

Tribunal Independence and Impartiality: Rethinking the Theory after *Bell* and *Ocean Port Hotel*—A Call for Empirical Analysis

Laverne A. JACOBS*

Introduction.....	45
I. Tribunal Independence and Impartiality: the New Procedural Fairness.....	47
A. The Doctrines of Tribunal Independence and Impartiality.....	47
B. Challenges to Independence and Impartiality.....	49
II. Critiques of the Positive Law on Tribunal Independence and Impartiality.....	51
III. <i>Ocean Port</i> and <i>Bell</i> : Piecing together the latest Supreme Court of Canada developments of the tribunal independence doctrine	55
Conclusion	59
Endnotes.....	61

Introduction

In the 1980s, the decision of *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*¹ stirred a significant debate in administrative law theory. At issue was whether the Supreme Court of Canada's decision to extend the requirements of procedural fairness to decision-making processes beyond those that were "quasi-judicial" had given judges too much power to police and even create procedures in public administration. For some, the flexibility that the Supreme Court of Canada had endorsed was viewed as a positive step. It was believed to encourage judges to ask the questions that could truly lead to fairness in a wide range of situations.² For others, the ability of the courts to impose in an area with which they were greatly unfamiliar—namely, the various procedures used in the decision making process of the often multifunctional bodies of the administrative state—was a cause of considerable concern.³

Today, we are in the heart of a new debate, yet one that brings the procedural fairness discussions to a finer point: How much independence and impartiality should administrative tribunals and their members have and, more crucially, how should the degrees of independence and impartiality of any given tribunal or tribunal member be determined? These questions no longer focus on the explicit modification of a tribunal's procedures by the superior courts. They centre instead on the preliminary question of whether a tribunal can be reasonably perceived to be capable of providing procedural fairness in its decision-making process in light of its structure and the influences that may affect its members. Although, when it comes to structural factors that may affect a tribunal's independence, courts must defer to the legislature's choice of tribunal design as a matter of parliamentary supremacy and particularly when constitutional constraints are not involved,⁴ concerns still loom over the fact that tribunals are evaluated primarily with respect to a judicial model of independence when their independence is under attack. The test for impartiality has also been criticized for its reliance on a well-informed person when absence of empirical data on the internal functioning of polycentric tribunals can render such a notional person inconceivable.

Similar to the greater debate about procedural fairness of the 1980s, the approach taken by the courts to issues of independence raises the question of whether the superior courts will appreciate the complexity and nature of decision-making in the administrative state. Often overlooked is the fact that tribunal decision-making forms part of broader economic and social regulation. While some administrative tribunals deal with pure dispensation of justice in a manner similar to courts,⁵ most have wider mandates and have developed processes that stray from the traditional adversarial model in order to fulfill them. Given the multitude of functions that exist among tribunals and that may exist within one single tribunal, a model of independence designed for the judiciary may not always be appropriate. It is also important that we increase public knowledge about the operational context of tribunals in order to ensure that the test for impartiality does indeed serve the goal of maintaining public confidence in administrative justice. As a consequence, within the debate on tribunal independence and impartiality has emerged a quiet push by some administrative law theorists for the adoption of evaluative paradigms that are better equipped to provide fairness and instil confidence in light of the nature and functions of the different types of tribunals under scrutiny.⁶

This article explores a single question: Namely, is the approach currently taken by the courts to determine the amount of independence that tribunals require appropriate to fulfil the goals of providing administrative justice and encouraging public confidence? I argue that it is essential to appreciate the modes of internal functioning and the normative understandings within tribunals in order to make a valid determination of the degree and nature of independence that they should have. For this, more qualitative empirical analysis is needed in our administrative law literature. I commence this article with an overview of the rationale behind tribunal independence, outlining the current approach used by the courts in evaluating independence and impartiality on judicial review applications. I then move to discuss some of the shortcomings of the judicial model and the utility of empirical data in evaluating questions of tribunal independence. I conclude by considering the Supreme Court's most recent decisions on tribunal independence and impartiality, *Bell Canada v. Canadian Telephone Employees Association* and its predecessor, *Ocean Port Hotel Ltd. v. British Columbia (Gen. Manager Liquor Control)*,⁷ and evaluating whether these cases have affected the jurisprudential notion that there is significant value in "seeing the tribunal in operation."

I. Tribunal Independence and Impartiality: the New Procedural Fairness⁸

A. The Doctrines of Tribunal Independence and Impartiality

At the outset, it is useful to explain the current doctrines of tribunal independence and impartiality and to note their rationale as well as the problems involved in their application. The doctrine of administrative tribunal independence is largely based on the similar concept of judicial independence. When we speak of independence of both administrative tribunals and the courts, we are referring to the ability of the decision-maker to render decisions in an atmosphere that is free from inappropriate influences. Chief Justice Dickson, speaking on behalf of the Supreme Court of Canada, has defined judicial independence in the following way:

[h]istorically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: **no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.** This core continues to be central to the principle of judicial independence.⁹ [emphasis added]

It is clear that freedom from interference plays a fundamental role in the concept of judicial independence. Part of the rationale underlying this insistence on freedom is that judicial independence helps to ensure the impartiality of judges and, by extension, procedural fairness to the litigants. By guaranteeing that the judiciary is free from outside pressures or influences, it becomes easier to achieve the goal of impartial decision-making as judges should then decide based solely on fact, law and their own conscience. The independence of the judiciary is not an end in itself; it aims to assure us that decision-makers are in a position to make impartial decisions.¹⁰ The doctrine of tribunal independence shares this rationale.¹¹

Impartiality refers to the state of mind of the decision-maker in relation to the issues and the parties before her.¹² It seeks to make sure that the decision-maker is not deciding in her own interest or in a manner that favours one of the parties before her and that the decision made will consequently be a fair one. Impartiality is based on two fundamental ideas in our common law system: that a judge should neither judge her

own cause nor have any interest in the outcome of a case before her (*nemo iudex in sua causa debet esse*) and the notion that decision-making requires the decision-maker to hear and listen to both sides of the case before making a decision (*audi alteram partem*). The traditional Anglo-European perspective from which we tend to view issues of justice has taught us that for justice to be done, disputes must be decided by those who are disconnected from the matter and have no interest in the outcome.¹³ This perspective shows us futility in having a decision-maker resolve a dispute if his or her mind is already made up, or if he or she has personal reasons for favouring one party or another. A system with such impediments can only lead to an absence of fairness to one party. Willingness to hear all sides and be fair (*audi alteram partem*) is thus guaranteed by a lack of partiality (*nemo iudex*). Indeed, the converse may also be true, as lack of partiality to any one party to a dispute may inspire a greater openness to hear all sides of the dispute.

Furthermore, the image of independent and impartial decision-making bodies, whether they are courts or tribunals, not only guards against partiality, but helps to preserve public confidence in the justice system. A mere flaw in the perception that a decision-making body or decision-maker is independent or impartial is enough to destroy confidence in its ability to deliver justice—and respect and acceptance are essential to the effective operation of the justice system.¹⁴ As Chief Justice Hewart stated in *R. v. Sussex Justices, Exp. McCarthy*, it is “of fundamental importance that justice should both be done and be manifestly seen to be done.”¹⁵

As a consequence, the tests for the independence and impartiality of both courts and tribunals rely on matters of perception. If a reasonable, well-informed person who has thought the matter through would perceive the decision-maker to be insufficiently independent or impartial, this perception is enough to render the decision invalid, regardless of whether a lack of independence or impartiality exists in fact. The test of what “an informed person viewing the matter realistically and practically—and having thought the matter through—” would decide is used to determine if there is lack of independence or impartiality on an individual or institutional sense.¹⁶

Keeping these theoretical ideas that form the basis of the doctrine of tribunal independence in mind, I move to the challenges that threaten independence and impartiality as they have been identified in the jurisprudence.

B. Challenges to Independence and Impartiality

What constitutes the interferences from which tribunals are to be free? The excerpt from *Beauregard* cited above gives an indication. Based on *Beauregard* and the rest of the tribunal independence jurisprudence, I suggest that interferences to tribunal independence can be considered from two perspectives. The first and narrower view of tribunal independence focuses on freedom from governmental interference. It contemplates the degree to which the tribunal and its members are attached to the branch of government that established it or is responsible for it. The guarantee that a tribunal is structured in a way that enables it to operate at a reasonable distance from the branch of government that created it is sometimes termed “structural independence.”¹⁷ This view of tribunal independence is closely modelled on the notion of judicial independence. An inquiry into the structural independence of tribunals revolves around the traditional threats to judicial independence. It aims to determine if the tribunal members have sufficient security of tenure and financial security and whether the tribunal as an institution has sufficient administrative control. In other words, it looks at how easily the decision-maker can be removed from office; the safeguards of his or her remuneration, pension etc. and whether remuneration is adequate; and the degree to which the tribunals have control over their own administration.¹⁸ These three conditions of independence, borrowed from the judicial context are applied to tribunals with some flexibility in the stringency with which they must be satisfied. Taken into account in determining the degree of flexibility are whether the tribunal is governed by any constitutional or quasi-constitutional laws and all the circumstances of its establishment, including the intention of the legislator as expressed in the tribunal’s constituting statute, the nature of the tribunal, its functions, the interests at stake, and other indices of independence like oaths of office.¹⁹ The jurisprudence has also stressed the need to see how the tribunal actually operates in practice before reaching an opinion on the presence or absence of an appearance of partiality, as “without a clear understanding of the relevant, operational context these principles [of natural justice] cannot be applied.”²⁰

This narrow approach to tribunal independence is ubiquitous in the Canadian jurisprudence; it is found in all the Supreme Court cases on the matter in both overt and subtle forms.²¹ It is clearly the dominant approach to addressing the issue of whether a tribunal has sufficient

independence. This is, of course, partly due to the manner in which challenges to independence are raised by litigants—usually absence of one, two or all the guarantees are challenged. However, even in the rare case when independence is challenged generally, the merits of the claim are evaluated through an analysis of the tribunal's structural independence.²²

The second and wider view of independence concentrates on whether the tribunal and its members are free from all influences that hamper a decision-maker from exercising “freedom to decide according to [his or her] own conscience and opinions.”²³ While such interference may come from the tribunal's relationship with the government that created it, it may also come from the operational context of the tribunal itself, or from external influences like the parties that appear before it.²⁴ Interference of this nature may appear to exist as a result of such things as the tribunal's internal policies determining how hearings are to be held, internal discussions of matters relating to the furthering of the tribunal's policy, relationships with other members of the tribunal and its policies and practices relating to participation on judicial review. Questions about these sorts of interference sometimes manifest themselves in the jurisprudence as concerns about a reasonable apprehension of “institutional bias.” In such cases the tribunal members may possess overlapping functions which could cause a reasonable well-informed person to question the ability of the tribunal to reach decisions fairly in a substantial number of cases. For example, in *Régie*, there were no protections against the possibility of the same tribunal lawyer's involvement in both the prosecution and adjudication aspects of one file.²⁵ More often, however, concerns about independence that stem from tribunal operation are formulated in the case law as concerns about a member's “individual independence.” This is because the effect of the interference is an encroachment on an individual member's decision-making process.²⁶

Yet, the jurisprudence on the definition and scope of individual independence fluctuates. For example, in the 2003 Supreme Court of Canada decision in *Bell*, the appellants argued that the existence of interpretive guidelines posed a threat to the Canadian Human Rights Tribunal members' independence of thought. Surprisingly, the Supreme Court stated that the test for independence does not have to do with independence of thought. It held that although decision-makers must have independence of thought in the sense that they are not to be unduly influenced by improper considerations, this is just another way of saying

that they are to be impartial.²⁷ This approach contrasts with earlier cases such as *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69*.²⁸ There, the possible influence of full board meetings to discuss matters of policy could have on those who had heard the cases and were to decide them, was evaluated to see if it was a possible interference with the decision-maker's freedom to decide according to his conscience and opinions.²⁹

Based on the decision of *Bell* it seems that matters that were once classified as issues of individual independence by the Court—namely independence from other members of the tribunal—have been re-classified as matters of impartiality. This shift is problematic. The difficulty with the perspective put forth in *Bell* is that not all matters of individual independence constitute issues regarding partiality. Deciding because of media influence, for example, may not be indicative of bias *per se* in the sense that there is no self interest or favouritism of one party, but it is still likely an inappropriate influence in the decision-making process and one that does not fit well with this new categorization. It may be, however, that the Court in *Bell* was simply indicating that the test to be used when questions of individual independence arise is the same as the test for bias—that is, what a reasonable, well-informed person who had thought the matter through would think.

II. Critiques of the Positive Law on Tribunal Independence and Impartiality

Both the narrow and wide views of independence have been criticized for failing to deal adequately with the realities of tribunal existence. While some of these criticisms have been addressed by decisions rendered subsequently, many still have significance. Some ask whether the criteria of security of tenure, financial security and administrative control are really sound ones when more serious threats to tribunal existence, such as abolishment, may make such guarantees irrelevant. Des Rosiers, for example, writes:

Are the criteria of administrative control, security of tenure and financial security really sound? For example, is it realistic to suggest that providing members with a short-term contract and some financial compensation is enough to insure independence of mind? What about tribunals that may be abolished at any time because of budgetary restrictions? What about discretionary cuts to travel allowances or administrative budget? Tribunals are creatures of statutes and may be

abolished at any time. In that context, financial security and security of tenure may be completely illusory.³⁰

As creatures of statute, administrative tribunals do not enjoy the same constitutional protection of their existence and independence as the courts.³¹ But, while the threat of abolishment will always be a reality where tribunals are concerned, having an assurance that the three structural guarantees will be met to a degree that is desirable and appropriate for the tribunal in question and for the duration of its existence can be an indication that members will refrain from acting in ways that will compromise their integrity in order to have their economic security met. At the same time, however, DesRosiers' observation leads us to inquire about the effectiveness of the judicial paradigm as a protector of impartiality in the tribunal setting.

Other elements could be added to the test, as well. Budgetary interference by the government to which the tribunal is accountable is a factor that could significantly affect the tribunal's ability to provide procedural fairness. Inadequate funding can lead a tribunal to develop shortcuts in its procedures. Citing the example of an accelerated process for determining refugee status that was first brought into the Immigration and Refugee Board when funding became insufficient to support a deluge of claims, France Houle has wondered about the negative effects that such shortcuts could have on the quality of decision making in the long term. She asserts that shortcuts such as these ones pose even greater problems in the context of particular types of tribunals, namely, economic regulatory bodies, as opposed to purely adjudicative ones. This is because decision-making in economic regulation requires a higher degree of technical complexity. Indications of governmental intention to ensure sufficient tribunal funding would help to counter perceptions of institutional partiality, yet budget is not a factor that is currently considered in the tests for independence or impartiality.³² Houle's reference to the impact that neglecting budget could have on regulatory bodies as opposed to adjudicative ones suggests a need to take a tribunal's nature and decision-making process into account in applying this factor.

The observations by DesRosiers and Houle highlight two ways in which the tests for independence and impartiality are misaligned with the realities of tribunals. But there is a graver shortcoming of the current paradigms used: both the tests for independence and impartiality rely on the perception of a reasonable well-informed person; however, information about the internal workings of tribunals is often not available to inform such a notional person and this information can be

determinative. Often, the courts rely on information about how tribunals function in their daily operational context in order to evaluate if a tribunal's way of proceeding is indicative of a lack of independence or impartiality. On judicial review, details about the tribunal's daily operational context may form part of the record because it was brought to court by the tribunal itself.³³ Yet, this information is generally not available in the public domain.

There is a considerable amount of information, including what is sometimes termed 'soft' law, that could have an impact on the reasonable person's perception of whether or not a tribunal appears independent or impartial. Citing primarily from cases that have already been decided, this information can include: the factors that different tribunals take into account in making their decisions which stem from their expertise of the sector or area that they regulate and which serve to further policy,³⁴ internal administrative policy respecting, *inter alia*, remuneration of tribunal members,³⁵ details about the procedure of "short listing" prospective tribunal members,³⁶ information about the chain of command from the Minister to individual adjudicators, about transfer arrangements and the scheduling of cases.³⁷ These are just a few examples. Similar useful contextual information that can inform the reasonable person's appreciation of whether there is deficient independence and impartiality includes knowledge about internal direction and monitoring by the chair and legal services; details about how informal communications with the government that has constituted them are made, such as exchanges with responsible ministers or MLAs, their frequency and their impact on the decision making process and information regarding internal procedures for ensuring furtherance of the tribunal's mandated policies. The tribunal's enabling statute can only take us to a point in establishing its operational context. Elements such as those outlined above are fashioned at the tribunal level and it is necessary to study the tribunal's daily workings to determine them. They can also have impact on the reasonable person's evaluation of whether fairness exists in the decision-making process. Justice Sopinka notes this in *Matsqui*. Speaking for the majority, he states:

Case law has thus tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment. That institutional independence must be considered "objectively" does not preclude considering the operation of a legislative scheme which creates an administrative tribunal, but only vaguely or partly sets out the three *Valente* elements, as in this appeal, where the taxation by-laws in issue are silent with regard to details relating to tenure and remuneration. **It is**

not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of the institution and its relationships. Otherwise, the administrative law hypothetical “right-minded person” is right minded, but uninformed.”³⁸ [emphasis added]

As Justice Sopinka observes, this gap in our information can be determinative. An example can be taken from the trilogy of cases dealing with the post-hearing ‘duty to be fair’ found in *Consolidated Bathurst, Tremblay* and *Ellis-Don*.³⁹ It is clear that without knowledge of the full board meeting consultation process, well-informed appreciations of whether or not bias appeared to exist could not have been made.

Another example and one that touches less on the thorny issues of deliberative secrecy arises from the fact situation in *Bransen Construction Ltd. v. C.J.A., Local 1386*.⁴⁰ There, an employer sought judicial review of the labour board’s decision to certify a trade union because the board had used its long standing practice of determining whether a bargaining unit exists, using one of two choices of date. This date, the date of application, was systematically used by the labour board when dealing with construction industry certification applications. The employer argued that the board’s choice of date was patently unreasonable as it knew that the bargaining unit would drop to one person on the day after its certification. The result, therefore, left the employer with collective bargaining obligations for one employee. Although the employer did not argue that there was a reasonable apprehension of bias, the board’s systematic choice of date does appear to favour unions in the construction industry. To the reasonable person with just this amount of information, it may seem that the board was acting in a way that demonstrated institutional bias. On appeal, the board was able to explain that it had developed its long-standing practice of using the date that it did when dealing with construction industry applications in recognition of the transient nature of employment in that industry. Its choice of date was a policy choice, developed through its expertise and used in its mandate of fostering harmonious and equitable labour relations. With this additional information, the reasonable person would likely change her mind as to the appearance of partiality.

The crux of the matter is that the reasonable apprehension test serves the greater, social goal of safeguarding public confidence in the administrative justice system.⁴¹ If public confidence relies on the

assessment of a reasonable, well-informed person but the information needed to make this assessment is not in the public domain then, unless more information about how tribunals work internally becomes available, this test contributes little to instilling public confidence in administrative justice. And, while the information required may be gathered from the tribunal to form part of the record on judicial review, it seems illogical that the reasonable person should have to attend the judicial review proceedings in order to become informed enough to make a decision. This defeats the point of a test that theoretically purports to avoid the need for judicial review on the issues of independence and impartiality altogether.

There is a dearth of empirical studies on tribunals⁴² although the need for empirical research on the way that tribunals do their work has been noted.⁴³ I suggest that the most effective way to approach the question of improving the paradigms we use to evaluate the independence and impartiality of tribunals is to start by learning more about tribunal operational reality. I also argue that studies to marshal the information required to improve our evaluation of their independence and impartiality may be done most effectively by starting on a sectoral basis—that is, by examining tribunals individually or in groups of those with similar natures or purposes as opposed to searching for a global notion of independence applicable to all administrative tribunals.⁴⁴

As well, what I am suggesting does not require travelling beyond information that should rightly be transparent. It is not the details of any particular case before the tribunal that is of interest, for example. Rather it is an examination of the ways in which work is done at a tribunal.

III. *Ocean Port* and *Bell*: Piecing together the latest Supreme Court of Canada developments of the tribunal independence doctrine

While the Supreme Court in *Ocean Port* put together an approach to evaluating questions of independence and impartiality, this method of analysis was not closely followed by the court in *Bell*. How are we to understand the latest developments in the tribunal independence jurisprudence? Is it possible to conceive of the tribunal independence doctrine as an integrated whole into which these latest decisions fit? Have these two cases affected the importance of seeing tribunals in operation? The evolution of the jurisprudence in the area of tribunal

independence seems to evidence the mapping out of branches which are sometimes contradictory and whose reconciliation will have to be awaited through the emergence of cases to come.⁴⁵

The method of analysis set out in *Ocean Port* focused on a distinction between two situations. In cases in which an administrative tribunal is not subjected by constitutional or quasi-constitutional enactment to provide guarantees of independence, the degree of independence required is to be determined from legislative intent. The intention of the legislature can be appreciated by studying the tribunal's statutory regime, which encompasses the express statutory language, necessary implication and, in keeping with modern approaches to statutory interpretation, construction of the statute as a whole. Moreover, the degree of independence intended by the legislature is to prevail over common law principles of natural justice as it is "ultimately... the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question."⁴⁶

An analysis that gives precedence to legislative creation seems to make room for flexibility and understanding of tribunal functioning in the determination of the degree of independence required of any administrative tribunal. In such an analysis, factors particular to a tribunal's ability to maintain its independence and which are developed within its daily operation have the ability to gain prominence in the discussion of the degree of independence required. Internal practices can be considered not only to temper the judicial paradigm used to gauge whether a tribunal is sufficiently independent, but as factors on the same level as security of tenure, financial security and administrative control. In a vein similar to the procedural fairness debate originally struck by *Nicholson*, the decision in *Ocean Port* was also considered by many to be a positive step, for it presented the opportunity for judges to ask pertinent, ground level questions in determining the amount of independence required by any particular administrative tribunal.

The only problematic issue foreseen by the court in *Ocean Port* was the question of how to address legislation that was silent or ambiguous on matters of independence. In such cases, the court reasoned that it is correct to infer that the will of the legislature is for the tribunal's

process to comport with common law principles of natural justice. It added that, in such cases, the precise standard will have to depend: “on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make.”⁴⁷

A framework of analysis was thus crafted for non-constitutional situations. But, how should the question of independence be treated in the face of constitutional constraints? While the fact situation in *Ocean Port* did not require the court to address the matter in great detail,⁴⁸ the court’s discussion implied that the first step would be to determine the level of independence required by the applicable constitutional or quasi-constitutional enactment for the tribunal. Indeed, this was the approach the court had taken in *Régie*—a case to which the court referred with approval with respect to its reasoning under s. 23 of the Quebec *Charter of Human Rights and Freedoms* while also stressing that reliance on this reasoning in the absence of constitutional constraints constituted the source of the lower court error in *Ocean Port*.⁴⁹ The opportunity to put this approach into practice arose in *Bell*. Ironically, however, this was a case in which common law principles of natural justice and the applicable quasi-constitutional provision were found to be one and the same. Possibly because of this overlap, the question of independence was approached differently.

The quasi-constitutional constraints at play in *Bell* are found in the Canadian *Bill of Rights*,⁵⁰ a statute to which all federal Acts of Parliament must conform unless they indicate expressly that they are operating notwithstanding it. Subparagraph 2(e) of the *Bill of Rights* mandates that a fair hearing in accordance with the principles of fundamental justice be given in determining a person’s rights and obligations under an Act of Parliament. This subparagraph reads:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

[...]

- (e) Deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations

Two issues were argued in *Bell*. The first centred around the power of the Canadian Human Rights Commission to issue binding guidelines to the Canadian Human Rights Tribunal regarding how a provision of the *Canadian Human Rights Act* should apply in a certain class of cases. Bell submitted that the Commission's power compromised the Tribunal's independence by placing limits on how the Tribunal can interpret the Act. Bell also argued that the power undermined the Tribunal's impartiality since the Commission appears as a party before the Tribunal. The second issue was whether the Tribunal Chair's power to extend the terms of members in order to address ongoing inquiries threatened the members' security of tenure. Bell further argued that this power also undermined the Tribunal's impartiality by introducing the possibility of the Chair pressuring members to reach particular outcomes.

In light of the reasoning in *Ocean Port*, one would have expected the Supreme Court to begin its analysis with a determination of what the *Bill of Rights* requires of the Human Rights Tribunal in terms of its independence and impartiality. However, while the degree of independence and impartiality required were determined, they were determined with reference to the context of the statutory language, the tribunal's functions and the interests at stake, as set out under the *Canadian Human Rights Act*. In other words, an approach very similar to that described in *Ocean Port* as being a common law, natural justice approach was taken.⁵¹ In the court's words: "In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal...All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions."⁵² Unlike in *Ocean Port*, where constitutional or quasi-constitutional constraints were alluded to as the primary guiding factor, or *Régie* where they were evaluated as the first step, the court only turned to the quasi-constitutional principles after examining the statutory regime. The court stated:

Our analysis has, thus far, looked to the statute and its overall purpose in determining the appropriate content for the requirements of independence and impartiality that apply to the Tribunal. However, the

content of the requirements of procedural fairness applicable to a given tribunal depends not only upon the enabling statute also upon applicable quasi-constitutional and constitutional principles.⁵³

Moreover, although it was acknowledged that the *Bill of Rights* was applicable, the court held that it was not necessary to examine the content of the guarantees required under s. 2(e) of the *Bill of Rights* separately. The bench noted that Canadian courts have held that the content of s. 2(e) is to be established by reference to common law principles of natural justice. Since the parties had not suggested that the guarantees would differ in this case from the common law requirements of procedural fairness, it was found to be unnecessary to address the matter at all.

Striking about the court's reasons, is that its common law, natural justice approach is really quite statutory. It is legislative intent, through the enabling statute and its overall purpose that drives the analysis as opposed to a determination of what a "fair hearing in accordance with the principles of fundamental justice" in the context of a human rights tribunal hearing intrinsically requires. The interesting effect of *Bell* and possibly of *Ocean Port* as well, is that pockets of jurisprudence are being created in which the substance of administrative justice sought is the same but, because of differences in legislative wording, the content of procedural fairness required may be different. A quasi-judicial human rights tribunal in Quebec, for example, will be scrutinized for its degree of "independence and impartiality" using a tempered judicial paradigm, due to the existence of the Quebec Charter. A similar tribunal at the federal level, however, will be evaluated through an analysis that focuses heavily on the statute and its overall purpose.

One also wonders if *Bell's* emphasis on the legislative scheme will translate to a general move away from the close examination of tribunal practices advocated earlier in cases such as *Matsqui* and which seemed to be supported in *Ocean Port*.

Conclusion

This paper revolved around a question: whether the approach to determining the degree of independence required of tribunals that is currently taken on judicial review applications serves to fulfil the goals of providing administrative justice and instilling public confidence in the administrative justice system. While this question is certainly much

larger than one that can be addressed exhaustively in a paper of this length, I hope to have raised a few points of reflection.

First, given that procedural fairness concerns itself with encouraging public confidence in the administrative justice system, it is hard to see that an appreciation of tribunal independence matters based on a close understanding of a tribunal's functioning could be anything but useful. That we need a deeper understanding of the bodies that make up our administrative justice system becomes even more relevant once we take into consideration that the jurisprudential test for independence and impartiality relies on the reasonable, well-informed person. It is not the decision of just the reasonable person, but the reasonable person who is well informed of all relevant information and has then thought the matter through, that counts.

Yet, when it comes to the place of empirical information about tribunal workings, our jurisprudence which once was quite assertive about its need to contemplate a tribunal's operational context has lately seemed to have moved the spotlight to a position that overlooks the necessity of empirical information, focusing more heavily instead on the legislative scheme as gleaned from the enabling statute. There are two ways that empirical information about tribunal workings could be incorporated into our legal thinking on tribunal independence and impartiality. One is through the development of statutes that reflect the daily, real world aspects of tribunal functioning that affect, foster and encourage tribunal independence and impartiality. This would guide the courts to consider these factors in determining whether a tribunal exhibits a sufficient amount of independence and impartiality. Another is for advocates to bring these aspects of tribunal workings before the court so that they can be considered as factors in evaluating independence and impartiality.

But this is not all. Other factors could be considered in the test for independence itself such as budgetary control. As well, from a policy perspective, one wonders if the variances in approach and possibly result to questions of independence and impartiality in different jurisdictions—variances which are due to the presence or absence of constitutional constraints, their wording and how their provisions have been interpreted—may provide more hindrance than help in sectors where the substantive administrative justice sought is essentially the same.

As with the original procedural fairness debate and *Nicholson*, the debate on independence may raise more questions than answers in the beginning. However, working through questions such as these will

hopefully generate answers that lead to more meaningful exercises of judicial review and, possibly, more even access to administrative justice—in this way enhancing public confidence in the administrative justice system.

Endnotes

* University of Windsor, Faculty of Law. This paper stems from the author's doctoral dissertation in train. An earlier version was prepared for a roundtable for judges and tribunal chairs: *Administrative Tribunals—Structure, Independence, Impartiality and Expertise* (Toronto, February 13, 2004), hosted by the Canadian Institute for the Administration of Justice. I am grateful to the participants of the roundtable for their invaluable comments, to Thomas Kuttner, David Mullan and Lorne Sossin for their insightful reflections on an earlier draft and to Kirryn Hashmi for her editorial assistance. I would also like to thank the Canadian Institute for the Administration of Justice for its invitation to present this work, the Social Sciences and Humanities Research Council of Canada for its generous financial support and Cornell University Law School, where I began revisions on the final version of this article during my appointment as a Visiting Scholar in the Spring semester, 2006. For a fuller version of these ideas which treats the three concepts of independence, impartiality and bias, please see Laverne Jacobs, "Independence Impartiality and Bias" in Colleen Flood and Lorne Sossin eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008).

¹ [1979] 1 S.C.R. 311.

² See David J. Mullan, "Fairness: The New Natural Justice?" (1975) 25 U.T.L.J. 281; Julius H. Grey, "The Duty to Act Fairly after Nicholson" (1979–80) 2 McGill L.J. 598; Roderick A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: II" (1980) 26 McGill L.J. 1.

³ Eric Tucker explains this concern well in "The Political Economy of Administrative Fairness: A Preliminary Enquiry" (1987) 25 Osgoode Hall L. J. 555; see also Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 U.T.L.J. 215.

⁴ See *Ocean Port Hotel Ltd. v. British Columbia (Gen. Manager Liquor Control)*, [2001] 2 S.C.R. 781 [*Ocean Port*] and *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 [*Bell*]. After *Ocean Port* was decided but before *Bell* came down, it almost seemed that the Supreme Court may have been moving in the direction of abandoning the three aspects of security of tenure, financial security and administrative control in favour of a mode of analysis of tribunal independence based on legislative design. It was not entirely possible to determine this from *Ocean Port* alone, however since the matter had been argued on the basis of inadequate security of tenure on the part of the members of the Liquor Appeal Board, the tribunal under attack. In *Bell*, the judicial paradigm was once

again used although not as explicitly as it had been used in earlier Supreme Court decisions. See *Bell* at para. 24.

- ⁵ It is hard to think of many though. The *Tribunal Administratif du Québec* is one example. Its purpose is to decide issues that arise between the citizen and the administration in certain regulated sectors. See generally, Gilles Pépin, « La loi québécoise sur la justice administrative » (1997) 57 R. du B. 633.
- ⁶ I use the expression ‘quiet’ here because the literature on this matter is only now emerging. Authors who discuss this matter include: Nathalie DesRosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals” in Madam Justice Gene Ann Smith & Hélène Dumont, eds., *Justice to Order: Adjustment to Changing Demands and Co-ordination Issues in the Justice System in Canada* (Montreal: Thémis, 1999); France Houle, « Indépendance et impartialité des organismes de régulation économique : droit positif et droit prospectif – Étude sur la Commission du droit d’auteur », dans Ysolde Gendreau (dir.), *Institutions administratives du droit d’auteur*, (Cowansville, Qc: Yvon Blais, 2002) at 3; Roderick A. Macdonald, “The Acoustics of Accountability – Towards Well-Tempered Tribunals” in Andrés Sajó, ed., *Judicial Integrity* (Leiden: Martinus Nijhoff Publishers, 2004) 141 [Macdonald, “Acoustics of Accountability”] and K.M. Wyman, “The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence” (2001) 14 C.J.A.L.P. 61. See also some of my earlier work in which I raise this possibility: Laverne A. Jacobs, “The Place of the Administrative Tribunal in Canada: Linking our Past to Future Prospects” (Paper presented to the Council of Canadian Administrative Tribunals, 19th Annual Conference, June 2003), online: CCAT <http://www.ccat-ctac.org/en/conferences/docs/2003_jacobs.pdf>; Laverne A. Jacobs and Thomas S. Kuttner, “Tribunal Independence and Impartiality: An Invitation to Revisit *John East*” (Discussion paper presented to the Canadian Institute for the Administration of Justice, Roundtable on *Administrative Tribunals: Structure Independence, Impartiality*, Ottawa, May 31, 2002), Ron Ellis also discusses the utility of analyzing collections of tribunals with similar purposes to achieve better guarantees of independence and impartiality for administrative tribunals although his work advocates more for legislative reform of tribunals than for re-conceiving of the evaluative paradigm used on judicial review. See “A Smoking-Gun Reform Strategy for Rights Tribunals” (Speaking notes, lecture presented to the Council of Canadian Administrative Tribunals, 19th Annual Conference, June 2003), online: CCAT <http://www.ccat-ctac.org/en/conferences/docs/2003_ellis.pdf>.
- ⁷ *Ocean Port*, *supra* note 4; *Bell*, *supra* note 4.
- ⁸ Inspiration for this subtitle comes from David J. Mullan, “Procedural Fairness: the New Natural Justice?,” *supra* note 2.
- ⁹ *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at para. 21 [*Beauregard*].
- ¹⁰ This idea was stated by the Supreme Court in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 at 827 as well as in *R. v. Lippé*, [1991] 2 S.C.R. 114 at para. 48 [*Lippé*]. See also the eloquent encapsulation of this concept by Madame Justice L’Heureux-Dubé in her minority reasons in *2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool)*, [1996] 3 S.C.R. 919 [*Régie*] at para. 107.

-
- ¹¹ See *Régie, ibid.* See also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 [*Matsqui*] where Chief Justice Lamer states at para. 80: “...it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent... the principles for judicial independence outlined in *Valente* [*R v. Valente*, [1985] 2 S.C.R. 673] are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties.” Even though *Régie* heralded its use for adjudicative bodies, the courts have made no explicit refusal to apply the doctrine, in its more flexible form, to tribunals that are more regulatory and investigative in nature. See for example *Alex Couture Inc. v. Canada (A.G.)*, [1991] R.J.Q. 2534 (C.A.), leave to appeal to S.C.C. refused, [1992] 2 S.C.R. v [*Alex Couture*] involving the Competition Tribunal and *Katz v. Vancouver Stock Exchange* (1995), 14 B.C.L.R. (3d) 66 (C.A.), aff’d [1996] 3 S.C.R. 405. See also *Valente* in which the court first held that a flexible degree of judicial independence should be applied to a “variety of tribunals” (para. 25).
- ¹² See *Valente, ibid.*, at para. 15.
- ¹³ As Nathalie DesRosiers notes, the idea of conferring power on a stranger to decide disputes is not universally accepted. DesRosiers observes that in Aboriginal tribal laws, for example, “peacemaking courts stress the connections between the parties and the peacemaker as a guarantee that the solution reached will work in the long run and will satisfy both parties and society.” See DesRosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals,” *supra* note 6 at 61.
- ¹⁴ See *Valente*, *supra* note 11 at para. 22.
- ¹⁵ (1924), 1 K.B. 256 at 259.
- ¹⁶ This test of perception was established in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394. Although formulated in dissent by de Grandpré J., this test has been used throughout the jurisprudence on judicial and tribunal independence and was cited by the Supreme Court of Canada as recently as the *Bell* decision (see *supra* note 4 at para 17).
Originally created to address concerns of impartiality of an individual decision-maker, the test has been extended to address impartiality concerns on an institutional level (*Lippé, supra* note 10 at para 57). The notion of reasonable perception is also the standard for determining if sufficient independence exists, for both courts and tribunals (*Valente, supra* note 11 at para 22).
- ¹⁷ Philip Bryden, for example, defines the term structural independence to mean: “[the] legal guarantees that an administrative tribunal is structured in a way that enables it to operate at arm’s length from the government that created it.” See Philip Bryden, “Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*” (2003) 16 C.J.A.L.P 125 at 130.
- ¹⁸ See generally, *Valente, supra* note 11 at paras. 29, 40, 47.
- ¹⁹ See *Ocean Port, supra* note 4, *Bell, supra* note 4 and *Matsqui, supra* note 11 at para. 83. The substance of the factors themselves, qualitatively speaking, is not entirely clear.

-
- ²⁰ *Matsqui*, *supra* note 11 at para 117. Additional cases that are particularly illustrative of this approach include *Régie*, *supra* note 10; *Lippé*, *supra* note 10; *Alex Couture*, *supra* note 11; *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.) [*MacBain*]; and *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.) [*Mohammad*].
- ²¹ Over the past two decades, overt reference to the three conditions of judicial independence has decreased in the case law. In the latest Supreme Court of Canada case, *Bell*, the paradigm was used without explicit reference to the terms “security of tenure,” “financial security” or “administrative control” indicating that use of these evaluative factors is now commonplace; it is assumed and accepted without question that they will be used. See in particular *Bell*, *supra* note 4 at para. 24. This is not to say that issues of independence relating to the structural guarantees are not important or do not arise in practice. Indeed, cases such as *McKenzie v. Minister of Public Safety and Solicitor General et al.* 61 B.C.L.R. (4th) 57 (Sup. Ct.), (2007) B.C.L.R. (4th) 1 (C.A.), [2007] S.C.C.A. No. 601 (leave to appeal to the S.C.C. filed December 18, 2007 dismissed April 24, 2008) [*McKenzie*] and the recent controversy over the Canadian Nuclear Safety Commission reveal how important security of tenure, as one aspect of the structural guarantees of independence, can be. In *McKenzie*, a residential tenancy arbitrator was dismissed mid-tenure, leading to a lower court decision that suggests that unwritten constitutional principles may apply to protect the security of tenure of administrative tribunal decision-makers. The Court of Appeal did not address the matter, considering it to be moot. Leave to appeal to the Supreme Court of Canada was filed in December, 2007. The issues surrounding the security of tenure of administrative tribunal members also came to the fore in late 2007 when the Minister of Natural Resources threatened to have the then President of the Canadian Nuclear Safety Commission, Linda Keen, terminated for the Commission’s decision not to reopen a nuclear reactor in Chalk River, Ontario. The federal government then fired Ms. Keen from her position the night before her scheduled appearance before a parliamentary committee that was investigating the affair. The correspondence between the Minister and the President of the Commission can be accessed at: http://www.nuclearsafety.gc.ca/eng/newsroom/issues/corr_page.cfm.
- ²² See *supra* note 21.
- ²³ *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69*, [1990] 1 S.C.R. 282 at para. 41 [*Consolidated Bathurst*].
- ²⁴ In *Lippé*, the majority of the Supreme Court emphasized that freedom from government alone did not fulfill the scope of freedoms required to avoid infringing the guarantee of an independent and impartial tribunal under s. 11(d) of the Canadian Charter and s. 23 of the Quebec Charter. See *Lippé*, *supra* note 10, at paras. 87–96.
- ²⁵ *Régie*, *supra* note 10. Another concern in *Régie* was that one single director could be involved in both the investigation and adjudication of one file. See also *Lippé*, *ibid.*, for another example of a case in which institutional bias was argued.

-
- ²⁶ See *Consolidated Bathurst*, *supra* note 23. See also *Québec (Commission des affaires sociales) v. Tremblay*, [1992] 1 S.C.R. 952 [*Tremblay*]; and *Ellis-Don v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 [*Ellis-Don*].
- ²⁷ See *Bell*, *supra* note 4 at para 19.
- ²⁸ *Supra* note 24.
- ²⁹ Compare the outcome in *Consolidated Bathurst*, *supra* note 23, in particular the discussion of judicial independence of panel members in the context of a full board meeting (paras. 33–41) to the court’s classification of the appellant’s argument in *Bell*, *supra* note 4. In the former, the majority, in speaking of the possibility of influence on the members, states that “the criteria for independence is ...the freedom to decide according to one’s own conscience and opinions” (para 41). In *Bell*, however, the Supreme Court asserts that Bell’s argument that the Canadian Human Rights Tribunal members’ independence of thought was threatened by the guideline power was “category mistake.” It appears that the Court may have subtly taken a new outlook on the matter of interference with the decision-making process of individual members. The Court states in *Bell*: “the requirement of independence pertains to the structure of tribunals, and to the relationship between their members and others, including members of other branches of government, such as the executive. The test does not have to do with independence of thought. A tribunal must certainly exercise independence of thought in the sense that it must not be unduly influenced by improper considerations. But this is just another way of saying that it must be impartial.” (para 19). Compare also the *dicta* in the early cases on the question of independence of the judiciary, the concept that forms the foundation of our jurisprudence on tribunal independence. See, for example, *Beauregard v. Canada*, *supra* note 9 at para. 21, where independence is defined as freedom from all influences and *Lippé*, *supra* note 10, in which Gonthier J., for the majority, writes separate reasons disagreeing with the Chief Justice’s view that independence denotes freedom only from government.
- ³⁰ DesRosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals,” *supra* note 6 at 59–60.
- ³¹ But see the decision of the Supreme Court of British Columbia in *McKenzie v. Minister of Public Safety and Solicitor General et al.* 61 B.C.L.R. (4th) 57 (Sup. Ct.), (2007) B.C.L.R. (4th) 1 (C.A.), [2007] S.C.C.A. No. 601 (leave to appeal to the S.C.C. filed December 18, 2007) [*McKenzie*], discussed *supra* note 21.
- ³² See Houle, « Indépendance et impartialité des organismes de régulation économique : droit positif et droit prospectif – Étude sur la Commission du droit d’auteur », *supra* note 6 at 22–24.
- ³³ When tribunals are not prevented from participating. See generally, Laverne A. Jacobs and Thomas S. Kuttner, “Discovering What Tribunals Do: Tribunal Standing before the Courts” (2002) 81 Can. Bar Rev. 616 reproduced in this volume at 5.
- ³⁴ See *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction* (2002), 249 N.B.R. (2d) 93 (C.A.) [*Bransen*].

-
- ³⁵ *Alex Couture*, *supra* note 11 at 668.
- ³⁶ *MacBain*, *supra* note 20 at 865–66.
- ³⁷ *Mohammad*, *supra* note 20.
- ³⁸ *Matsqui*, *supra* note 11 at para. 123.
- ³⁹ *Supra* note 34.
- ⁴⁰ *Supra* note 33. For a fuller discussion of *Bransen*, see Laverne A. Jacobs, “Recent Developments in Tribunal Standing: *Bransen Construction Ltd.* and Tribunal Impartiality” (2003) 50 Admin. L.R. (3d) 123.
- ⁴¹ See *supra* notes 15 and 16 and accompanying text.
- ⁴² A couple of studies that have been done on aspects of tribunal operations other than independence and impartiality are: “Lorne Sossin, “The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion,” in David Dyzenhaus (ed.), *The Unity of Public Law* (London: Hart, 2004) 87 and France Houle, *Les règles administratives et le droit public: aux confins de la régulation juridique* (Cowansville, Qc.: Yvon Blais, 2000).
- ⁴³ See for example Jerry L. Mashaw, “Agency Statutory Interpretation” (2002) *Issues in Legal Scholarship*, Dynamic Statutory Interpretation (2002): Article 9, online: Berkeley Electronic Press <<http://www.bepress.com/ils/iss3/art9>>; Jerry L. Mashaw, “Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise” (2005) 55 U.T.L.J. 497; and Macdonald, “Acoustics of Accountability,” *supra* note 6. In the context of tribunal independence, see also DesRosiers, “Toward an Administrative Model of Independence and Accountability for Statutory Tribunals,” *supra* note 6.
- ⁴⁴ See also Jacobs, “Linking our Past,” *supra* note 6.
- ⁴⁵ Although the section focuses on recent Supreme Court of Canada decisions, another independence decision from a lower court that is of note is *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, 61 B.C.L.R. (4th) 57 (S.C.). In that case, the British Columbia Supreme Court held, despite the holding in *Ocean Port*, *supra* note 4, that the unwritten constitutional principles of judicial independence should apply to residential tenancy arbitrators. See *supra* note 21 and accompanying text.
- ⁴⁶ *Ocean Port*, *ibid.* at para. 22 and see generally the court’s discussion at paras. 20–22.
- ⁴⁷ *Ibid.* at para 21. See also *Régie*, *supra* note 10 at para. 39.
- ⁴⁸ The facts in *Ocean Port*, *supra* note 4, dealt with the security of tenure of the Liquor Appeal Board in British Columbia. No quasi-constitutional enactment applied to tribunal determinations in that province.
- ⁴⁹ *Ibid.* at para 28.
- ⁵⁰ S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III).
- ⁵¹ See *Ocean Port*, *supra* note 4 at para. 21.
- ⁵² *Bell*, *supra* note 4 at para. 22 [emphasis in original].
- ⁵³ *Bell*, *ibid.* at para. 27.