CCAT 2nd International Conference, Quebec City, June 20, 2001

Training Workshop
LOOKING OVER THE SHOULDERS OF ADMINISTRATIVE LAW JUDGES

Text of Workshop Panel Presentation by Ron Ellis

The topic for this panel to-day, as I understand it, is basically how – and also perhaps whether – a tribunal may appropriately manage the quality of the performance of its members particularly in the light of their autonomous and independent status. The question is posed from the perspective of the tribunal's management – typically the Chair.

I propose to begin by addressing some issues presented by the label *Administrative Law Judge* in the title of this workshop – "Looking over the shoulders of Administrative Law judges" – and, indeed, by the general use of the *administrative law judge* label in this conference overall.

My first problem is that, in Canada, we do not have anything resembling "administrative law judges". Actually, that is no longer entirely true, since under the new legislation in Quebec, it may be arguable that we now have there the near equivalent of administrative law judges.

The "administrative law judge" label has its origin, as I understand it, in the United States' federal administrative law system, and, in particular, in the 1946 U.S. Administrative Procedures Act. And the use of this label in the Canadian context has misleading tendencies, to say the least.

Furthermore, for those of you in the audience whose perspectives on administrative justice adjudication may have been shaped by the American system, the discussion during this program – where, in the nature of things, the Canadian experience is likely to be dominantly reflected – will be more than somewhat confusing unless you begin with some appreciation of the fundamental differences between the American concept of an *administrative law judge* and the Canadian concept of a *tribunal member*.

In the Canadian context, the word "agency" also connotes something quite different than it does in the American context, and that difference needs to be understood as well.

Accordingly, I thought it would be important, as the first speaker, to take a few minutes to outline the principal differences in these concepts between the Canadian and

American administrative justice systems. I also find that looking at our Canadian structures through the prism of the American experience is a particular help in clarifying some of the performance management issues. And, for those from other jurisdictions, this comparative analysis will, hopefully, also assist you in understanding how the Canadian concepts compare with your own structures and traditions.

I hasten to say that I claim no expertise in the American system, and propose only to provide a brief description which I confess to having lifted directly from the *Program Handbook for Administrative Law Judges*, published by the United States Office of Personnel Management in 1989, as that handbook is illuminated by Administrative Judge Ann Marshall Young's paper *Judicial Independence in Administrative Adjudication: Past, Present and Future*, delivered at last year's CCAT Conference in Ottawa[1].

I have not attempted to update the 1989 handbook but I believe it is reasonable to infer from Judge Marshall's paper that while there is much ongoing debate concerning possible reforms to the system, and much in practice that may not be entirely consistent with the integrity of the system, the federal system remains much as the 1989 Handbook describes it.

In comparing the Canadian and American systems, the word "agency" is a particularly confounding element.

Canadians use the word "agency" interchangeably with the words, "boards" and "commissions", and more recently the word "tribunal" has become increasingly the Canadian generic label for any administrative law *agency*, *board* or *commission*. But, in Canada, all these labels, including "agency", are applied for the most part to institutions that are significantly different from the typical U.S. Federal administrative law "agency" – and, one gathers from Judge Young's presentation yesterday[2], also from the typical State "agency".

In the United States, federal *agencies* are political instruments to which the U.S. President delegates his political powers in certain areas of social or economic policy. It is the agencies who largely decide the policy to be applied to the area within its jurisdiction and it is the agencies that write and promulgate the regulations that are necessary to give effect to those policies.

And, like other political institutions, when the government changes – a new President is elected – the chairs and executive members or commissioners of all federal agencies are replaced as a matter of course by appointments of the new President.

The comparable institution in the Canadian system is not, as one is, I think, rather prone to assume, our *agencies*, *boards* or *commissions* – or, as we now call them, *tribunals*. No, the Canadian institution that seems most comparable to the American

---

[1] Originally printed in THE ABA JUDGES' JOURNAL, Vol. 38, No.3 at 16 (Summer 1999).
[2] A presentation based on her paper, *Evaluation of Administrative Law Judges: Premises, Means*, and Ends, Volume XVII, Journal of the National Association of Administrative Law Judges, Spring 1997, at page 1.

"agency" is the tribunal's host, government *Ministry*, headed by a "Minister" who is an elected member of the legislature and who has been appointed by the Premier to be the political head of the Ministry. Ministers are, of course, members of the cabinet.

When I say the "*host* government Ministry", I am referring to the Ministry that is charged by statute with the care and feeding of the tribunal. In our system, that Ministry is also typically the Ministry whose administrative decision-making the tribunal has been created to supervise. A typical example in Ontario is the Ministry of Community and Social Services which is the host Ministry for the Social Benefits Tribunal. The Social Benefits Tribunal hears appeals from decisions on welfare entitlement that are made originally by staff of the Ministry.

In Canada, it is *Ministry* staff that provides the expertise and administration on the development of policy comparable to that provided by U.S. agency staff, and it is the *Minister*, assisted by a personal political staff, as well as by the Ministry staff, and in conjunction ultimately with the Cabinet, who performs the function that the chair and executive members of a U.S. agency typically perform – that is, deciding the policy that will be applied, and writing and promulgating the rules and regulations that are deemed to be necessary to implement that policy.

The fit between the functions of a typical U.S. agency – headed by a chair and executive members or commissioners – and the functions of a typical Canadian Ministry – headed by a cabinet minister with the support of the cabinet – is not, of course, exact, certainly not in every case. However, generally speaking, the U.S. *agency chair* - Canadian *Minister* fit is typically close enough to be a helpful comparison for purposes of to-day's discussion.

Well, then, you will be wondering, if it is the Canadian *Ministries* that compare most closely to the U.S. *agencies*, to what do the Canadian *tribunals* most closely compare?

The answer to that question – and, for those interested in understanding what will be said from this platform this morning, this is a very important concept to understand – is that the *tribunals* compare, not to the U.S. *Agencies*, but most directly to the U.S. system's *administrative law judges*.

Canadian tribunals are principally corporate, judging institutions. Their corporate, institutional assignment is primarily the same as the individual assignments of administrative law judges in the U.S. federal system. That assignment is to hear and determine factual and legal disputes arising from the application of, in the U.S., the Agency's, and, in Canada, the Ministry's, policies, law and regulations.

Canadian tribunal members are members – or agents – of a judging entity, they are not the judging entity themselves. And, on the subject of performance management, this is a distinction that makes a world of difference.

The relevance and significance of the understanding that the appropriate comparison in terms of functions is not between U.S. agencies and Canadian agencies, but between U.S. *agencies* and Canadian *Ministries*, and not between the U.S. administrative law judges and our tribunal members, but between the U.S. administrative law judges and our tribunals, becomes very clear when we turn to compare the status in the two systems of the U.S. *Administrative Law Judge* and the Canadian *Tribunal Member*.

In the U.S. federal administrative law system, the administrative law judges are centrally recruited and appointed through a rigorous, statute-mandated, highly competitive selection process administered by the U.S. Office of Personnel Management through its Office of Administrative Law Judges.

To be qualified for consideration, candidates must be lawyers and must have a minimum of seven years of administrative-law or court hearing experience, must file a list of 10 significant administrative law or litigation cases in which they have been involved, and a copy of one brief, or memorandum or decision which they have written in the course of their experience.

Then, if they are found to have met the minimum requirements, they must then submit a "Supplemental Qualifications Statement" in which they describe the scope, complexity and impact of their experience in the areas of:

(a) Rules of evidence and procedures
(b) Analytical ability
(c) Decision-making ability
(d) Oral communications ability and *judicial temperament* (emphasis added)
(e) Writing ability.

Next, applicants who receive a satisfactory minimum score based on the quality of their experience as described in their Supplemental Qualifications Statement are then eligible to participate in the following final rating process.

First, they provide a written demonstration of their ability to prepare a clear, well-reasoned decision of the type they might be expected to write if employed as an Administrative Law Judge. The written demonstration is administered by the Office of Personnel Management at a site adjacent to the applicant's home and takes about six hours to complete.

Next they submit to a panel *interview* designed to gauge the applicant's abilities to: 1. Deal with people, 2. Communicate orally, 3. Make decisions and 4. Analyze and evaluate situations.

Then, the Office of Administrative Law Judges identifies from the applicant's file ten to twenty persons having personal knowledge of the applicant's "judicial

temperament and qualifications to become an Administrative Law Judge" and sends each of those people a questionnaire asking them to choose from a group of behavioral descriptions those which best describe the applicant.

Next, the candidates are subjected to a background investigation designed to verify the information provided in their applications.

Based on all this information, each successful applicant receives a final numerical rating and is placed on a list of eligible applicants in order of their rating.

When a federal agency has a vacancy in its roster of administrative law judges, it applies to the Office of Administrative Law Judges for the referral of eligible candidates. The agency is sent the list of eligibles and must choose from amongst the three top-ranked names. The agency is given extensive information from the candidates' files before making its choice.

It is only when candidates have succeeded in being certified by the Office of Administrative Law Judges as eligible for appointment and, then, have been chosen by an agency that they become administrative law judges. At that point they receive "permanent career appointments" – what Canadians would call "tenured" appointments. They cannot be removed from their position except for cause and then only in accordance with a formal, on-the-record hearing process structured to insulate them from a displeased agency chair or an alienated client constituency.

The removal process is administered by the U.S. Merit System's Protection Board.

Administrative Law Judges appointed through the foregoing process do the adjudicative work of a particular agency – hearing and deciding disputes concerning factual and legal issues arising in the application of that agency's policies and regulations. But it is an essential part of the concept – the *reason* for the existence of administrative law judges and their rigorous appointment procedures and their tenured appointment – that they are to be independent of the agency and of the agency chair in whose organization they will work.

Their work location is often physically within the agency's office but they are not there to advance the agency's policy agenda but to ensure that, in the agency's exercise of its political and legislative powers in pursuit of its policy agenda, the rule of law continues to be respected.

As will be apparent to all the Canadians in the room, with, as I say, the possible exception now of those from Quebec, Canadian tribunal members are definitely a breed apart from the administrative law judges I have just described.

In Canada, we have no competitive selection processes – the ones we do have are simply the exceptions that prove the rule. [May I enter here a caveat concerning my

sweeping statements about what *Canada* does or does not have – I know about Ontario, for the rest I rely on what I have learned from attending 15 of these annual CCAT conferences.]

We also have no specified, minimum, professional qualifications.

The persons to be appointed as tribunal members are effectively selected by the tribunal's host Minister, or the staff of the Premier's office, exercising what is, effectively, the Cabinet's untrammeled discretion in such matters. The views of those experienced in the needs of the tribunal such as the tribunal chair may or may not be influential in the selection decision.

And, in all parts of Canada, we have, of course, set our minds entirely against the very idea of *tenured* appointments. Members are appointed for a fixed term – which may be three years or five years or ten years, but which are usually three, and not uncommonly only one.

They may be re-appointed for one or more additional terms and usually are. Indeed, the tribunals' operational need for experienced adjudicators demand that most members be offered and accept renewal on more than one occasion. Thus, for a member who performs well, there is a reasonable expectation of a number of re-appointments that may add up to many years of service with a particular tribunal.

But – and here is a particularly important feature – every *re-appointment* of each individual tribunal member at the end of their three, or five, or one-year term, is entirely in the discretion of the government. In United States terms, it is as if every two or three years U.S. agency chairs had the discretion to simply fire those of their agency's administrative law judges whose decisions they had not liked.

Wholesale dismissals do not, of course, occur very often. Tribunal efficiency requires that the vast majority of tribunal members be re-appointed. However, the government's discretion to re-appoint or not, means that each Canadian tribunal member knows that, when the end of their current term comes up, they will be open to being picked out from amongst their peers for a refusal of re-appointment – for what Ontario's Chief Justice referred to in his 1997 address to the Conference of Ontario Boards and Agencies (COBA) as an "idiosyncratic removal"[3].

These decisions to refuse a reappointment – these *idiosyncratic removals* – are communicated without reasons or explanations and, typically, only a few weeks – or a few days – before the existing term expires.

---

[3] November 20, 1997. As far as is known, the address has not been published. However, the text of the address was released at the time and the "idiosyncratic removal" reference appears in the fourth paragraph from the end of the text.

This discretion to make idiosyncratic removals of tribunal members does not just exist in theory. In Ontario, at least, idiosyncratic removals are not uncommon. In point of fact, they are common enough that all tribunal members in Ontario contemplating a decision in support of the rule of law that is likely to put a spoke in a Ministry's policy wheel – or negatively impact in any serious way private interests close to the government – must now *believe*, whether it be true or not, that if they make that decision they will be risking their career.

The new appointment agreement that has been proposed by the Ontario government for Ontario adjudicators and regulators[4] makes the discretion to make idiosyncratic removals explicit. Paragraph 12 of that agreement reads:

> The parties agree that consideration will be given to the renewal of the Appointee for one further term. Any such consideration will be based *in part* [note the "in part"] on the performance of the Appointee and the needs of the agency. *Nevertheless, the Parties acknowledge that any such renewals are at the discretion of the governor in council* [effectively, the Minister and/or the Premier's Office]. (Emphasis added.)

I have said that in Canada there are no specified minimum professional qualifications for appointment as a tribunal member. I am sure someone here who is not from Ontario will be shortly setting me straight about the appointments to their tribunal, but again any exceptions will only prove the general rule.

And, in fact, in Ontario, the government *has* recently defined what it refers to as "core competencies" for adjudicators. Some of you will have heard Richard Prial[5] refer to these on Monday.

The recent efforts of Ontario's Agency Sector Co-ordination Unit to address the principles that ought to govern the management of the performance of administrative justice adjudicators – the efforts that produced the current set of government-approved "core competencies" – are also not the first such efforts in Ontario. In 1994, the Circle of Chairs section of the Society of Ontario Adjudicators and Regulators (SOAR) initiated a study of the performance management of adjudicators. The study was conducted by an ad hoc committee established for that purpose by the Circle of Chairs. The committee's members brought to the assignment a wealth of experience at various levels of tribunal work. It was a four-person committee, comprised of the Chair of the Environmental Appeal Board, who chaired the Committee, the Manager, Operational Planning, of the Ontario Energy Board, a Vice-Chair of the Environmental Assessment Board, and a Vice-Chair of the Ontario Municipal Board.

The Committee conducted a survey of Ontario agencies, chairs and members respecting the then current performance management practices and particularly inviting

---

[4] *Appointment Agreement for Regulatory & Adjudicative Agencies*, November 2000

[5] Executive Lead, Agency Sector Coordination Unit, Management Board Secretariat, Province of Ontario. Mr. Prial had spoken earlier in the Conference concerning recent developments in agency reform in Ontario.

ideas – and concerns – about the prospect of establishing formal, performance evaluation systems.

When the draft report was ready, it was circulated widely amongst the chairs and members of Ontario tribunals, adjusted in response to the ensuing input, and, when finally adopted by the SOAR Board of Governors in October 1995, it was understood to reflect a broad consensus of opinion within the tribunal community as it existed at that time in Ontario. The report is entitled: *Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice System*. It may be found published in its entirety in vol. 9 of the Canadian Journal of Administrative Law and Policy at page 179. I will refer to it here as the "SOAR Report".

In my view, the *SOAR Report* provides an exceedingly intelligent, and inside analysis of all the issues, and it suggests a very adequate framework for an actual system of performance management.

Both the *SOAR Report* and the 1998 Guzzo report (to which Mr. Prial also referred)[6], identify the essential underpinning for any performance management strategy to be the appointment of competent people with the qualifications to do the job. And the SOAR report proposed a specific list of qualifications for appointment – what, using the current terminology, may be referred to as SOAR's 1995 "core competencies".

These core competencies, labeled in the *SOAR Report* as "Generic Selection Criteria for Tribunal Members" are listed in APPENDIX B (at page 215 of the Journal) and read as follows:

> Professional
>
> - A good understanding of the mandate of the tribunal and other relevant legislation
> - Experience with public hearings
> - Experience in a field related to the subject matter of the tribunal's hearings or in law
> - A good understanding of procedure, including the S.P.P.A. [Statutory Powers Procedure Act] if applicable to the tribunal's hearings, and the common law concepts of natural justice/fairness
> - An awareness of, and sensitivity to, the various interests and issues represented at the tribunal's hearings
> - An aptitude for adjudication, including fairness, good listening skills, open-mindedness, sound judgement, tact, and an ability to interpret legislation
> - An ability to organize an analyze evidence (written and oral)
> - Good writing skills – the ability to write a clear, well-reasoned decision that takes into account the evidence, the submissions, the law and policy

[6] *Everyday Justice*, Report of the Agency Reform Commission on Ontario's Regulatory & Adjudicative Agencies, April 1998. Garry Guzzo, MPP, was the chair of the Commission.

- A willingness to participate in non-hearing related matters affecting the tribunal, e.g., tribunal committee work; speaking engagements; the drafting of tribunal policies/rules/procedures; the training of new tribunal members.

Personal

- A commitment to public service
- Good interpersonal skills, including the ability to work in a team
- The ability to work under time pressures
- Computer literacy
- Bilingualism [obviously, this would only apply to some of the adjudicative positions in a tribunal]
- Willingness and ability to travel throughout the Province, often with voluminous written materials.

You will see that this was a report that, in effect, acknowledged the need for professional adjudicators. However, the current Ontario government has decided not to go down the road of officially countenancing professional adjudicators.

Here is the new Ontario core competencies for appointees to administrative justice adjudicator positions as recently approved by the Ontario government:

- Analytical Thinking
- Conceptual Thinking
- Concern for Image Impact
- Flexibility
- Information seeking
- Organizational Awareness
- Organizational Commitment
- Self-Confidence
- Self-Control
- Self-Development
- Steady Focus

Generally speaking, the Ontario government's new agency policies, as reflected in the various documents that have emerged from the agency reform process administered by the Agency Sector Coordination Unit and that were published and approved by the responsible government ministers in November 2000, comport quite well with traditional notions of what tribunal members are expected to do, and be, once they are appointed. However, it is only the "core competencies" that are listed above that are specified as a condition of appointment.

That the policy in Ontario is one of non-professional appointments is made clear in the Ontario government's new, adjudicator and regulator learning strategy document[7]. In the paragraph in that document devoted to explaining why "at least some level of basic

[7] *Learning Strategy for Appointees to Regulatory & Adjudicative Agencies,* November 2000.

orientation and training early in the term of new appointees" is important one finds the following[8].

Early orientation and training is important, the paragraph explains, because "*[a]ppointees come into the agency sector from many walks of life, and are commonly unfamiliar with government, the role of administrative justice agencies, the agency decision-making process, and particularly with the expectations associated with the role of an appointee*".

This statement as to what is "commonly" the limitations of the qualifications of persons appointed as tribunal members is only unusual in the Canadian context because it has been written out. It has always been an article of faith amongst Canadian politicians that after a few days of orientation and training the adjudicative role of a tribunal member can be adequately – and appropriately – performed by any public-spirited citizen of reasonable, general competence. Professional adjudicators are instinctively not wanted. They are sure to complicate what the politicians believe should be a simple matter.

It is, as you will see, essentially the concept of administrative law tribunal members that one encounters in the United Kingdom's 1957 Franks report[9] - a report of a simpler time, as it was characterized yesterday by Professor Martin Partington[10].

Of course, notwithstanding all of that, we do have competent tribunal members. Perhaps the majority will be in fact the equal, in skills, experience, and judicial temperament, to U.S. federal administrative law judges. And, the reason is that, as you all know, it is a fact of life that our tribunals could not function without those skills, experience and judicial temperament. And the self-interest of governments in not being afflicted with the political fall-out from dysfunctional tribunals ensures that very often the tribunal chair's advice is followed and people with sound qualifications do in fact get appointed.

(Although, it must be said, that one can be more confident that this is true with respect to our "elite" tribunals – those handling commercial, business and real property issues – than with respect to tribunals dealing with social welfare issues.)

It is also true that we believe that we are frequently the beneficiaries of what Judge Young has referred to as "functional" independent decision-making. Probably, many Canadian tribunal members – perhaps even the majority – who find themselves in a tight adjudicative corner will carry the banner of independent decision-making with the "herculean feistiness" that is required to ignore their personal vulnerability to retaliation.

---

[8] See the last paragraph on page 1 of the Learning Strategy document.

[9] Franks Committee Report *Administrative Tribunals and Inquiries*, Cmnd 218, (London 1957)

[10] Law Commissioner for England and Wales; Professor of Law, University of Bristol. Professor Partington appeared at this Conference on the Panel dealing with the topic "*...What the USA, Canada and other countries are doing to recruit the best, train them well and make sure they stay*". His paper (in draft form and not yet published) was entitled *The Status of Administrative Law Judges in the UK: Recruitment, Tenure, Training and Appraisal.*

Herculean feistiness is the telling phrase that Justice Rosalie Silberman Abella, now of Ontario's Court of Appeal, once coined to describe what was required of Canadian tribunal members, if – in the face of their personal vulnerability to retaliatory measures presented by the absence of any structural guarantees of independence – they were to remain truly independent in their decision-making[11].

In short, we have in Canada a system of administrative law that depends for its impartial and independent decision-making on the willingness of individual tribunal members to provide that decision-making despite their clear understanding that they do so at the risk of significant damage to their adjudicative careers.

Now what makes this all more manageable than one might expect from the preceding recital is the fact that the individual adjudicators perform their work within the protection afforded by their status as members of an *independent* tribunal.

Unlike the U.S. federal administrative judges acting alone and making their own individual decisions, Canadian tribunal members are effectively agents of the tribunal to which they have been appointed, performing the *tribunal's* adjudicative work.

And the tribunal protects them. Their colleagues support them. The Chair and staff and colleagues help train them, and provide administrative support and collegial legal back up. And, when they face the possibility of an *idiosyncratic removal*, if they are competent and productive members, their chair will defend them, and, because of the chair's standing and the Ministry's dependency at some level on that chair, the chair will often succeed in that defence.

The existence and significance of these major structural differences between the Canadian and U.S. federal systems of administrative law adjudication may be seen played out in the two systems' approach to a number of issues.

In the U.S., the traditional focus of the independence concerns has been the relationship between the administrative law judges and the Chairs of the agencies to which they have been assigned. And the independence of the agencies has not, of course, been an issue.

In Canada, until the *Barreau* case in Quebec[12] (which I regard as anomolous), the traditional focus of the independence concern has not been the relationship between the tribunal members and their tribunal chair but that between the tribunal (including the

---

[11] "... It takes herculean feistiness for tribunal adjudicators to develop decisions of a potentially controversial kind ... when they know that at the end of the political telescope through which they are observed is a person with the power to renew or not renew a three- or five-year appointment." - Rosalie Silberman Abella, *Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization.* This was an address delivered to the 4th Annual CCAT Conference, May 29-June 1, 1988, when Justice Abella was Chair of the Ontario Labour Relations Board. The paper is published in 2 C.J.A.L.P. 1, and the passage quoted may be found at page 10.

[12] Barreau de Montréal c. Québec (Procureur Général), [1999] J.Q. no 5472

chair and its members) and the Minister and/or the Ministry. And, of course, the independence of the tribunal *has* been an issue.

In Canada, the perception that a tribunal member's adjudicative decisions are *tribunal* decisions – institutional decisions in whose quality, consistency and congruency with other tribunal decisions, the tribunal has a legitimate *corporate* interest – has been innate for most Canadian tribunals since their inception. That that perception is, in Canadian law, also a legitimate perception has been formally recognized since the SCC decision in *Consolidated Bathurst* in 1990[13].

But in the American model what is referred to as the "ex parte rule" has always been operative and remains strong. With some very limited exceptions, that rule, which is often statutorily based, prohibits a U.S. administrative law judge from talking to or receiving information from anyone unless all parties in a case are present.

Thus, in the U.S., the Canadian processes for *institutionalizing* (not my word, the Supreme Court of Canada's word) the tribunal members' adjudicative decisions that were approved in *Consolidated Bathurst* – or in the jurisprudence that has subsequently applied the Consolidated Bathurst principles – would not be acceptable. One thinks here of such processes as the tribunal "full-board" meeting to discuss interpretation issues being considered in a particular case by one of the tribunal members, or the draft-decision-review processes involving expert, staff counsel reviewing a tribunal member's draft decision – two examples of processes that you can be assured U.S. federal administrative law judges would regard as hair-raising.

In the U.S. it is the agencies and agency chair who have historically been frustrated by the administrative law judges' refusal to give the agency's policy agenda priority over the rule of law. However, in Canada it has been the Ministries and the Ministers who have been frustrated and the focus of that frustration has been the not frequent but occasional failure of *tribunals,* acting through their members, to give the Ministry's policy agenda priority over the rule of law.

In summary, then, in Canada, the *context* in which the pros and cons of the performance evaluation of adjudicators falls to be examined includes:

- a system in which the administrative law judge function, as it is understood in the U.S., has been assigned in Canada to a corporate entity called a tribunal, and in which the tribunal members are seen as making institutional decisions;

- a system in which the independence of tribunal adjudication is always under strong pressures from those who insist on the Ministries' policy agenda being given priority over the rule of law;

---

[13] *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 et al* (1990), 68 D.L.R. (4th) 524.

- a system in which appointees do not necessarily come to the tribunal with adequate skills or experience – or with an innate judicial temperament;

- a system in which the re-appointment of tribunal members must be decided on some basis, whether or not there is a formal system of evaluation;

- and, a system where there is no "practical independence" but only "functional independence".

In that context, deficiencies in the abilities or performance of individual members may be seen to impact on the credibility of the corporate adjudicative body and, therefore, threaten that body's independence and its ability to defend the independence of its competent members.

In that context, in protecting an individual member from his or her inherent vulnerability to an "idiosyncratic removal", the chair has need of objective evidence of good performance, and, in eventually ridding the tribunal of inappropriate and unqualified appointees, the chair also has need of telling, negative performance evaluations.

In the Canadian context, the tribunal chair has not historically been seen to be a threat to independent decision-making. He or she shares common institutional interests with competent and independent members. It is the *Minister's* powers and interests – like the powers and interests of the agency chair in the U.S. – that presents the overriding threat.

In this context, it is my opinion that performance management and evaluation powers may be countenanced in the hands of a tribunal chair that would be regarded as anathema were they placed in the hands of the Minister or of a U.S agency chair.

You will have noticed that I have not contributed to the discussion of how to actually manage the performance of tribunal adjudicators. No doubt we will begin to get to the substance shortly. However, I hope I have at least made the following points: first, that on performance management issues, context is everything, and, second, that the Canadian administrative justice context has many unique features – some might say, even peculiar features – that are highly relevant to that discussion.

Thank you for your attention.

SRE
June 2001
Toronto, Ontario
e-mail address: srellis@idirect.com