was added by Madame Justice Chapnik)

That brings me to the re-appointment decisions and appointment decisions at WCAT and at the OLRB in the spring and summer of 1997 which were the principal focus of my [jeopardy] speech which you will find in the Conference Materials. You will find the detailed facts in that speech.

I will now summarize the submissions I made in my [jeopardy] speech.

.....

In that speech, I also attempted a summary of the legal principles at play in this regard, and in his COBA address last week, Chief Justice McMurtry, was kind enough to refer to that summary. The Chief Justice also made a number of other points that are germane to this morning's topic and I should like to take an extra moment here to read to you some of the especially pertinent passages from that speech.

> It is for this reason — the potential enormity of the impact of decisions of administrative justice system agencies on people's lives, particularly the lives of the poor and disadvantaged in our society — that the actual and perceived independence and the actual and perceived fairness of our administrative justice system agencies must be seen to be fundamental to the rule of law and to the health of our society. Independence and fairness are the bulwarks of the rule of law and the essential counterweights to the always understandable push for more efficiency.

> ***251** Independence means, of course, having administrative justice agencies and their adjudicators so positioned and organized that they see themselves and are seen by others as being free to decide undeterred by outside influences or fear of personal consequences.
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> ...
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> Before concluding I should like to make some brief comments on the Ontario Government's Consultation Paper on the Reform of Ontario Regulatory and Adjudicative Agencies which was released in September. As most of you will know, it covers the wide spectrum of issues and challenges facing administrative justice, including:
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> Screening; streaming; alternative dispute resolution; case management prior to the hearing; form of the hearing; size of hearing panel; improving the hearing; decisions and reasons; finality of decisions; costs of the parties; paying of hearing costs and other tribunal expenses.

It is an important document and appears sensitive to the need to "achieve the objective of a faster, simpler and more cost effective system."

> The consultation paper is generally quite comprehensive but curiously in my view makes only one brief reference to independence in decision-making, which is undoubtedly the most important principle in the justice system.
>
> Fundamental to a high level of administrative justice is the requirement that tribunals be seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way which reflects respect for their independence. If appointments are made for short terms and poorly remunerated with no security of tenure, this could invite in

> the appointees either a passive commitment or create a deterrent to courageous judgment calls. It is clearly essential that the collegial internal tribunal environment be not dominated by fear of non-renewal.
>
> In my view, the legal principles were accurately stated by Ron Ellis in his address to the CBAO in September, entitled An Administrative Justice System in Jeopardy, which he referred to as follows:
>
> 1. Issues involving legal rights and obligations can at law only be validly determined by adjudicators who are independent and impartial and whose circumstances do not provide any reasonable basis for an informed observer to think otherwise.
>
> ***252** 2. The confidence of the adjudicator, and of the parties, that the adjudicator is free to make a decision in their case without fear of personal consequences is a fundamental prerequisite for any independent and impartial adjudication.

The problem of appointments is, of course, not unique to tribunals. One does hear skepticism over judicial appointments, citing suspicions over qualifications or merit. However, there is a fundamental difference in the judge's security of tenure. Whatever the potential or intellectual origins of appointments to the bench, one expects that with the assumption of office the judge will execute his or her role independently and free from fear of idiosyncratic removal. Decisions are expected to be made in accordance with impartial criteria subject to the adjudicator's conscience and view of the law. I am confident that this is probably also the way tribunal adjudicators see their role. It is vital that the public perceive their role in the same manner.

The phrase “idiosyncratic removal” as used by the Chief Justice in the above passage is new to me. As far as I know, it was coined for the purposes of that speech. In any event, it is a phrase which perfectly captures the type of re-appointment decision-making that occurred at WCAT and the OLRB this summer and to which I have taken exception. Adjudicating free from fear of idiosyncratic removal is obviously an essential pre-requisite if there is to be any claim to impartial decision-making.

As mentioned in my [jeopardy] speech, I take strong exception to both the legitimacy and viability of a "replacement" appointments policy for a new government. Moreover, I deplore the apparent acceptance of the concept of "our" neutrals and "their" neutrals as reflecting either an implicit reality or a legitimate vision of administrative justice adjudicators. The suggestion of Mr. Harris and the Minister of Community and Social services in the fall of 1995 that an important selection criteria is the assurance that in adjudicating disputes about legal rights and obligations a government-appointed adjudicator will be biased in favour of the government's view of matters, is not, I would respectfully suggest, compatible with the role of an adjudicator deciding other peoples legal rights and obligations — whether it be in an adjudicative agency or a so-called regulatory agency.

If the criterion that governed the October 1995 SARB appointments were to receive general acceptance within the profession ***253** and continue to be government policy, then we move into an era in which no agency will be credible in the eyes of the persons dependent on it for resolving disputes about legal rights in which some interest of the government or its friends is at stake. The consequences for the attitude of the general populace towards the very idea of justice in our society are incalculable.

Well how is all this relevant to practitioners?

In the first place, as a practical matter, you should be boning up on the law of bias and conflict of interest. You and your opponents are going to find a whole lot of opportunities to use that law.

Secondly, if nothing can be done to reverse this appointments policy, you should begin considering the implications for your practice of a serious deterioration in the quality of the work of the agencies before whom you practice.

The consequences of these new appointments policies are sure to include the following: short-term appointments; complete uncertainty respecting re-appointments even if the government of the day is re-elected; the lack of any financial security when the uncertain term ends without notice; the inability of chairs to provide the necessary leadership or protection; the disappearance of the kind of commitment to relevant qualifications and merit that a responsible chair can bring to the selection process, and which a distant, Minister or Premier's office is unable to; the professional disrespect for appointees and ultimately for the agencies themselves that inevitably accompanies this type of appointment system (and the non-competitive compensation packages that result from that disrespect).

All of these consequences will combine to make these positions unattractive to serious and talented people, will erode the experience base of the agencies, eventually make them unmanageable in any meaningful sense, and, eventually, destroy their credibility as the source of justice in the eyes of the public.

Finally, as a responsible lawyer, you should be thinking about what you can and should be doing about this situation.

I recommend to your attention the resolution passed by the CBAO's Labour Law Section at its meeting on October 28, 1997. At that meeting the Section decided to request a meeting with the Minister of Labour with respect to the following recommendations regarding appointments and re-appointments to the OLRB:

> 1. That the normal term for OLRB appointment should be increased from three to five years;
>
> ***254** 2. That Vice-Chairs (and the Chair and Alternate Chair) should serve the entire term, subject to removal for cause;
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> 3. That Vice-Chairs (and the Chair and Alternate Chair) should be automatically re-appointed to subsequent terms, subject to a decision not to re-appoint for cause;
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> 4. That there should be reasonable notice of the decision not to re-appoint, which should be set at no less than six months; and
>
> 5. That there should be a consultative process entrenched so that the Chair of the OLRB and the labour relations community (which would include the CBAO Labour Law Section as well as recognized groups which represent the views of labour and management) would be the driving force, in consultation with the government, behind appointments and removals or decisions not to re-appoint. To this end, a Consultative Committee should be struck.

See, as well, The Canadian Institute for the Administration of Justice's new Tribunal Governance Protocol Project. [25]

The new SOAR appointments policy proposal [described above] ... also makes an important contribution to any discussion of an appointments policy.

See also SOAR's Principles of Administrative Justice — the “little green book” referred to by the Chief Justice. [26] These were released in June 1995, after a long consultation process. Of particular interest to the subject of my speech to-day is Principle Number 3 for Adjudicators and Staff (at page 21):

> Administrative justice requires that adjudicators be independent in their decision-making, and that adjudicators and staff be free from improper influence and interference.

***255** The “Commentary” which accompanies that statement of the Principle is also of special interest in this context. It reads:

> Independence is the ability to make decisions free from external pressures and without fear of personal consequences, including reprisals. Decisions must be based on facts, evidence, expertise, and properly delegated discretion. Independence allows for sufficient freedom to structure the process, consistent with the legislation, fairness and natural justice and to deal with the matter placed before the adjudicator. Adequate funding as well as the control and management of resources are integral to the independence of the decision-making process. Independence is not the opposite of accountability, but should instead be recognized as a necessary feature and precondition for accountability.

> A person who comes before the tribunal must feel confident that the person to whom he or she presents the case will be the one making the decision. Acceptance of the value and integrity of the system depends upon the existence of public confidence. The adjudicator is the intermediary between the state (which recognizes, allocates and enforces rights, duties and benefits) and the individual. The respect that is accorded to this exercise of the power of the state is based to a large degree on adherence to accepted values, including fairness and freedom from improper influence. The further advantages of independence are that individuals

> and society are more likely to accept the decisions; predictability is enhanced since unseen influences and pressures do not affect the decisions.

I should not close these comments without acknowledging some recent indications that the government's current appointments policy may be in the process of some revision. The Agency Reform Commission's decision to now address the appointments question and to welcome submissions on that issue is a promising development. Whether moderate views on the appointments issues are capable of eventually prevailing over the existing policy of the appointments apparatus in the Premier's office remains, however, to be seen.

One especially positive piece of news that I have recently heard is that it is thought that appointments to the new tribunal being set up under the *Tenants Protection Act* are to be selected through a competitive appointments process. If that proves to be a reliable news item, then we will indeed have reason to hope for the re-emergence of a progressive policy.

*256 6. CONCLUSION

In the foregoing speeches, I failed, despite their length, to address one ubiquitous, but mischievous concept that should not, in this context, be left unnoticed. It is a concept frequently found marshaled in defence of the patronage system of appointments. The omission struck me while I was considering a column by Claire Hoy in the February 16 -22, 1998, issue of the *Law Times*.

Hoy's column is headed: “Patronage Primer.” It appeared shortly after the Chief Justice's COBA speech had been reported in *The Toronto Star*,[27] and is focussed on disparaging the very idea of an independent administrative justice adjudicator.

The tone and direction of the column may be seen from the comment directed at the two principles which the writer had set out in his jeopardy speech and which, in the part of the address reported in the Star, the Chief Justice had quoted with approval.[28] “All that sounds very nice,” Hoy wrote, “but in reality, it's a crock.”

That Hoy, a professional columnist with presumably a commitment to responsible comment, could so characterize such bedrock principles might be thought to be a particularly sobering measure of how far the toleration of past abuses of power concerning adjudicative appointments in the administrative justice system has taken us. However, the ill-considered nature of that comment is clear and there is no point in dwelling on that here.

The part of the column that made the writer realize that in these speeches he had omitted an important issue appears at the end where Hoy closed with the following, rhetorical question:

> ... if I were asked to chose between two qualified people — and that's the key, they must be qualified, or it is an abuse — and one supported me and the other didn't, I'd pick the one who supported me every time.
>
> Who wouldn't?

It will be remembered that the subject here is the appointment of adjudicators who are to be given the power to decide other people's legal rights and obligations. I will save for another day the ethically challenged nature of Hoy's answer in that context, but what struck me ***257** particularly on this occasion was the implicit premise in the question. It is a premise on which one finds the defence of the patronage system of appointments commonly based and one that, once accepted, has very serious implications for the quality of the administrative justice system.

I refer to the premise that there is a set of standard qualifications for an administrative justice agency position such that the appointment of *whomever* conforms to that set is by definition an appropriate appointment from an abilities perspective. (This seems more realistic than the other possible version of Hoy's underlying premise: that is, that it is commonplace to find people whose qualifications for appointment are in fact equal.)

In point of fact, one knows that in any normal organization a specified set of standard qualifications is useful only for screening out people who will clearly not be able to do the job. In the real world, being “qualified” only gets one an interview.

We also know that at the interview stage and beyond there are no “equally qualified” candidates. One candidate is bound to be better for the position than the other — more relevant experience, better abilities, better skills, more energy, a better “fit”, whatever. A recruiter may fail to discern the better candidate, and may have difficulty making a choice, but he or she knows that one of the candidates is better, and the inquiry into whom is better is not abandoned until the decision is made. The future success of a normal organization depends not on hiring “qualified” candidates, but on its success rate in attracting better qualified candidates and in discerning who is the *most* qualified candidate.

Thus, at the point at which the decision to hire a new employee is being made in any normal organization, the question is never whether the candidate is “qualified” but always whether he or she is *better* qualified than others who might be chosen.

In Hoy's rhetorical question, the issue as to which of his two people (both of whom are "qualified") is the *better* candidate for the position is not addressed. If Hoy were thinking about the real world, he would come clean in his rhetorical question and explain, not that the two people are both qualified to be *appointed*, but only that they are both qualified to be *interviewed*. Once that piece of realism is added, then in response to the question: If one of the candidates is a supporter whom would you choose? I would answer: "I'd pick the one ***258** who showed best in the interview and had the most positive references. Wouldn't you?"

It is the essence of a patronage system of appointments that at the point of decision — to appoint or not to appoint — that question: "Have we got the best candidate?" and that thought: "Let's wait for the interviews and references", are never in play. In a patronage system, when at the end of the day the question is finally asked: "Is this candidate qualified?", what is meant, bottom-line, is: "Are we at least satisfied that in the real world he or she would qualify for an interview?" This is not to say that competent candidates do not get chosen, but it does mean that with reliance on standard qualifications and without commitment to the search for the better candidate, the chance of appointing candidates of marginal competence is high and of appointing truly excellent candidates is low.

Over time, this renouncing of any commitment to finding the better or best qualified candidate dooms organizations afflicted by a patronage system of appointments to mediocrity and turmoil. We know from experience that this is true in the business world, we know it to have been true, historically, in the public service, and we also know that it has been proven time and again to be true in the agency world.

The recurring attempts to purge the patronage system for appointing administrative justice adjudicators of its inherent venality by assurances that only candidates who are "qualified" will be appointed are delusional, whether intended to be so or not. As a standard for appointment, "qualified" is not nearly sufficient, and where agency competence and excellence are of such pressing practical importance to us all, and where the quality of justice remains the hallmark of a society's essential civility, why do we — how can we — continue to justify this pretence to the contrary?

Thank you for your attention. I hope these materials may have provoked some interest and thought.

Ron Ellis

Toronto, Ontario

March 1998

Footnotes

a1 The author was the founding chair of Ontario Workers' Compensation Appeals Tribunal (WCAT) from October 1, 1985, to July 1, 1997. He was also the first President of the Society of Ontario Adjudicators and Regulators (SOAR), 1992 to 1996.

1 To avoid confusion, it is important to note that these appointment and re-appointment decisions at the OLRB are not the mid-term terminations that provoked the litigation in *Hewat v. Ontario* (February 27, 1998), Doc C27352 (Ont. C.A.). The latter terminations occurred in October, 1996 — about 14 months earlier than the ones referred to here.

2 See the following articles: by Michael Valpy, headed: A disturbing erosion of democratic safeguards, *The Globe and Mail*, Friday, December 19, 1997, at page A27; by Jonathan Eaton, headed: Questions growing on picks for tribunals, *The Toronto Star*, Monday, December 22, 1997, at page D1; and by Ian Urquart, headed: Power play beneath the surface, *The Toronto Star*, Saturday January 24, 1998, at page B5. Also, on Tuesday, February, 3, 1998, on its editorial page *The Toronto Star* printed excerpts from McMurtry's address under the heading “Tribunals bring justice to the people”. The excerpts were introduced by an editorial lead which referred particularly to the Chief Justice's reference to the need to protect members of tribunals “from fear of idiosyncratic removal”.

3 Mr. Garry Guzzo, M.P.P., Ottawa-Rideau. The Members of the Commission are: John Baird, M.P.P, Nepean, Parliamentary Assistant to the Minister of Finance; Bill Grimmett, M.P.P., Muskoka-Georgian Bay, Parliamentary Assistant to the Chair of Management Board; and Gerry Martiniuk, M.P.P. Cambridge, Parliamentray Assistant to the Attorney General. Hon. James Flaherty, M.P.P., Durham Centre, was a Commission member untill October, 1997, and was subsequently appointed Minister of Labour.

4 This first speech was previously published in the Canadian Labour & Employment Law Journal (1998), Volume 6, Number 1, pp. 53-75, and is republished here with the kind permission of the editors of that Journal.

5 The Tribunal Chair is appointed for three-year terms. Ellis had been re-appointed by the Liberal government in 1988, and 1991 and by the NDP in 1994. When the current government confirmed that it would be appointing a new chair, Ellis agreed to facilitate the transition by leaving at the end of June, 1997, three months before the term of his current appointment would have otherwise expired.

6 Ellis, *Administrative Justice System Reform* (1996), 10 C.J.A.L.P 1.

7 Unpublished transcript of proceedings in the 1996 Conference of Ontario Boards and Agencies.

8 The Globe and Mail, May 9, 1990.

9 Toronto Star, January 6, 1994.

10 In the Matter of the Mental Health Act, R.S.O. 1990, Chapter M-7 And In The Matter Of JS, A patient in the Penetanguishene Mental Health Centre, Penetanguishene, Ontario — a decision by Michael Bay, Acting Chairman of the Panel of the Review Board having jurisdiction for Penetanguishene Mental Health Centre, dated at North York, March 25, 1994.

11 The Globe and Mail, October 7, 1994.

12 (1996), 10 C.J.A.L.P. 77.

13 The firing received broad media coverage. See, for example, the March 9, 1995, Toronto Star report by Leslie Papp of the Star's Queen's Park Bureau.

14 I should, in fairness, emphasis here that the Chair selected by the NDP government was a highly qualified natural candidate for the Chair position with a number of years of exemplary service as a full-time Labour Board Vice-Chair and previous extensive experience as labour counsel. She would have been a leading candidate to fill a vacancy in the position under any circumstances.

15 For some concrete suggestions in that respect, see Ellis, *Restructuring the Administrative Justice System: The Provincial Tribunal*, (1996), 10 C.J.A.L.P. 175 at pp. 203-204

16 *Commonwealth of Massacheusetts v. Woodward*, Judgment of Judge Hiller B. Zobel in the Massacheusetts, Middlesex Superior Court, November 11, 1997.

17 (1996), 10 C.J.A.L.P. 1 at 19

18 Chair of the Committee: Grace Patterson, Chair of the Environmental Assessment Review Board. Members: Christopher D. Bredt, Chairman, Administrative Law Section, CBA-O; Professor John Evans, Osgoode Hall Law School, York University; Michele Fuerst, President, CBA-O; Professor Ian Green, Dean, Faculty of Arts, York University; Sylvie Kissin, Chair, Licence Suspension Appeal Board; Elizabeth Klassen, Clinic Director, Scarborough Community Legal Services; Robert D.M. Owen, Vice Chair, Ontario Municipal Board; Margot Priest, Consultant, Regulatory Consulting Group; Andrew J. Roman, Partner, Miller Thomson; Professor Richard Simeon, Department of Political Science, University of Toronto; Barry S. Smith, Member, Assessment Review Board; and John Swaigen, Director, Quality Assurance Program, Ontario Legal Aid Plan.

19 The Chair of the Agency Reform Commission was also a participant in this Law Society program and his address had preceded mine.

20 (1997), 6 C.L.E.L.J. Volume 1.

21 Directions (Toronto: Queens Printer for Ontario, 1989). The Report by Mr. Robert Macaulay on his review of Ontario's Regulatory Agencies.

22 See footnote 1, above.

23 This case has since been reported at (*sub nom. S.E.I.U., Local 204 v. Johnson*) (1997), 151 D.L.R. (4th) 255, 35 O.R. (3d) 345 (Gen. Div.).

24 (1997), 149 D.L.R. (4th) 545, 28 M.V.R. (3d) 146 (Ont. Gen. Div.).

25 A project of the C.I.A.J's Administrative Tribunals Committee, under the direction of Professor Nathalie DesRosiers.

26 The Principles were written by the SOAR Working Committee on First Principles chaired by Brian Goodman, then Chair of the Rent Review Hearings Board. The Committees members were: Professor Harry Arthurs, Osgoode Hall Law School; Peter Hoy, Consultant, Ministry of Citizenship; Mary McCormick, Vice Chair, Assessment Review Board; Ivana Petricone, Director, Rexdale Community Legal Clinic; Margot Priest, Chair, Ontario Telephone Service Commission; Herb Sohn, Chair, Child and Family Services Review Board; and Tom Wright, Ontario Information and Privacy Commissioner.

27 See footnote 2 above.

28 See above at page 251.

11 CJALP 205

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