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Case Comment

Tribunal Independence the Constitutional Foundation-- An Epiphany Moment on the Road to Tribunal Justice

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"The legitimacy of a transfer of dispute-resolution authority away from the ordinary courts rests upon whether [the place to which it is transferred] can provide a comparable measure of justice."

Supreme Court of Canada Justice Russell Brown, in his concurring reasons in *Uber Technologies Inc. v. Heller* [1]

1. PRELUDE

This article revisits the issue of constitutional protection for the independence of adjudicative tribunals for which the Canadian Constitution provides no explicit, written protection. The list of such adjudicative tribunals is lengthy and in Ontario includes such prominent institutions as the Labour Relations Board, the Workplace Safety and Insurance Appeals Tribunal, the Landlord and Tenant Board, the Social Benefits Tribunal, the Human Rights Tribunal, and a great many more.

In this article, the author is reporting an epiphany in his understanding of the root source of the argument in support of implicit, constitutional protection for the judicial independence of the latter tribunals and their members, and he will come to that shortly. First, however, for the purpose of setting the context it will be helpful to begin by reviewing the bidding, as it were, and recalling the categories of adjudicative tribunals for which there *are* written constitutional or quasi-constitutional requirements of judicial independence.

The latter categories include tribunals covered by: ss. 11(d) and 7 of the *Canadian Charter of Rights and Freedoms;* the provincial constitutional requirement in s. 23 of the Quebec *Charter of Human Rights and Freedoms;* the quasi-constitutional requirement of ss. 2(e) and (f) of the *Canadian Bill of Rights;* and, possibly, the "due process" requirement under s.1(a) of the *Alberta Bill of Rights.*

Thus, any tribunal exercising the function of trying persons charged with an "offence" is required by s. 11(d) of the Charter to be independent and impartial; any tribunal whose decisions are dispositive of rights respecting "life, liberty or ***134** the security of the person" is required by s. 7 of the Charter (as interpreted by the Supreme Court) to be independent and impartial; any Quebec tribunal that is deciding rights must be independent and impartial; and any federal tribunal that is "determining" a person's "rights and obligations" is required by the Canadian Bill of Rights to be independent and impartial, unless its constitutive statute provides otherwise.

While these are extensive categories, it is a remarkable peculiarity of our constitutional arrangements that, outside of Quebec, not only does the written constitutional protection of judicial independence not extend to large numbers of adjudicative tribunals but it also does not extend to provincial courts exercising civil jurisdictions such as family law courts, or small claims courts, or, it would appear, justices of the peace.

As we know, the latter surprising lacuna in the Constitution's protection of judicial independence was eventually addressed, as far as the provincial courts are concerned, by the Supreme Court of Canada in its, by now, iconic 1997 decision in what is commonly referred to as the *PEI Provincial Judges Reference*.[2] In that decision, the Court identified an implicit, "unwritten" constitutional principle of judicial independence that applied to protect the independence of "all courts".

And it is in the latter decision that one finds the root of the arguments now commonly made in support of constitutional protection for the independence of the large proportion of adjudicative tribunals that are not "provincial courts", so-called, but, like provincial courts, exercise judicial functions, yet do not fall within the categories of tribunals protected by written constitutional requirements of judicial independence.

And so, we begin.

2. INTRODUCTION

In addressing the question of whether the Canadian constitution *implicitly* requires adjudicative tribunals that are outside the reach of its written protections to be, nevertheless, independent, Canadian Courts have always viewed the issue from what might be said to be an institutional, top-down perspective. Since 1997, all claims for constitutional protection of independence for tribunals not covered by the written provisions have been based on arguing for the extension to those tribunals of the unwritten constitutional principle of judicial independence; the principle first recognized by the Supreme Court in its decision in *PEI Provincial Judges Reference* referred to above. And that case, it may be noted, concerned the financial independence of provincial court judges and was brought by the judges themselves. Moreover, in *Ocean Port*[3] --the ***135** abiding obstacle to the extension of the *PEI* principle to tribunals[4] --the Supreme Court denied

the extension of that principle on the basis of what the Court saw to be the difference between the positioning of courts in our constitutional structure and the positioning of tribunals in that structure. The former, it said, required independence in order to "demarcate the fundamental division [in our constitutional structure] between the executive and the judiciary", [5] whereas the latter were in fact part of the executive, having been, the Court noted, "created precisely for the purpose of implementing government policy". [6]

But what if one were to consider the constitutional case for tribunal independence, not from the institutional, top-down perspective, but from, as it were, the bottom up--that is, not from the perspective of a tribunal's positioning in our constitutional structure but from the perspective of parties who must rely on that tribunal for the vindication of their rights?

What if the argument in support of the implicit constitutional protection of the independence of adjudicative tribunals that are not covered by the Constitution's written provisions does not depend on the extension of the *PEI* principle to those tribunals? What if that argument is to be found rooted simply in everyone's constitutional right to have disputes concerning their rights and obligations resolved by the courts?

What if, after all, it is just a question of access to justice?

Well, this author, whose pursuit of the extension of the *PEI Reference's* principle of judicial independence to otherwise unprotected adjudicative tribunals may be fairly likened to Ahab's pursuit of his whale, experienced exactly that "what if" epiphany as he found himself reading the Supreme Court's Judgment in *Uber Technologies Inc. v. Heller*, [7] rendered on June 26, 2020.

(a) *Uber*

The issue in *Uber* was the validity of an arbitration clause in Uber's standard-form contract with its drivers.

The *Uber* arbitration clause requires all disputes to be submitted to arbitration in the Netherlands, and makes such submissions conditional on the up-front payment of a fee of about $15,000 U.S. The Court's majority held the ***136** clause to be invalid under the equitable doctrine of unconscionability because, in short, if the clause were held to be valid, the size of the fee made it highly unlikely that the dispute would ever be resolved.

And, what, on those facts, the reader will be asking, are the possible grounds for an epiphany respecting the constitutional protection of the independence of tribunals?

Well, the epiphany began when the concurring reasons of Justice Russell Brown caught the writer's attention.

3. JUSTICE BROWN'S REASONS

Justice Brown agreed with the majority that the clause was invalid but disagreed with the majority's reliance on the unconscionability doctrine. Instead, he held that the arbitration clause was invalid because it undermined the rule of law by effectively denying Uber drivers access to justice and was, therefore, contrary to the public-policy, rule-of-law doctrine prohibiting the ouster of access to justice. [8]

"This head of public policy", he said, in para. 114 of his reasons, "serves to uphold the rule of law, which, at a minimum, guarantees Canadian citizens and residents 'a stable, predictable and ordered society in which to conduct their affairs' (*Reference re Secession of Quebec*, [9] at para. 70)"; a "guarantee", he continued, "[that] is meaningless without access to an independent judiciary that can vindicate legal rights".

He acknowledged, of course, that the rule of law does not always require access to an actual court of law.

> [115] None of this is to say that public policy requires access to a court of law in all circumstances. As this Court has recognized, "new models of adjudication can be fair and just" (*Hryniak*, [10] at para. 2). But public policy does require access to *justice*, and access to justice is not merely access to a resolution. After all, many resolutions are *un*just .... Where a party seeks a rights-based resolution to a dispute, such resolution is *just* only when it is determined *according to law*, as discerned and applied by an independent arbiter. [The underlining emphasis has been added by the author of this article; the italics, however, are Justice Brown's.]

And, of course, arbitration is one of the new models of rights-based resolution of disputes that the courts now recognize to be fair and just. But, and here's where the epiphany began to emerge, Justice Brown goes on (in para. 115) to note that the transfers of rights-based resolutions disputes from the courts to an arbitrator has been recognized by the courts to be valid only if the resolutions ***137** by the arbitrator were "just"-- "just" in the sense that they were "determined according to law, as discerned and applied by an independent arbiter".

In para. 116 of his reasons, Justice Brown, citing in support the Supreme Court's 2019 decision in *TELUS Communications Inc. v. Wellman*, [11] tracks the courts' historical view that arbitration could not deliver dispute resolution according to law, and, therefore, "as a matter of public policy", arbitration agreements were not enforceable. They were not enforceable because they removed contractual disputes "from the purview of the courts", thus excluding parties to those agreements

from “access to justice”--justice that, in the courts' view at the time, could only be found in the ordinary courts.

Faced with this “hostile judicial posture”, legislators, Justice Brown notes, intervened by enacting modern arbitration legislation, and that led the courts to the enforcement of arbitration agreements that qualified under that legislation. However, there was a condition: the arbitration clause had to provide for an arbitration that would “guarantee the same measure of justice as that provided by a court;” which is to say, an arbitration by an “*impartial”* arbitrator proceeding according to “the rules of fundamental justice”. [12]

In support of this conclusion, Brown quotes [in para. 117] the following passage from the Supreme Court's 1988 decision in in *Zittrer c. Sport Maska Inc.*: [13]

> The legislator left ... various procedures for settling disputes to be resolved freely by litigants when recourse to the courts was still possible. If judicial intervention was ruled out, however, the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts, and for this reason, rules of procedure were developed to ensure that the arbitrator is impartial and that the rules of fundamental justice ... are observed .... [Emphasis added-- by Justice Brown.]

Justice Brown went on, in para. 117 to say this:

> In other words, any means of dispute resolution that serves as a final resort for contracting parties must be *just* .... The legitimacy of a transfer of dispute-resolution authority away from the ordinary courts rests upon whether [the place to which it is transferred] can provide a comparable measure of justice. [Emphasis added by the author of this article.]

Justice Brown held Uber's arbitration clause to be invalid because it effectively barred Uber drivers from access to a just, rights-based, dispute-resolution forum.

*138 4. AND HERE'S THE EPIPHANY

So, now, what would Justice Brown have to say about legislation that transfers rights-based resolutions of disputes from the courts to adjudicative bodies not called “arbitrator” but instead

"tribunal" or "Board"--bodies that are not independent and therefore not impartial and, therefore, bodies that *cannot* provide a measure of justice comparable to that provided by the courts?

The reader will presumably see now where the writer is going with this.

Justice Brown would say, would he not, that that legislation was invalid because it undermined the rule of law by denying access to justice for all those required to have the rights-based resolution of their issues determined by tribunals that are not impartial.

Take the Ontario Landlord and Tenant Board, as an example. The legislators have transferred the rights-based resolution of disputes between residential landlord and tenants from the courts to the Landlord and Tenant Board--a Board that in law is not impartial; not impartial because not independent, and not independent because the members are appointed to short, *renewable* terms by the government and the renewal of their terms is entirely in the government's discretion. [14]

It is akin to a landlord seeking enforcement of an arbitration clause which leaves the choice of the arbitrator up to the landlord alone. On the basis of the authorities cited by Mr. Justice Brown in *Uber*, the courts would hold such a clause to be invalid-- invalid because it did not provide a measure of justice that was comparable to that which would be provided by the courts; which is to say: did not provide for the resolution of disputes by an impartial arbiter in accordance with the principles of fundamental justice (see above).

In transferring the rights-based resolution functions from the courts to the tribunals and boards comprising what we refer to as the administrative justice system, legislators have done what (on the basis of the authorities cited by Justice Brown in *Uber)* the rule-of-law forbids: ousted the access of citizens and residents to the courts for the rights-based resolutions of their disputes, without substituting access to a comparably just forum.

Since legislators could not validly authorize the ouster of access to the courts by the parties to arbitration agreements unless the agreements ensured the impartiality of the arbitrator, why then should they be thought capable of the ouster of access to the courts by the users of the administration justice system without providing such users with access to adjudicative tribunals that are comparably just?

The fact that adjudicative tribunals whose adjudicators are serving renewable terms, with the renewals of their terms entirely in the hands of the government, ***139** are not independent and therefore not impartial seems self-evident. Continuing with the Landlord and Tenant Board example, consider that, at the time of writing (August 2020), the Ontario Public Appointments Secretariat has just announced the appointment of fourteen, new, part-time members of the Board, all to one-year terms. The government's *Agency and Appointments Directive* provides that at the end of those terms each of these members will be *eligible* for reappointment to a further term of "up to" three years as the government may choose, conditional on their chair's recommendation.

The Directive also makes it clear, however, that the government reserves the right to refuse any reappointment, notwithstanding the chair's recommendation, and to do so without notice or reasons. [15]

Now, picture cases in which tenants are coming before one of these new members in, say May 2021, attempting to resist their landlord's application for eviction orders. Would any sensible person with knowledge of these facts be prepared to argue that the Board in these proceedings was in fact, or in appearance, independent and, thus, impartial?

Of course not; however, then there is the question: does the law agree?

It is this writer's opinion that, as one would reasonably expect, the law does agree. However, it must be conceded that in Ontario that agreement may not be regarded as fully settled.

For a full analysis of the law supporting the writer's foregoing opinion, see: “The Rule-of-Law Implications of the Arbitrary Removal Power” in the writer's book, *Unjust by Design: Canada's Administrative Justice System*. [16]

Meanwhile, the writer will proceed to his conclusion in this article on the footing that a tribunal whose members are appointed to renewable terms with their subsequent reappointments in the discretion of the government are not tribunals that can be said to be in fact or in law independent or impartial.

5. CONCLUSION

Based on the law recited by Justice Brown in his concurring reasons in *Uber*, the Canadian Constitution does not permit the transfer of any rights-based resolution of disputes from the courts to another body unless that body provides ***140** justice that is, in comparable measure, the equivalent of the justice the courts provide, and, in particular, therefore, unless that body is, and can be seen to be, independent.

As things now stand, none of Ontario's adjudicative tribunals can be seen to be, in fact, or in law, independent.

Therefore, until the legislators enact provisions concerning the appointment and reappointment of tribunal adjudicators that ensures their independence, Ontario's adjudicative tribunals will continue to exercise mandates that are constitutionally invalid.

Moreover, in anticipation of troubles to come, as governments move to “modernize” their tribunals' adjudicative processes, it must also be noted that the same law prevents the transfer of rights-based resolutions from the courts to bodies that do not provide resolutions in accordance, generally, with the principles of fundamental justice. [17] Which is not to say that this will require an enhanced

judicialization of tribunals, but, as more proportional methods of adjudication are developed, it will require maintaining a suitable balance between proportionality, efficiency and ease of access on the one hand and fairness on the other.

The excellent article by WSIAT's General Counsel, Michelle Alton: “Rethinking Fairness in Tribunal Adjudication”, [18] points the way to a recalibration of tribunal processes that, in this writer's opinion, would be consistent with the constitutional, rule-of-law requirement that those processes accord with the principles of fundamental justice. The appointment and reappointment structures that will ensure the independence of the tribunals and their members, will also help to ensure that, in the recalibration of a tribunal's processes, the government of the day's natural interest in efficiencies will not be allowed to outweigh the rule-of-law's requirement for just--i.e., fair-- dispute-resolution processes.

Footnotes

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1 2020 SCC 16, 2020 CarswellOnt 8828, 2020 CarswellOnt 8829 (S.C.C.) at paras. 101-119.

2 *R. v. Campbell*, 1997 CarswellNat 3038, 1997 CarswellNat 3039, (*sub nom.* Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island) [1997] 3 S.C.R. 3 (S.C.C.), additional reasons 1998 CarswellNat 79, 1998 CarswellNat 114 (S.C.C.).

3 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 CarswellBC 1877, 2001 CarswellBC 1878, [2001] 2 S.C.R. 781 (S.C.C.).

4 An abiding but not, one has reason to believe, a permanent obstacle. See “Settling the Constitutional Issue” in *Unjust by Design*, UBC Press (2013) at 215-227.

5 *Supra*, note 3, at para. 23.

6 *Ibid.*, at para. 24. But note the finding in *Bell Canada v. C.T.E.A.*, 2003 CarswellNat 2427, 2003 CarswellNat 2428, (*sub nom.* Bell Canada v. Canadian Telephone Employees Assn.) [2003] 1 S.C.R. 884 (S.C.C.) at para. 21 that not all administrative tribunals were created for the purpose of implementing government policy--there is another category whose primary purpose is to adjudicate disputes through some form of hearing.

7 2020 SCC 16, 2020 CarswellOnt 8828, 2020 CarswellOnt 8829 (S.C.C.).

8 *Ibid.,* at para. 101.

9 1998 CarswellNat 1300, 1998 CarswellNat 1299, [1998] 2 S.C.R. 217 (S.C.C.).

10 *Hryniak v. Mauldin*, 2014 CarswellOnt 640, 2014 CarswellOnt 641, [2014] 1 S.C.R. 87 (S.C.C.).

11 2019 CarswellOnt 4913, 2019 CarswellOnt 4914, [2019] 2 S.C.R. 144 (S.C.C.) at para. 48.

12 *Uber*, *supra*, note 7, at para. 116.

13 1988 CarswellQue 27, 1988 CarswellQue 134, [1988] 1 S.C.R. 564 (S.C.C.), at para. 58.1.

14 For a recent description of the Ontario government's reappointment policies, see the writer's website, administrativejusticereform.ca at https://administrativejusticereform.-ca/judicial-tribunals-ontarios-appointment-and-reappointment-policies-drilling-down/.

15 See Treasury Board, Agency and Appointment Directive, s. 3.2.2.

16 Ron Ellis, *Unjust by Design: Canada's Administrative Justice System*, UBC Press (2013), at 89-93; this argument relies importantly on the decision of the Quebec Court of Appeal in *Barreau (Montréal) c. Québec (Procureur général)*, 2001 CarswellQue 1950, REJB 2001-25633, (*sub nom.* Québec (Procureure générale) c. Barreau de Montré al) [2001] R.J.Q. 2058, 48 Admin. L.R. (3d) 82, [2001] J.Q. No. 3882, [2001] Q.J. No. 3882 (C.A. Que.), leave to appeal refused 2002 CarswellQue 2078, 2002 CarswellQue 2079, (*sub nom.* Barreau de Montré al v. Québec (Procureur géné ral)) 302 N.R. 200 (note) (S.C.C.), reconsideration / rehearing refused 2002 CarswellQue 2684, 2002 CarswellQue 2683 (S.C.C.), which was subsequently affirmed by another Quebec Court of Appeal decision in *Assoc. des juges administratifs de la Commission des lésions professionnelles c. Québec (Procureur général)*, 2013 QCCA 1690, 2013 CarswellQue 9692, EYB 2013-227288, [2013] R.J.Q. 1593, 60 Admin. L.R. (5th) 52 (C.A. Que.).

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