

Accountability of Administrative Tribunals: Does the Present Design Ensure Independence?

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Introduction

The most important principle of all to establish is that the tribunals should be independent of the executive. If this is vital for the ordinary courts it is even more vital for the tribunals and it is even more difficult to attain.

– Lord Denning, M.R. (1949)¹

Tribunals are not ordinary Courts, but neither are they appendages of government departments. They are machinery provided by Parliament for adjudication, rather than as part of the machinery of administration (...) The intention of Parliament to provide for the independence of tribunals is clear and unmistakable.²

Independence for Administrative Tribunals: Why Do We Need it Anyway?

Essentially, the arguments in favour of protecting and promoting the independence of administrative decision-makers may be grouped under three main headings.

Firstly, independence provides decision-makers with some degree of insulation from political factors that might otherwise stall progress in developing administrative law. For instance, Judith McCormack, former

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1. A. Denning, *Freedom under the Law* (London: Stevens & Sons, 1949) at 81.
2. *Report of the Committee on Administrative Tribunals and Enquiries*, (1957) HMSO, Cmnd. 218, at para. 128

Chair of the Ontario Labour Relations Board has written that absent such guarantees,

Decisions can become carefully calibrated so that they are positioned equidistant from parameters established by the parties' litigation or lobbying positions, or perhaps a sequence of decisions will reflect an equal distribution in constituency success. The effect can be stagnation rather than stability at the point of maximum strategic buoyancy for the tribunal.³

Secondly, an administrative decision-making model based on independence from the government will likely produce higher-quality decisions by these bodies, since the decision-makers will have to take individual responsibility for the decisions rendered, instead of hiding behind institutional structures and hierarchies.⁴

Finally, administrative decision-makers should be insulated from political interference so as to protect the appearance and reality of their impartiality. Professor Ed Ratushny has argued that such safeguards are necessary to protect administrative impartiality since

The quality of life of many elected members of legislative bodies would be greatly enhanced by being able to reverse the decision of a tribunal which does not find favour with a constituent...Ministers in related portfolios, often encouraged by their officials, are quite willing to explore "informal" avenues of nudging agencies in a more comfortable direction.⁵

All administrative justice suffers if people feel that "the system" is stacked against them. Rather than just grumbling about a particular case, the public confidence in the entire integrity of the tribunal requires an arm's length relationship between the Board and the government. Above and beyond the presence of such actual pressures, the appearance of

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3. Judith McCormack, "The Price of Administrative Justice", (1998) 6 Canadian Labour and Employment Law Journal 1. (McCormack #1)
 4. Lorne Sossin and Charles W. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government", 40 Alberta L. Rev. 867 at 878.
 5. Ed Ratushny, "The Road Ahead, Independence: Unfinished Business", Annual Conference of the Council of Canadian Administrative Tribunals (Plenary Session) June 2002, Ottawa. at 2.

impartiality may also be compromised if the government is party to a dispute before an adjudicative body which is completely at the mercy of the government's whims and directions, whether exercised directly or indirectly.⁶

Theories of Accountability

The threats to the independence of administrative tribunals are often rationalized by arguments to the effect that administrative justice is guaranteed by accountability. The very term "accountability" must be unpacked: accountability must assess to whom one is accountable and for what. Specifically, bureaucratic actors such as administrative decision-makers are accountable to the government; in turn, the government is accountable to the electorate.⁷ This chain of accountability is reinforced by mechanisms including the administrative decision-makers' duty to provide reasons for their decisions, and their obligation to apply various written and unwritten rules in the course of decision-making.

It is clear that democratic accountability, as sketched above, stands in direct opposition to board independence. Specifically, if tribunals are independent from government, they are also effectively insulated from the Canadian people. Arguably, this is repugnant to certain fundamental democratic ideals animating Canadian society.⁸ It should be noted, however, that this argument is premised on the idea that government itself is accountable in a meaningful way. As stated by Professor Mullan, "[a]ny theory of accountability based on the electoral process and the answerability of Cabinet and the individual ministers in Parliament is almost completely divorced from the realities of present-day Canadian political life."⁹ There are at least three points of contact between executive government and tribunals: (1) with respect to budgets where the government provides funding to the Boards; (2) with respect to

6. Katrina Wyman, "The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence" (2000-01) 14 C.J.A.L.P. 61, at 120-121. ("Wyman #1")

7. Smith and Sossin, *op. cit.* at 878.

8. McCormack #1 at 32.

9. David Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984", in *Regulations, Crown Corporations and Administrative Tribunals*, Ivan Bernier and Andr ee Lajoie, Research Co-ordinators (University of Toronto Press: Toronto, 1985), 155. at 179.

appointments, as the government of the day appoints tribunal members; and (3) with respect to accountability, the executive's need to be accountable to Parliament or to the Legislature so there is accountability for individual tribunals for the administrative justice system as a whole.

Notwithstanding the limitations to this sort of accountability argument and the limitations on administrative tribunals providing an appropriate forum for policy development, it is clear that our democratically elected governments should be entitled to influence the process of administrative justice as well. As stated by Judith McCormack, "If accountability is not a trump card, it is still a strong suit."¹⁰

Judicial Review as a Means of Ensuring Independence

Although perhaps to a lesser degree than their counterparts play in the republic to the South, courts in the Canadian system of parliamentary democracy are conceived as providing the primary check to threats to an administrative decision maker's independence. Specifically in the course of performing judicial review of administrative decisions, the judiciary can ensure that disputes are assigned to bodies possessing adequate levels of institutional independence, and that whatever independence guarantees administrative bodies are presently accorded are adequately applied.¹¹

Theoretically, the supervisory powers of a branch of government which is itself independent from the executive and legislative branches should sufficiently safeguard an administrative tribunal's independence. McLachlin C.J., for example, has written: "[J]udicial review ensures that the processes of decision-making are neither arbitrary nor offensive to the values underlying our concept of the rule of law."¹² Such optimism is not unanimous, however. Dean Philip Bryden, for example, has stated that:

It is worth remembering as well, however, that this requirement has never carried the entire freight of the commitment our system of administrative law makes to

10. McCormack #1, at 38.

11. Philip Bryden, "Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*" (2002-03) 16 C.J.A.L.P. 125, at 141.

12. Hon. B. McLachlin, "Rules and Discretion in the Governance of Canada" (1992), 56 Sask. L. Rev. 167, text after note 22.

independent and impartial decision-making, and in my respectful opinion is incapable of doing so.¹³

There are at least three limitations to judicial review providing an effective means of protecting the independence of administrative bodies. First, recent Supreme Court jurisprudence suggests that the common law requirements of independence may be ousted by express statutory language or by necessary implication.¹⁴ Therefore, barring a constitutional challenge to the impugned legislation, independence-infringing phenomena or structures may be effectively insulated from judicial review. As stated by David Jones, this “casts a serious damper on the potential use of structural independence as a successful ground of judicial review”.¹⁵

Secondly, the courts have indicated that they will not apply unwaveringly high standards of independence in every situation. As held by the Supreme Court of Canada in *Ocean Port*, the applicable degree of independence will be divined by looking at the legislation as a whole.¹⁶

Above and beyond the common-law limitations on judicial review in this area, it may also be argued that the courts are fundamentally ill-suited to the task of protecting and promoting the independence of administrative bodies. Professor Katrina Wyman, for instance, has argued that judicial oversight of this independence issue may ultimately result in reducing the administrative body’s accountability, and insulating it from social concerns relevant to their policy-development functions.¹⁷ Wyman further suggested that such an approach could cause governments to bring in-house some of the functions that were previously performed by administrative bodies, thereby eliminating or reducing the procedural safeguards available to individuals who would have previously appeared before a tribunal or other administrative body.¹⁸ Finally, Wyman has argued that the judiciary is ill-equipped to provide guidance in this

13. P. Bryden, *op.cit.*, at 137.

14. *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, at para. 22.

15. David Phillip Jones, “Recent Developments in Independence and Impartiality” (2001-02) 15 C.J.A.L.P. 81, at 100.

16. *Ocean Port*, at para. 20.

17. Katrina Wyman “Appointments to Adjudicative Tribunals: Politics and the Courts” (1999) 57 U.T. Fac.L. Rev 101, at para. 36. (“Wyman #2”)

18. *Ibid.*

context as judges usually do not possess the requisite expertise to do so, and the common law is not sufficiently developed in this area.¹⁹ Although these comments were made in the context of judicial supervision of the appointments process, they are equally applicable to the other dimensions of institutional independence.

Similar arguments have been made by Dean Bryden, who has stated that the:

(...) [A]ppropriate guarantees of security of tenure, security of remuneration and administrative independence represent only a small element of what is needed to create an effective system of administrative justice. Other elements include good recruitment and selection processes, resources for effective training and support of tribunal members, appropriate mechanisms for managing performance problems, thoughtful statutory mandates and the careful design of tribunal powers. All of these elements fall within the purview of government and all of them compete for priority with other demands, including demands for resources to enable our court systems to function more effectively. This should not be taken as a counsel for despair, but as a suggestion that it behooves courts to pay some attention to the practical limits on their ability to make an effective contribution to the production of high quality administrative justice through the imposition of structural independence requirements.”²⁰

Should Different Tests be Applied to Measure Judicial Independence and the Independence of Administrative Tribunals?

One of the most superficially appealing solutions to the “independence dilemma” facing Canadian administrative tribunals is to transpose the requirements established in the judicial context onto administrative decision-makers. Such an approach would require

19. *Ibid.* at pars. 37 and 40

20. P. Bryden, *op.cit.*, at 158.

administrative bodies to satisfy the *Valente* criteria: namely, security of tenure²¹; financial security²²; and administrative independence.²³

The Supreme Court of Canada, however, has recently rejected this approach.²⁴ Specifically, in *Bell Canada v. Canadian Telephone Employees Association*,²⁵ the Supreme Court of Canada stated that “As an administrative tribunal subject to the supervisory powers of s.96 courts, the Tribunal does not have to replicate all features of a court.”²⁶ As shall be explored below, this writer believes that there are sound reasons for differentiating between the standards of independence required for courts and administrative decision-makers.

One of the reasons for this differentiation is the fact that the independence guarantees required of administrative tribunals are rooted in different legal sources. Specifically, judicial independence is based primarily upon division of powers principles.²⁷ Administrative tribunals, on the other hand, have been said primarily to be extensions of the executive.²⁸

Their rather precarious position within the bureaucratic structure spawns a second reason to hesitate before transplanting the *Valente* criteria into an administrative context: administrative tribunals may require some degree of independence from the judiciary as well as from the executive and the legislature.²⁹ As the *Valente* criteria were clearly not developed with this criterion in mind, it is possible that they would not adequately address this issue.

21. *R.v.Valente* [1985] 2 S.C.R. 673, at para. 37.

22. *R.v.Valente* at para. 40.

23. *R.v.Valente* at para. 47.

24. See James L.H. Sprague, “The Quest for the Grail of Agency Institutional Independence: A case comment on *Bell Canada v. Canadian Telephone Employees Association*”(2002-03) 16 C.J.A.L.P. 315, at 315.

25. [2003] 1 S.C.R. 884

26. *Bell Canada* at para. 29

27. *Reference re Remuneration of Judges*, [1997] 3 S.C.R. 3, at para 138.

28. *Canadian Telephone Employees Assn. v. Bell Canada*, [2001] F.C.J. No. 776 (FCA) at para. 30. See also *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, at para. 24.

29. *Wyman #1*, at 124.

A more convincing reason for applying different standards of independence to courts and administrative tribunals is that these two bodies perform different functions. As stated by Professor Katrina Wyman

...for the most part, administrative tribunals are not assigned the role of upholding the Constitution against incursions from the legislative and executive branches that provides one of the primary justifications for constitutionally protecting the independence of the judiciary. Moreover, while many tribunals make determinations about rights, tribunals generally differ from the traditional courts in the way that they adjudicate rights.³⁰

Furthermore, administrative tribunals usually have a more significant policy-making mandate than courts.³¹ This latter basis of distinction has been disputed by some academics who have properly noted that courts, of course, also consider policy implications when adjudicating disputes, interpreting statutes, undertaking reviews of division of powers and in performing *Charter* analyses.³² Notwithstanding this divergence of opinion, it is clear that the courts and administrative tribunals do fulfill different functions, and that the application and enforcement of the *Valente* criteria to administrative tribunals may compromise some of the latter's distinguishing features, such as their efficiency and sensitivity.

Finally, the *Valente* criteria may be inappropriate in an administrative law context as they do not address issues pertaining to the appointments process. As argued by Wyman:

The common law that has emerged in the wake of judicial interpretation of s.11(d) of the *Charter* simply does not regulate the process for selecting the members of adjudicative tribunals because the constitutional jurisprudence on judicial independence does not regulate the "procedure and criteria for the appointment" of judges,

30. *Ibid*, at 113.

31. Wyman #2 at para.34.

32. Wyman #1 at 118-119

preferring instead to define judicial independence in terms of the post-appointment factors of security of tenure, financial security and administrative independence. As a result, the common law does not address what is perhaps one of the most significant threats to the independence of adjudicative tribunals: the lack of procedure and criteria governing the selection of most adjudicators, and the extensive discretion that this vacuum affords the executive branch in appointing members of tribunals.³³

Accepting thus that courts and administrative tribunals should be judged against different standards of independence, the issue then becomes what that alternative standard should look like. For its part, the Supreme Court of Canada has indicated a willingness to apply to administrative decision-makers a test which differs quite dramatically from that elucidated in *Valente*. Specifically, in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*,³⁴ the majority of the Supreme Court determined that labour arbitrators' independence may be guaranteed by their experience, training and mutual acceptability instead of by means of security of tenure, administrative independence and financial security.³⁵ Some courts and scholars have suggested that such divergences may not have much practical significance. As stated by McLachlin C.J.: "While the same general values underlie good decision-making by both courts and administrative tribunals, they may be reflected in different ways."³⁶ One must question, however, whether the tests applied to each are simply different means of accomplishing the same end, or whether in fact administrative tribunals are to be judged against a lower standard of independence.

What Would be the Ingredients of a Fair Compromise?

The foregoing discussion clearly indicates that there are strong policy factors militating against administrative tribunals being subject to

33. Wyman #2, at para. 19

34. [2003] 1 S.C.R. 539

35. *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para.192. ("CUPE 2003")

36. Hon. B. McLachlin, *op.cit.*, text after note 36.

the *Valente* criteria of judicial independence. Nevertheless, it seems inescapable that there is a need for some degree of institutional and structural guarantees of a tribunal's independence from the government. In short, a compromise must be struck between accountability and independence. I will develop the content of this compromise through a consideration of the appointments process, remuneration, tenure, overlapping roles, and the appropriateness of consultation within administrative bodies.

i) the appointments process

The appointments process has been widely acknowledged as one of the most significant source of threats to the independence of administrative bodies.³⁷ Currently, the removal and selection of most adjudicators are not governed by any formal legal requirements.³⁸ This void has contributed to a situation whereby governments are "...blatantly and unapologetically using their powers of appointment, reappointment, and dismissal to achieve political ends and political rebalancing."³⁹ It is clear that the appointments process should be bolstered with structural independence guarantees. The issue is what form these guarantees should take, and who should implement and enforce them.

One potential solution is to emphasize judicial review of the appointments process. Proponents of this solution would doubtlessly point to the recent Supreme Court of Canada decision in *C.U.P.E. v. Ontario (Minister of Labour)*. In that case, the Court determined that in the absence of statutory authority to the contrary, the Minister was

37. See *e.g.*, *Wyman #2*, at para. 19.

38. *Wyman #2* at para. 29. However, efforts have been made to improve this situation in certain provinces. For example, BC's new *Administrative Tribunals Appointment and Administration Act*, SBC 2003, c. 47 regularizes the appointment process and limits executive discretion in the recruitment and termination of board members. See also *Administrative Tribunals Act*, SBC 2004, c.45. Similarly, in Québec, see the *Act respecting administrative justice*, which was passed by the National Assembly on December 13, 1996, establishing The Tribunal administratif du Québec. It has been in operation since April 1, 1998. But see S. Comtois, « Le Tribunal administratif du Québec: un tribunal suffisamment indépendant? » *Commentaire de Barreau de Montréal c. Québec (Procureur général)*, (2001) 14 C.J.A.L.P. 127.

39. David Mullan, *Administrative Law* (Irwin Law, 2001, Toronto) at 346.

required to appoint independent and impartial arbitrators.⁴⁰ Although this decision is encouraging, it does not address some underlying issues pertaining to judicial review of the appointments process. In the first instance, it is arguable that judicial review of this process would effectively achieve independence at the cost of the tribunal's accountability to the broader public.⁴¹ Furthermore, it may be argued that the courts do not possess the necessary expertise to regulate the area.⁴² Finally, some academics have suggested that the common law has not developed to the point where it can provide sufficient guidance to judges in this regard.⁴³

Alternatively, the appointments process could be re-designed so as to cede a large measure of control over the appointments process. This would undoubtedly help insulate the tribunal from political interference; nevertheless, this gain may be achieved at the expense of the tribunal's accountability to the Canadian public. As noted by Judith McCormack, constituency control could "...result in adjudicators who pander to the constituencies served by the tribunal, and who may contribute to an environment of self-governance."⁴⁴

Finally, the tension between accountability and independence with respect to the appointments process could be resolved through policies designed to increase the chair's role in the process. As the chair is indirectly responsible to the electorate, such a strategy could preserve the tribunal's accountability, and erect a barrier to direct political manipulation. However, it has been argued that such a course of action would simply shift the locus of the threat to the tribunal's independence. Specifically, it may increase the vulnerability of adjudicators to the influence of the tribunal chair.⁴⁵

ii) overlapping roles

40. *CUPE 2003*, at para.111

41. *Wyman #2* at para. 36.

42. *Wyman #2* at para. 37.

43. *Wyman #2* at para. 40.

44. *McCormack #1* at 48.

45. *McCormack #1*, at 45-46.

Recent jurisprudence suggests that the courts, at least, are of the opinion that the appropriate balance between independence and accountability with respect to overlapping roles lies quite heavily on the accountability side. Specifically, in *Ocean Port*, the Supreme Court of Canada determined that “[t]he overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role.” More recently, the Supreme Court of Canada determined that the Canadian Human Rights Tribunal’s independence was not compromised by the fact that the Commission could simultaneously act as prosecutor, and issue guidelines governing the adjudication before the Tribunal.⁴⁶

Admittedly, such overlapping may well help increase the organization’s overall efficiency. Furthermore, there may be some valid basis for drawing a distinction between interference from other administrative officials, such as members of the Human Rights Commission, and interference from the legislature or the executive.

Nevertheless, it is my opinion that the Court in *Bell* may have strayed too far from the independence end of the spectrum in this context. A more appropriate balance would impose more significant limitations on overlapping functions within administrative bodies.

The main issues before the Supreme Court of Canada in this case were whether the Canadian Human Rights Tribunal’s independence was compromised by the fact that the Commission could issue binding guidelines regarding a “class of cases”, or by the Tribunal Chairperson’s power to extend a member’s term in ongoing inquiries. Ultimately, the Court determined that neither of these phenomena unduly compromised the Tribunal’s independence.⁴⁷

Beyond these specific findings, the Court determined that the procedural fairness and independence requirements for tribunals exist on a spectrum. Specifically, administrative bodies that are closer to the judicial end of the spectrum must conform to more exacting procedural fairness requirements.⁴⁸ The Court did not specify exactly what that

46. *Bell* (SCC), at para. 40.

47. *Bell* (SCC), at para. 50 and 54.

48. *Bell* (SCC) at para. 21.

“high standard” is,⁴⁹ but did state that a tribunal’s position on the spectrum must be determined based on an assessment of the functions they perform, and of the applicable legislative scheme.⁵⁰

Finally, the Court resolved any ambiguities left in the wake of *Ocean Port* as to whether the unwritten constitutional principles apply to administrative bodies near the judicial end of the spectrum. The Court dismissed the Tribunal’s arguments to this effect, stating simply that “Bell presents no authority for this argument.”⁵¹

iii) consultation

The tension between accountability and independence is perhaps most immediately apparent in issues surrounding consultation in administrative decision-making. Specifically, although consultations may increase a body’s internal consistency and hence accountability, these gains may come at the direct cost of the decision-maker’s independence.

With respect to the former, consultation may increase a tribunal’s internal accountability by promoting and facilitating consistency in decision-making. As stated by Gonthier J., full board meetings or consultations:

...create the possibility that different panels will decide similar issues in a different manner. It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be “[TRANSLATION] difficult to reconcile with the notion of equality before the law, which is one of the main

49. Sprague, *op.cit.*, at 316.

50. *Bell* (SCC) at paras. 22 to 24.

51. *Bell* (SCC), at para. 31. The British Columbia Court of Appeal recently applied the Supreme Court of Canada’s dicta regarding the spectrum of independence in the case of *Eckervogt v. British Columbia* 2004 BCCA 398. Specifically, in the course of determining whether the Expropriation Compensation Board’s impartiality or independence had been impermissibly compromised, the British Columbia Court of Appeal determined that the Board would require a high standard of independence as it was located near the judicial end of the spectrum.

corollaries of the rule of law, and perhaps also the most intelligible one”.⁵²

On the other hand, consultation may negatively affect an administrative decision-maker’s independence. Specifically, this process may result in ideas and evidence obtained outside of the hearing process being introduced into the deliberation process.⁵³ This may be particularly troubling if those ideas and evidence are being put forth by chairs who exert significant personal power over the decision-maker through their influence on case assignments, reappointments, and overall working conditions.⁵⁴

The task of balancing these two diametrically opposed concerns vis-à-vis consultation is clearly a difficult one. As the ensuing discussion shall demonstrate, however, the judiciary has managed to strike a creative balance between these concerns.

The Supreme Court of Canada first had the opportunity to consider this issue in depth in *IWA v. Consolidated-Bathurst*.⁵⁵ This case directly raised the issue of the legitimacy of full-board meetings in which the policy implications of a specific labour arbitration were discussed. The majority of the Court ultimately determined that the meeting at issue did not compromise the board’s independence. In coming to this determination, they emphasized the fact that the meeting was voluntary, and no minutes or votes were taken.⁵⁶ Gonthier J., writing for the majority, stated as follows:

It is obvious that no outside interference may be used to compel or pressure a decision-maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force

52. *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at para. 74. (*Consolidated-Bathurst*)

53. *Ibid.* at para.75.

54. J. Evans, H.N. Janisch, David J. Mullan, R.C.B. Risk, *Administrative Law: cases, text and materials* (4th ed.) (Toronto: Emond Montgomery Publications Limited, 1995) at p. 458.

55. [1990] 1 S.C.R. 282.

56. *Consolidated-Bathurst*, at para. 84.

or induce decision-makers to adopt positions with which they do not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently.⁵⁷

The Supreme Court of Canada had the chance to revisit the issue in *Tremblay v. Québec*.⁵⁸ This time, the Court determined that the full-board meetings at issue did compromise the tribunal's independence. In reaching that conclusion, the Court emphasized the fact that the president of the Commissions des Affaires Sociales could unilaterally call a plenary meeting,⁵⁹ as well as the fact that minutes were kept, votes were taken and consensus-based decision-making was employed.⁶⁰

iv) security of tenure

The tension between the independence and accountability of administrative bodies is also played out in the arena of security of tenure. On the one hand, the ability to terminate a decision-maker or regularly appoint new ones is an effective tool for ensuring that the decision-maker ultimately remains accountable to the Canadian public. On the other hand, a tribunal's independence could be compromised by the intense psychological pressure that may result from the implied or explicit threat of a member's termination or inability to be re-appointed. Ron Ellis has canvassed the personal interest that administrative decision-makers have in continued employment, and concluded as follows:

[A]n administrative law system design that provides no protective structures but relies for the system's capacity for truly independent decision-making solely on the expectation that within the secret corridors of agency members' minds integrity may be counted on to routinely triumph over obvious and compelling self-interest, is a

57. *Consolidated-Bathurst*, at para. 80.

58. [1992] 1 S.C.R. 952.

59. *Tremblay v. Québec*, [1992] 1 S.C.R. 952, at para. 41. ("*Tremblay*")

60. *Tremblay*, at para. 46.

system design that is, in my respectful submission, so ingenuous as to not be credible.⁶¹

Despite the significant threat that lack of security of tenure may pose to administrative decision-maker's independence, the courts have thus far indicated a willingness to tolerate substantial incursions upon members' security of tenure. In *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*,⁶² for instance, the Supreme Court of Canada determined that fixed-term appointments did not violate guarantees of independence found in the *Québec Charter of Human Rights and Freedoms*.⁶³ In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*,⁶⁴ the Supreme Court of Canada further determined that administrative decision-makers could be appointed at pleasure so long as the government relied upon clear statutory provisions to that effect.⁶⁵ Such judgments have led to Professor Wyman's assessment that "...the law on bias seems reluctant to acknowledge that a reasonable apprehension of bias arises when an adjudicator faces uncertainty about continuing employment, likely because such a finding could undermine the viability of fixed-term appointments of adjudicators."⁶⁶

It should be noted that the courts have not totally abandoned all guarantees of security of tenure, however. In *Régie*, for instance, the Supreme Court of Canada indicated that the common law guarantees of independence prohibit at pleasure appointments.⁶⁷ Furthermore, in *Re Hewat et al. and The Queen in Right of Ontario*,⁶⁸ the Ontario Court of Appeal determined that the government impermissibly infringed upon the Ontario Labour Relations Board's independence when it dismissed a number of vice-chairs of that board without cause.⁶⁹ This latter decision

61. S. Ronald Ellis, Q.C. "Administrative Justice System Reform" (1996-97) 10 C.J.A.L.P. 1, at 16.

62. [1996] 3 S.C.R. 919 (hereinafter "*Régie*").

63. *Régie*, at para.67.

64. [2001] 2 S.C.R. 781.

65. *Ocean Port*, at para. 27.

66. Wyman #2 at para.12.

67. *Régie*, at para. 68.

68. [1998] O.J. No. 802 (Ont. CA)

69. *Ibid.*, at para. 22.

not only protects the integrity of fixed term appointments, but also establishes that government cut-backs do not qualify as “cause”.⁷⁰ Certain provinces have also made legislative efforts to address this difficulty.⁷¹

v) ***financial security***

A final area where the tension between independence and accountability is played out is financial security. As the ensuing discussion shall demonstrate, the courts have acknowledged the link between independence and financial security; nevertheless, to date they have failed to extend meaningful protections to an administrative decision-maker’s financial security.

In *R. v. Généreux*,⁷² the Supreme Court of Canada stated that the salaries of administrative decision-makers should not be subjected to arbitrary interference by the government. The majority further determined that:

Within the limits of this requirement, however, the federal and provincial governments must retain the authority to design specific plans of remuneration that are appropriate to different types of tribunals. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided that the essence of the condition is protected.⁷³

Subsequent cases, however, suggest that the range of schemes that may satisfy these minimal requirements may not adequately protect the independence of administrative tribunals. In the first instance, parties before the administrative tribunals may be able to determine the decision-makers’ salaries through by-laws without offending the common law principles of independence. Authority for this proposition may be derived from the Federal Court’s decision in *Bell Canada v. Canadian Telephone*

70. Wyman #2 at para. 24.

71. See *supra*, note 37.

72. [1992] 1 S.C.R. 259

73. *R.v.Généreux* [1992] 1 S.C.R. 259, at. 285-286.

*Employees Association*⁷⁴. There the Court interpreted the Supreme Court of Canada's decision in *Canadian Pacific Ltd. v. Matsqui Indian Band*⁷⁵ to mean that so long as the by-laws at issue are not phrased in permissive language, they may be an acceptable means of determining tribunal members' salaries.⁷⁶ The Court then distinguished the case from *Matsqui* on the basis that the Tribunal at issue in *Bell* was an adjudicative one, involved in human rights adjudication.⁷⁷ Ultimately, the Court determined that the Tribunal's independence had been violated by the Commission's power to determine Tribunal members' salaries, as well as the fact that their salaries were determined through negotiation.⁷⁸

A more significant incursion into an administrative tribunal member's independence may result from the Newfoundland Court of Appeal's recent decision in *3163083 Canada v. St. John's (City)*⁷⁹. The plaintiff in that case argued that the independence of the adjudicators on the Assessment Review Court was compromised by the fact that they were paid on a per case basis.⁸⁰ In dismissing this argument, the Newfoundland Court of Appeal placed heavy emphasis on the legislative authority conferred by the *St. John's Assessment Act*, and then stated:

Even assuming section 65 leaves gaps in the authority of the City to determine the Commissioner's remuneration such that a limited operation of common law principles of natural justice would apply, counsel has not provided any evidence or judicial authority to support the proposition that payment in this manner, particularly viewed in the context of sections 63 to 66 of the Act, would either by itself, or in the context of the Act as a whole, result in a determination of institutional bias.⁸¹

74. *Canadian Telephone Employees Assn. v. Bell Canada*, [2001] F.C.J. No. 776 (FCA).

75. [1995] 1 SCR 3.

76. *Bell* (FC) at para. 149

77. *Bell* (FC) at para. 149.

78. *Bell* (FC) at para. 150.

79. *3163083 Canada v. St. John's (City)*, [2004] N.J. No. 239 (Nfld CA).

80. *Ibid.*, at para. 22.

81. *Ibid.* at para. 23.

Therefore this decision may be cause for concern in that it suggests that the common law guarantees of independence may not be compromised by a per case salary scheme.

In summary, the courts have provided a certain degree of protection in the context of an administrative tribunal's financial security. Nevertheless, these guarantees fall far short of those established for the judiciary. This leads one to question whether the current guarantees of an administrative decision-maker's financial security are sufficient to prevent political interference through economic manipulation. This danger could be more effectively guarded against if tribunal's salaries were determined by compensation commissions similar to those mandated for the judiciary by the famous *P.E.I Reference*.⁸² Such a commission would act as an intermediary between the administrative bodies and other branches of the government, and would help protect the independence of administrative decision-makers without unduly compromising their accountability.

Administrative Guidelines: The Use of "Soft Law"

Recent developments in the jurisprudence and administrative law literature indicate a growing enthusiasm for the use of guidelines as a means of enhancing administrative decision-makers' accountability. It has been argued that guidelines can help foster accountability by ensuring that like cases are treated consistently, and by clarifying the policies advanced by administrative bodies.

Guidelines can indeed engender consistency in the results reached by various administrative decision-makers. Thus in *Bell Canada v. Canadian Telephone Employees Association*, for instance, the Supreme Court of Canada determined that the guidelines issued by the Canadian Human Rights Commission regarding pay equity disputes would help ensure that decisions regarding gender discrimination are made in a non-discriminatory, consistent manner.⁸³ In addition, the use of guidelines in administrative decision-making may increase the administrative body's accountability to the public at large with respect to the particular policies being advanced by these bodies. Essentially, this is achieved as a result of

82. (1997) 150 DLR (4th) 650.

83. *Bell* (SCC), at para. 26.

the extensive opportunities for public participation in the process of developing such guidelines. Specifically, public participation is fostered by mechanisms such as those which ensure that interested parties are notified of the impending guideline formulation process, guarantee the public's right to submit written comments on a given policy, and allow for broad-based consultation regarding the proposed guideline.⁸⁴ In Ontario, I understand that all agencies are required to have memoranda of understanding. But what does a board do when the government ignores them? Often it is the officials in the bureaucracy, not the ministers who pose the greatest difficulties. In practical terms, who would the chair approach if there were problems? Would it be the Deputy Attorney-General or the Clerk of the Privy Council (or his/her provincial counterpart?)

Toward a Conclusion: The Potential Ways to Reconcile the Accountability/Independence Tension

As accountability may only be achieved at the expense of independence, and independence in turn compromises accountability, the task of reconciling the two is difficult, to say the least. Nevertheless, I will venture to canvass a few options which may be partial solutions to reducing this tension.

The first of these is to institute full institutional guarantees of an administrative body's independence, and to encourage the government to exert its influence over policy development through altering the tribunal's constituent legislation.⁸⁵ This solution has superficial appeal; however, as noted by Judith McCormack, it does not account for the temporal constraints inherent in legislative processes. In particular, these constraints suggest that the government will not be able to adequately or immediately respond to each change in the social terrain affecting the policies put forth by administrative bodies. Furthermore, such detailed legislative direction may ultimately prevent decision-makers from using

84. H.N. Janisch, "Consistency, Rulemaking and Consolidated-Bathhurst", (1991)16 Queen's L.J. 95, at 108.

85. McCormack #1, at 40.

their personal judgment to issue context-specific judgments, which would be an entirely retrograde result.⁸⁶

A second potential way to resolve the accountability-independence tension is to require independence with respect to a tribunal's adjudicative functions and to encourage accountability with respect to the tribunal's policy-making functions. The central flaw to such an approach is that these two functions are inextricably intertwined.⁸⁷ Furthermore, such an approach ignores the possibility that it may be beneficial to impose a degree of independence over a tribunal's policy-making functions. As stated by Judith McCormack, the application of such safeguards "...opens up the possibility that policy decisions can be based at least in part on independent fact-finding and analysis, rather than self-interested opinion, lobbying skills or political influence and convenience."⁸⁸

I will conclude by noting that what ultimately counts is the ability of administrative decision-makers to exercise judgment independent of the executive. This was recognized by Lord Denning as long ago as 1949 and is as important now as it was then. As Madam Justice Rosalie Abella has also emphasized, independence is the "soul of the justice system"; administrative and judicial decision-makers alike must internalise this concept. She has stated that the essence of independence is "the right to be free from external control or influence, and the right to be seen that way." If decision-makers have the "feeling of independence", the confidence to look and act independently will follow.⁸⁹ At the end of the day, only the concerted vigilance of legislators and courts will guarantee the conditions for such a feeling, surely one of the most important "feelings" of all for those charged with providing administrative justice to Canadians.

86. *Ibid.* at 42.

87. *Ibid.* at 35.

88. *Ibid.* at 36.

89. As cited by Nurjehan Mawani, "Issues of Independence, Accountability and Ethics facing Administrative Tribunals and the experiences of the Immigration and Refugee Board", presented at The Council of Canadian Administrative Tribunals 1999 International Conference, at pages 2-3.