

# Toward an Administrative Model of Independence and Accountability for Statutory Tribunals

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The initial impetus for this paper comes from the hypothesis that the issue of independence of administrative tribunals<sup>1</sup> was slightly more complex than is presently defined by the courts. Most current discourses on the subject of administrative tribunal independence attempts to superimpose the "judicial model" on tribunals. That is, the courts view independence of administrative tribunals as requiring "to a lesser extent"<sup>2</sup> the same criteria identified for the judiciary : financial security, security of tenure, and a measure of administrative control or institutional independence. My critique is essentially that the criteria of security of tenure, security of salary and administrative control, which I describe as the "judicial model" of independence, are inadequate to describe the reality of tribunals. In my view, the model needs to be further refined to adequately protect the measure of independence and accountability necessary for the successful functioning of administrative tribunals. The purpose of this paper is to develop an alternative model of independence, "an administrative model," that is better suited to the nature and role of administrative tribunals.

In the first part of this paper, I discuss and critique the current criteria applied by the courts. In the second part, I deal with the rationales for independence and accountability and the reasons why society values such concepts in the context of administrative decision-making. Finally, an "administrative model" of independence is proposed and suggestions are made as to how courts might evaluate the issue of independence of administrative tribunals.

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1. The initial question as to which administrative tribunals ought to be independent raises interesting issues : should it be only a legislative choice, except for tribunals who adjudicate issues affecting the "life, liberty or security of person" of citizens? When such an interest is involved, the courts must assess whether the process complies with the principles of fundamental justice, which include an independent adjudicator, as required by section 7 of the *Charter of Rights and Freedoms* (See *Reference re Independence of Judges the Provincial Court, Prince Edward Island*, (1997) 150 D.L.R. (4th) 577 (S.C.C.)). There is some merit to the idea that the independence of the decision-making structure is a question that should be decided by the government establishing the public authority. However, currently, because "independence" is seen as part of the rules of natural justice, courts feel free to second-guess the structures established by governments. This paper assumes that courts will continue to do that and independence will be required for most decision-making structures which carry adjudicative responsibilities.
  2. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Valente v. The Queen*, [1985] 2 S.C.R. 673 [hereinafer *Valente*]. *R. v. Généreux*, [1992] 1 S.C.R. 259; *R. v. Lippé*, [1991] 2 S.C.R. 114 [hereinafter *Lippé*].

## I. THE CURRENT CASE LAW ON INDEPENDENCE OF TRIBUNALS

During the last five years, notions of impartiality and independence have often been called upon to question administrative tribunals' decisions.<sup>3</sup> Decisions regarding independence have limited the scope of governmental action with respect to salary negotiations<sup>4</sup> and appointment procedures.<sup>5</sup> It is this recent case law that has prompted my reflections.

In 1995, the Supreme Court of Canada, in *Canadian Pacific Ltd. v. Matsqui Indian Band*<sup>6</sup> commented on the criteria of independence for administrative tribunals. In that case, band councils had, pursuant to the *Indian Act*, created a tribunal to deal with the evaluation of real property on reserves. In accordance with the regulations adopted by the Matsqui Band, members of the tribunal "could" be paid. The members were appointed for one year but could be revoked at the discretion of the band council.

The Supreme Court (five to four) decided that it was appropriate to allow *C.P.* to bypass the Aboriginal tribunal to obtain a ruling from the Federal Court on whether or not railway tracks were "on the reserve" and therefore subject to taxation.<sup>7</sup> The Chief Justice's decision, which finds the Aboriginal tribunal lacking independence and proves *C.P.* right, is a minority judgment. Only Mr. Justice Cory concurs. Three other judges, Mr. Justice LaForest, Mr. Justice Major and Madam Justice McLachlin, agreed to dismiss the appeal but for other reasons.<sup>8</sup> The four dissenting judges argued that the question of independence should be appreciated within a factual context and, therefore, the Aboriginal Taxation Appeal Tribunals should hear the case first. However, the dissenting judges agreed on the principles and the criteria applied by the Chief Justice in his discussion of the principle of independence of the tribunals.

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3. My intuition is that this type of argument has gained popularity in the last five to seven years, possibly because successful judicial reviews on other procedural grounds — procedural fairness or *audi alteram partem* — have decreased. See for a review of the 1995-1996 case law, Diana Ginn, *Recent developments in Impartiality and Independence*, (1997-1998) 11 C.J.A.L.P. 24. See also for an illustration, *Canada (Privacy Commissioner) v. Canada (Labour Relations Board) (T.D.)*, [1996] 3 F.C. 609 and recently, *Bell Canada v. Canadian Telephone Employees Assn*, [1998] F.C.J. No. 313. (Q.L).
  4. *Reference re Independence of Judges the Provincial Court, Prince Edward Island*, *supra* note 1.
  5. *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcools)*, (1996) 140 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Régie des alcools*].
  6. *Supra* note 2.
  7. The Federal Court eventually ruled that it was not : see [1996] F.C.C. No. 479.
  8. Mr. Justice LaForest considers that the question of whether the real property is on the reserve or not is a jurisdictional question subjected to the correctness standard. Mr. Justice Major and Madam Justice McLachlin are of the opinion that the question is not one which comes within the jurisdiction of the taxation appeal boards and that it is not necessary to have them reach a decision on this issue.

In his judgment, the Chief Justice analysed the issue of independence in accordance with the three criteria identified in the *Valente*<sup>9</sup> decision (security of tenure, financial security and administrative control). The discretionary language used in the by-law to provide for the financial compensation of the Aboriginal tribunal concerned the Chief Justice : "Independence premised on discretion is illusory."<sup>10</sup> His second concern was the lack of security of tenure for tribunal members. This situation "leaves open the possibility of considerable abuse."<sup>11</sup> The concern was further heightened because, for the Chief Justice, the members of the tribunal were appointed by "the opposing party" (para. 95). The oath of office was taken into account but could not reassure "the reasonable, well-informed person" that members of the tribunal would decide without bias. Applying the traditional test of the reasonable and well-informed bystander, and taking into account the three criteria, the Chief Justice concluded that the Aboriginal Taxation Appeal Tribunal was not "independent."

A strict reading of the opinion could affect many administrative tribunals as presently constituted. Many tribunals deal with questions opposing the citizen and the government. The government, the opposing party, appoints most members of the tribunals. The process of nomination is often focused on the cabinet level, with little or no public involvement. It is often secretive. Does that mean that such an appointment process requires greater security for the nominees? Does it entail that any time the government appoints decision-makers without a contract or leaves their mode of remuneration to the regulatory process, the tribunal is vulnerable on issues of independence? Although there is some uncertainties on this issue,<sup>12</sup> such an outcome is possible, even desirable for some.<sup>13</sup>

Another recent case of the Supreme Court of Canada on the issue of structural independence may also disturb the existence of some tribunals. In 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcools)*,<sup>14</sup> the Supreme Court dealt with the question of institutional bias in the Québec Régie des permis d'alcools. However, the court also made important points with respect to the issue of structural independence. The court ultimately

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9. *Supra* note 2.

10. *Matsqui Band*, *supra* note 2 at para. 104.

11. *Ibid.* at para. 94.

12. It seems clear that once the executive has chosen to give fixed term contracts, it cannot terminate the appointee at pleasure : *Hewat v. Ontario* (1998), 37 O.R. (3d) 161 (C.A.); *Dewar v. Ontario* (1998), 37 O.R. (3d) 170 (C.A.). See however the opinion of McEachern C.J.B.C. in *Preston v. British Columbia* (1994), 116 D.L.R. (4th) 258 (B.C.C.A.), where the power of the Lieutenant-Governor in Council to declare the office vacant at any time is upheld provided that damages are paid to the holder of the position whose appointment is terminated during term.

13. See for a summary of views on the desirability of having contracts for administrative decision-makers : Mr. Justice Gordon Blair, *The Evolving Role of Administrative Tribunals at a Time of Governance Reorganization* [unpublished paper].

14. *Supra* note 5.

dismissed the challenge brought by the permit holder with respect to structural independence. The challenge questioned the links between the Régie and the Ministère de la sécurité publique. Gonthier J. considered that "it is not unusual for an administrative agency to be subject to the general supervision of a member of the executive with respect to its management."<sup>15</sup> The key, according to Mr. Justice Gonthier, was that there be freedom in the course of the decision-making process. The burden of proof was on the parties to show how the Minister might influence this process.

Several points in this decision warrant discussion. First, Mr. Justice Gonthier explicitly rejected the idea that a member appointed "at pleasure" could be independent.<sup>16</sup> This is obviously worrisome. Appointments "at pleasure" of administrative boards' members were and continue to be common place. Does it mean that all these boards are vulnerable to an argument of lack of independence?<sup>17</sup> Mr. Justice Gonthier's statement should probably be attenuated by his reference, in another part of his decision on independence, to the state of affairs "generally occurring" in the organization of administrative tribunals. As mentioned, in reaching the conclusion that the links between the Ministère de la sécurité publique and the Régie were not "suspect," Mr. Justice Gonthier was satisfied to rely on the long-standing practice of having one minister supervise agencies. He went so far as to require that the party prove that such practice does "influence" the decision-making process.<sup>18</sup> However, a further caveat should be applied. In her concurring opinion, Madam Justice L'Heureux-Dubé suggested that only tribunals who are final decision-makers have to obey the strict requirements of independence. When a right of appeal on questions of law is provided or when judicial review is possible, she might argue that the elements of independence could be more loosely applied.

Lower courts have tended to approach the question with more pragmatism. For example, in *Katz v. Vancouver Stock Exchange*,<sup>19</sup> the British Columbia Court of Appeal considered that the practice of having several lawyers alternate as chairs on a panel for the Vancouver Stock Exchange did bring into question the ability of the panel to be "independent." The court found that the practice, although not written, was that the

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15. *Ibid.* at para. 70.

16. "the removal of adjudicators must not simply be at the pleasure of the executive." *Ibid.* at para. 67.

17. See for a similar conclusion : Blair, *supra* note 13.

18. This requirement that the party prove actual influence appears, at first, inconsistent with the traditional test of the reasonable bystander which, it must be remembered, emphasizes protection of appearances of independence and impartiality. However, Justice Gonthier's views could be read in light of his dissenting position in the *Matsqui Band* decision and his wish that questions of independence be discussed in a broader factual context. See Ginn, *supra* note 3. In my view, this approach which favours an evaluation of the question of independence in a broader factual context is preferable : it is compatible with the idea of broadening the viewpoint of the imaginary bystander.

19. *Katz v. Vancouver Stock Exchange* (1996), 128 D.L.R. (4th) 424 (B.C.C.A.), aff'd [1996] 3 S.C.R. 405.

lawyers were charging an hourly rate and were paid for their services. Therefore, even if, according to the written rules, they did not have security of tenure or financial security, the practice of the tribunal could not lead any reasonable and well-informed bystander to think that the panel was not independent from its appointee, namely the Vancouver Stock Exchange. The Supreme Court endorsed the Court of Appeal's opinion.

By considering the shortcomings of the judicial model, one could first criticize the application of the test, particularly in the *Matsqui Band* case. It is surprising that the approach in *Lippé*,<sup>20</sup> describing the *Valente* indicia of independence as *ideals*, as opposed to measuring sticks was not re-emphasized in *Matsqui*, particularly since it was a case where diversity and innovation were clear governmental objectives. Besides, in the search for what the reasonable and well-informed bystander thinks of the tribunal, one must be careful not to assume that the reasonable bystander is paranoiac or identifies only with the person complaining about the decision-maker, for example, with *C.P.* in the *Matsqui Band* case. The reasonable person is not only the one who stands to have her rights affected by the decision. It could also be a person who endorses the values of self-government or one who stands to lose because decisions will be further delayed. It could also represent the collective interests at stake. For example, in considering whether the reasonable and well-informed person would have concerns, the court in the *Matsqui Band* case only outlined the *Valente* concerns and not, as the dissenting judges suggested, the objectives of self-government. The reasonable person has, in my view, been portrayed as having an overly individualistic approach, always siding with the person who stands to have her rights affected by the decision and rarely with the collective interest of the taxpayers. Maybe if she were also informed about the long-term benefits of self-government, she would change her mind?

A more flexible approach to the concept of independence is certainly warranted. Otherwise, innovations in the delivery of administrative justice might be unduly abandoned.<sup>21</sup> Nevertheless, even a flexible approach to the way the reasonable bystander test is currently applied may not be sufficient if the only criteria that are still evaluated are financial security, security of tenure and administrative control. Therefore, the question must be asked : 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?

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20. *Supra* note 2.

21. For example, participatory models of administrative justice where the pool of potential litigants "elect" or "appoint" tribunal members seem incompatible with the tenets of security of tenure. See for a reference to such democratization of decision-making : L. Sossin, "*Redistributing Democracy : An inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State*" (1994) 26 Ottawa L.R. 1. See also *Sparvier v. Cowessess Indian Band no 73*, [1993] 3 F.C. 142 as an example of a form of participatory model. The members of the Election Appeals Board were to be elected prior to the elections. In the case, the court found that the members had in fact been appointed and not elected. An argument of bias was accepted because of comments made by one member prior to his resignation from the board.

Tribunals are creatures of statutes and may be abolished any time. In that context, financial security and security of tenure may be completely illusory.

Furthermore, it is also interesting to raise above all other concerns an apprehension about financial security. It presumes a certain lack of moral fibre in the potential decision-makers. It is also somewhat simplistic to think that persons in receipt of a salary never accept bribes. One can certainly find examples in history of rich and well-paid people accepting bribes. Similarly, security of tenure does not prevent ambitious people from wanting to please their superiors in the hope of becoming "vice-chair," from wanting to please one industry in the hope of being able later to obtain employment, or from wanting to please the press in the hopes of being well-known and popular. In that sense, the judicial model of independence and accountability may seem disconnected from the reality of the life of an administrative decision-maker.

Our current focus is on a hierarchical model of justice where the only guarantee resides in the isolation of the decision-maker from the daily troubles of working life. It is not only unrealistic but it also masks the need to address equally important problems in ensuring quality in decision-making. We have emphasized on financial criteria in a search for the good conscience decision-maker. It could be that financial criteria are not the only, or even not at all the proper, criteria to guarantee that a person is able to judge without bias. People might not be motivated only by money in the way they assess and carry on their duties as listeners and decision-makers.<sup>22</sup>

Therefore, it can be argued that the judicial model of independence is at the same time too permissive and too restrictive : it fails to provide a useful model to discuss real issues of independence of administrative tribunals while preventing the adoption of innovative measures. In my view, financial security, security of tenure and administrative control should not be the only key to ensuring independence of decision-makers. This "judicial model" of independence is not always appropriate and it should be modified or replaced by a model that emphasized on different issues in administrative justice. Prior to developing such a model, it is worthwhile to reflect upon the nature of the enterprise : Why do we want independent decision-makers? What is the nature of independence? What is its relationship to accountability? Such questions are developed in Part II of the paper.

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22. It was interesting to note that in *Canadian Pacific Ltd. v. Matsqui Indian Band*, *supra* note 2, the Aboriginal bands used "honour" as equivalent to financial security : the oath of office, the promise, was argued as an indicia of the future independence of the tribunal members. The court gave this some weight but not enough to offset the perceived risk of abuse brought about by the lack of financial security and security of tenure.

## II. INDEPENDENCE AND ACCOUNTABILITY : THE RATIONALE

Traditionally, one imagined that the fear of the litigant was to not be heard, in all senses of the word. The maxim *audi alteram partem* was the answer to the fear not to be heard in the primary sense of the word while the maxim *nemo iudex in sua causa debet esse* (no one should be a judge in his or her own case) related to the fear not to be "heard" in the secondary meaning of the word : there is no sense explaining one's case to someone whose mind is already made up, to someone who hears, but does not listen.

Authors have described the concept of independence in different ways. R. MacGregor Dawson explained, in 1954, that the decision-maker should be "placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong : there is therefore every reason that his best efforts will be devoted to the conscientious performance of his duty."<sup>23</sup> John Evans speaks of "adjudicative freedom."<sup>24</sup> Rosalie Abella speaks of "the right to be free from external control or influence and the right to be seen that way."<sup>25</sup>

The concept is generally associated with credibility of the process, and confidence on the part of the public. One thing is clear, however; independence serves a subsidiary role in the concept of natural justice. It aims at insuring the impartiality<sup>26</sup> and is a necessary but not sufficient aspect of impartiality.<sup>27</sup> Impartiality is the only reason for the principle of independence. Independence is therefore not a privilege of decision-makers but an institutional facet of their employment aimed toward a higher object : impartiality.

It must also be remembered that as the concept is currently understood, it emphasizes "disconnectedness." In that sense, it is a concept that is culturally driven. Peter Hogg notes : [I]t is inherent in the concept of adjudication, at least as understood in the western world, that the judge must not be an ally or supporter of one of the contending parties.<sup>28</sup> The idea of conferring power to decide to a "stranger" is not universally accepted. For example, Aboriginal tribal laws, peacemaking courts for example, 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. The choice of the peacemaker respects her experience and age as opposed to her lack of relationship

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23. D.R. MacGregor, *The Government of Canada*, 2d ed. (Toronto : U. Toronto Press, 1954) at 486, cited by M.L. Friedland, *A Place Apart : Judicial Independence and Accountability in Canada*, (Ottawa : Canadian Judicial Council, 1995).

24. J.M. Evans, H.N. Janisch & D.J. Mullan, *Administrative Law : Cases, Texts, and Materials*, 4th ed. (Toronto : Emond Montgomery, 1995) at 458, cited by D. Ginn, *supra* note 3 at 26.

25. R.S. Abella, "The Independence of Administrative tribunals" (1992) 26 Law Soc. Gazette 113.

26. *MacKeigan v. Hickman*, [1989] 2 R.C.S. 796.

27. According to the decision in *Régie des alcools*, *supra* note 5.

28. Cited by M.L. Friedland, *supra* note 23 at 1.

with the parties. Such a conception is at odds with the concept of separateness or "disconnectedness" that the anglo-european legal tradition has emphasized.

Our model is, at the core, searching for a the decision-maker who is seen as "truly listening."<sup>29</sup> It is interesting to note that the last two aspects of selection of judges and discipline were mentioned in the all-encompassing attack against the Régie des permis d'alcools du Québec at the trial level. The reasonable bystander is mainly concerned about two dangers : the concrete danger of interference by powerful outsiders, particularly the executive part of government, and the lack of integrity of the decision-maker. This diagnosis prompts me to suggest that the mechanisms to deal with question of independence must respond to both of these aspects.<sup>30</sup>

### III. TOWARD AN "ADMINISTRATIVE MODEL" OF INDEPENDENCE

#### A. Protection from Outsiders' Interference

Three types of powerful outsiders may attempt to or seem to influence the outcome of a decision. Traditionally, we always recognized that the executive branch of government might attempt to exercise its power and influence the outcome of a decision. The case of *Roncarelli v. Duplessis*<sup>31</sup> provides the ultimate example of such influence. However, powerful players in the industry affected by the tribunal's jurisdiction may have a similar access to the decision-maker and attempt to pressure that person in support of a particular outcome. Finally, one should not dismiss the influence of the media on decision-makers.<sup>32</sup>

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29. To listen and judge in good conscience, one must be able to resist not only pressures from government but also from other sources : pressures from colleagues, pressures from arrogant counsels, pressures from intense media coverage. Intimidation of a decision-maker may occur in more ways than just financial. If we were serious about ensuring the independence of the mind of decision-makers, we might look at ways to ensure their mental stability, to provide some psychological support in times of stress, proper facilities to relax, enough time to listen carefully to all litigants and help in identifying their own biases. If we were serious about ensuring the independence of mind of decision-makers, we would at least consider the way in which they are nominated and disciplined.

30. It must be noted that the case law generally provide a remedy when "the wrong decision-maker" has made the decision : see for example, the quintessential case of *Roncarelli v. Duplessis*, where the Court is satisfied that it is Mr. Duplessis who decided to cancel Roncarelli's liquor licence permit, and not the properly appointed Chair, Mr. Archambault. The court was helped in reaching this factual conclusion by the fact that Premier Duplessis had publicly claimed responsibility for such decision and had acknowledged, with pride even, his role in the affair.

31. *Ibid.*

32. See for a discussion of the media as a threat to judicial independence : B.C. court.

There are several ways to limit outsiders' interference in a process. One can :

- a) Limit the occasions for meetings;<sup>33</sup>
- b) Limit the amount of information that is provided to the outsider so that he or she does not know how to influence the decision-maker;
- c) Convince the outsider that interference is inappropriate;
- d) Convince the outsider that the interference is unnecessary.

Not all mechanisms are appropriate in the context of the relationship between the executive and administrative tribunals, the industry and tribunals or between the media and administrative boards. Information might need to flow between such players. Nevertheless, "limitation" strategies, (strategies A and B) call for accepted protocols on the sharing of information and reporting. Governments do need information about administrative tribunals and they should get it, without such request being perceived as interference. The information should be processed through accepted channels and be known in advance.

In that context, one might expect, for example, that independence would be measured by the following criteria :

- Whether reporting obligations are known in advance and not made ad hoc;
- Whether such reporting obligations are public;
- Whether codes of conduct dealing with the amount of social interactions between decision-makers and government officials or other powerful players are in place.

## **B. Whether There is a Determined Process of Dealing with the Media**

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33. In that context, the location of the offices of a tribunal may be questioned. See for a description of the critique of sharing of offices with the prosecution branch of a tribunal, *Bell Canada v. Canadian Telephone Employees Assn.*, *supra* note 3, where the decision to move the offices of the Human Rights Tribunal to a building other than the one occupied by the Human Rights Commission is discussed in the context of the search for the independence of the tribunal.

As for the last two mechanisms, that is the mechanisms that attempt to convince the outsider that the interference is neither appropriate nor necessary, they appear to be the more likely to succeed. If the outsider is convinced that the interference is inappropriate or, even better, unnecessary, the likelihood of such interference diminishes greatly.

The inappropriateness of interference is well known in our legal culture, although one can never know when generally accepted rules of conduct will be breached.<sup>34</sup> The recent interference by a senior public servant in the affairs of the Federal Court indicates the need for caution with respect to one optimist's view that "everyone knows that it should not be done." Humans may be driven by what they see as emergencies to ignore otherwise accepted rules of conduct. Similarly, one must be very cautious in thinking that the media, or even less so the industry, will self-regulate in order to convince its members that interference is inappropriate.<sup>35</sup>

*It is in that context that accountability measures must be understood.* Accountability measures must be understood as a method to convince the government and possibly the press and the industry that interference is unnecessary. The governments and the press who know or believe that the administrative board will deal with inconsistencies, incompetent decision-makers or other negative aspects of the administration are more likely to leave it to the board if they are satisfied that such inadequacies will be addressed or at least that processes are in place to deal with them. Mechanisms for accountability should be carefully designed with this objective in mind.

Such accountability mechanisms will also aim at fostering integrity in the decision-making, which is what the reasonable bystander is looking for.

## **B. Ensuring the Integrity of Decision-Makers**

Ensuring that decision-makers act with integrity may be the sole focus of the current criteria used by the courts. As discussed earlier, security of tenure, financial security and administrative control emphasize outside institutional attributes in the decision-maker that were traditionally associated with preserving integrity. My point is simply that the search for criteria which respect the integrity of decision-makers should be more comprehensive. In my view, one must look not only at outside attributes but also at the selection of decision-makers. I suggest two strategies to ensure that decision-makers act with integrity :

- that those who have integrity and the ability to resist pressures be selected;

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34. *Canada (Minister of Citizenship and Immigration) v. Tobiass (T.D.)*, [1996] 2 F.C. 729.

35. My own view is that efforts should be made to design protocols of conduct with the media in order for both sides to know what is and what is not appropriate conduct.

- that they be supported in maintaining their integrity.

i. The Selection Process

More studies need to be done to determine what are the proper indicia of potential for integrity in a decision-maker. How one demonstrates a potential for integrity and an ability to resist pressures is far from clear. However, nominations that ignore completely such criteria and are based solely on political affiliation would not satisfy anyone that the person has the ability to resist pressures.

Independent assessment of candidates might be a tool that could accomplish part of this objective. A public process might also be considered. One certainly worries about having selection criteria which would be based solely on past experience since this necessarily excludes people who were not given the chance before and might have just as much integrity. At a minimum, an ability to resist pressure should be considered in the selection criteria.

However, people do change and it is in that context that measures relating to the support of decision-makers are encompassed in the concept of independence.

ii. The Support of Decision-Makers

The rules of financial security and security of tenure attempted to address the issues of "protection from temptations." In my view, as I developed earlier in this paper, they are not sufficient to truly address the problem. One element, which should be addressed, is the way in which decision-makers are disciplined and evaluated. A known, objective process provides a great measure of "adjudicative freedom."<sup>36</sup>

A process for the establishment of salary and benefits is certainly important. Clear evaluation criteria would also provide a measure of certainty for the decision-maker. Some understanding of the level of authority of the Chair of the tribunal may also be looked at in this context. Support for dealing with stressful situations is also helpful.

Essentially, the inquiry would focus on creating an atmosphere where integrity and intellectual honesty are valued and rewarded.<sup>37</sup> Again, more studies need to be done to specify with greater details what mechanisms should be properly looked at in this context. My point is simply that attention should be paid to these measures because they may turn out to be just as important, if not more, as security of tenure in conferring true independence of mind.

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36. See J.M. Evans, *supra* note 24.

37. "How it looks and acts are of course critical incidents to being independent, but most important is how it feels." R.S. Abella, *supra* note 25.

## CONCLUSION

My criticism of the current criteria of security of tenure, financial security and administrative control was that they may stifle creative ways of providing administrative justice or more generally fail to capture the real and concrete problems of independence which administrative tribunals face. I have attempted to look behind the concept of independence of administrative tribunals to understand the real concerns of the "reasonable bystander." It seems to me that they aim at protecting both the decision-maker from outsider's influence and at strengthening the integrity of the decision-making process. I conclude that it is with these two objectives in mind that we should develop criteria to determine whether a tribunal is "independent" and develop an "administrative model" of independence. Although more studies are necessary to determine, among other things, what the qualities decision-makers should display in order to be selected or what mechanisms are necessary to sustain the integrity of their decision-making, we could start to evaluate current accountability techniques that are now used to suggest a broadening of the criteria used by the courts.