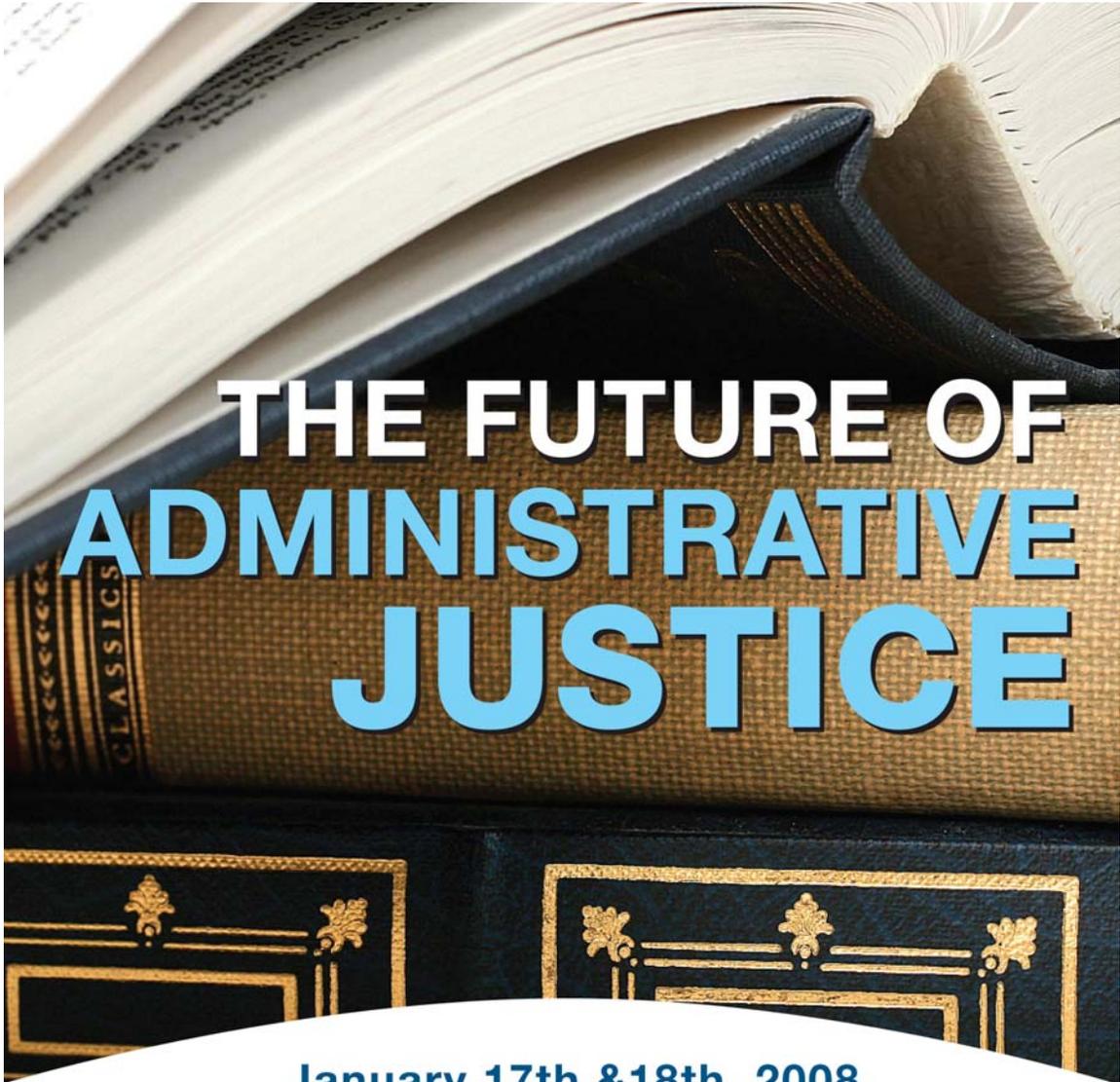


# **Future of Administrative Justice Symposium Report**



**January 17th & 18th, 2008  
University of Toronto Faculty of Law  
Flavelle House, 78 Queen's Park**

## Introduction

What is Administrative Justice? At its core, Administrative Justice refers to the system of decision-making of administrative agencies, boards, commissions and tribunals. As Chief Justice McLachlin of the Supreme Court of Canada famously observed, “Many more citizens have their rights determined by these tribunals than by the courts.” (*Cooper*, 1996) In addition to adjudicating rights and resolving disputes involving public authority, these administrative bodies also engage in regulatory decision-making, and ensuring that government programs operate fairly and in accordance with the law.

In recent years, there have been several jurisdictions which have overhauled their Administrative Justice sectors. Currently, there is a lively debate about the scope, nature and status of Administrative Justice in Ontario. There are also important developments in peer jurisdictions, especially in B.C., Quebec and the United Kingdom, which can and should inform the dialogue in Ontario.

The purpose of the “Future of Administrative Justice” Symposium, held at the Faculty of Law, University of Toronto, on January 17-18, 2008, was to bring together a wide range of experts, practitioners and observers of administrative justice to explore the dynamics of administrative justice and possible directions of reform. The Symposium was generously supported by the Law Foundation of Ontario, Legal Aid Ontario and the Faculty of Law, University of Toronto.

A webcast of the Symposium may be found at:  
<http://www.law.utoronto.ca/conferences/adminjustice.html>.

The Administrative Justice Bibliography (AJB) (discussed below in Appendix “A”) was launched at the Symposium as an ongoing resource for those interested in finding out more about Administrative Justice.

The Symposium was organized by the Administrative Justice Working Group (AJWG), a public interest network of lawyers, participants in the administrative tribunal sector and academics seeking to advance administrative justice issues in Ontario. AJWG grew out of an ad hoc Ontario legal clinic network called the Government Adjudicative Agencies Group (GAAG) that began in 2001 with the goal of improving the administrative justice system its most disenfranchised participants, low income Ontarians. Both AJWG and GAAG are informal and unincorporated network organizations.

The Organizing Committee of the Administrative Justice Working Group for the Symposium consisted of Ron Ellis, Alec Farquhar, Kathy Laird, Ivana Petricone, Carole Prest, Jo-Ann Seamon and Lorne Sossin.

The Organizing Committee wishes to thank Jennifer Tam and Dylan Reid of the Faculty of Law, University of Toronto, for their assistance in supporting the Symposium, and Evgeny Zborovsky for his assistance in preparing this report.

## Table of Contents

**Keynote address;** Lord Justice Robert Carnwath, (Senior President of Tribunals)

### **1. New Frontiers of Merit in Tribunal Appointments**

Lorne Sossin, Professor, (Faculty of Law, University of Toronto) (moderator)

- Debra Roberts (Public Appointments Secretariat, Government of Ontario)
- Judith McCormick (Downtown Legal Services)
- Michael Gottheil (Ontario Human Rights Tribunal)
- Dr. Lillian Ma (Landlord Tenant Tribunal)

### **2. Current Issues in Tribunal Independence**

David Mullan (Queen's/ Integrity Commissioner, City of Toronto) (moderator)

- Ron Ellis (Osgoode Hall Law School)
- Laverne Jacobs (University of Windsor)
- Audrey Macklin (University of Toronto)

Adam Dodek (Osgoode Hall Law School) – Commentator

### **3. New Developments in Tribunal Reform**

Justice John Evans (Federal Court) (moderator)

- France Houle (University of Montreal) “Lessons from Quebec”
- Lord Justice Robert Carnwath (Senior President of Tribunals) “Lessons from the UK”
- Dean Philip Bryden (University of New Brunswick) “Lessons from BC”
- Ivana Petricone (ARCH) “The Situation in Ontario”

Cristie Ford (UBC) - Commentator

**Roundtable Discussion on Next Steps to Reform** (Kathy Laird (Ontario Human Rights Tribunal) – Moderator)

**Appendix “A” – Administrative Justice Bibliography**

## **Keynote Address by Lord Justice Carnwath**

Lord Justice Carnwath set the stage for the conference by focusing on the ways in which recent reforms in the U.K. have transformed administrative justice, and highlighting key areas of continuing debate about the nature of administrative justice and its role within the justice system.

Lord Justice Carnwath emphasized the importance of the recognition of administrative tribunals as an integral part of the justice system in the *Tribunals, Courts, and Enforcement Act* (2007):

The key message of the new Act is that tribunals are no longer the Cinderellas of the justice system. Tribunal justice is real justice, and a distinctive and vital part of the judicial system; and tribunal “judges” (as they will now be called – rather than commissioners, panellists, adjudicators or whatever) are full members of the independent judiciary. Section 1 of the Tribunals Act underlines the point, by extending to them the statutory guarantee of judicial independence, conferred on the court judiciary by the Constitutional Reform Act 2005.<sup>1</sup>

At the same time, Lord Justice Carnwath noted some continuing questions about the place of administrative tribunals in the U.K. justice system.

Applying for Membership in International Association of Supreme Administrative Judges (IASAJ), for example, raised the question of whether a tribunal exercising appellate jurisdiction in a common law nation could be seen as a ‘supreme administrative tribunal’ if it is still subject to further appeal or review by the courts. The answer seems to be “Yes”, following the example of the Australian Administrative Appeals Tribunal (AAT), which has been recognized as a full member of IASAJ on the basis that it exercises the highest purely administrative jurisdiction.

Lord Justice Carnwath also recounted a speech delivered by the Vice President of France’s Conseil d’État, M. Jean-Marc Sauvé, which highlighted both the similarity and the differences between the direction of administrative justice in the U.K. and in France. As with the Upper Tribunal in the U.K over which Lord Justice Carnwath will preside as Senior President of Tribunals, the Conseil d’État has evolved into an appellate body which hears cases from a host of administrative tribunals of first instance. However, unlike in the U.K., the Conseil d’État has maintained an advisory role to government, while successfully safeguarding its independence through the use of ethical walls and other protections. In the U.K., by contrast, the creation of the Supreme Court to take over

---

<sup>1</sup> Lord Justice Carnwath, Keynote Address. In response to a question, Lord Justice Carnwath noted that although the Franks report recognized tribunals as independent adjudicators, they continued to be administered by the government departments whose decision they reviewed and it was not until the recommendations in the Leggatt report to create an integrated, independent tribunal system, that the idea of independent adjudicators was realized.

the role of the House of Lords as the highest appellate body was said to be necessary to ensure independence.

Lord Justice Carnwath also explored the categorization of tribunals, and advocated a flexible approach that embraces both disputes between individuals that are not directly concerned with public administration, and administrative disputes between individuals and the state.

Finally, Lord Justice Carnwath explored the relationship between courts, tribunals, mediators and ombudsmen. Here, too, a flexible and integrated approach was advocated. While tribunals continue to have a unique role to play in delivering expert, flexible and efficient justice, we need to take a broad view and ensure that courts, tribunals, mediators and ombudsmen are all able to work together to address the everyday problems of, and effectively communicate with, the ordinary citizens who use the justice system. The hope for the future of administrative justice is that “we will have a fully integrated administrative justice system, which includes everyone engaged in the business of resolving administrative disputes, and there are prayers for all.”<sup>2</sup>

---

<sup>2</sup> Lord Justice Carnwath, Keynote Address.

## 1. New Frontiers of Merit in Tribunal Appointments

**Judith McCormack (Downtown Legal Services)** began the discussion with an insightful analysis of “What We Talk About When We Talk About Merit and Why It Isn’t Enough”. McCormack argued that we need to move from a culture of amateurism to one of professionalism and start thinking of adjudicators like other professionals who receive years of training, apprenticeship and licensing.

Merit-based appointments have been defined in reaction to the worst government practices associated with patronage appointments, where positions are offered to reward constituencies and supporters, and the appointment and re-appointment processes are manipulated to attempt to influence decision-making. The patronage model was invested in the idea that anyone can be an adjudicator, and that all they needed was a smattering of experience, a little on-the-job training, and maybe some mentorship. This view of adjudicators, of course, flies in the face of idea that tribunals are specialized bodies, with unique expertise in their fields, and it presents the most serious impediment to the professionalization of administrative tribunals.

The discussion of merit has taken place in three arenas: (1) in the courts, (2) through governmental initiatives to reform the appointment process, and (3) through tribunals’ own efforts to design and implement training, selection criteria, and performance evaluation. All three, McCormack argued, have come short in significant ways.

The courts are inherently limited because they can only reach back to questions of merit through individual party rights. Courts are thus unlikely to address what constitutes merit, what is a merit appointment, or other fundamental systemic issues. To some extent, they also should not do so. Where courts have intervened, the results have not provided consistent guidance, and, in some cases, the courts have even sanctioned bad government practices. Although the courts do have the advantage of being able to tell governments what to do where there is little political will for reform, and are familiar with norms of judicial independence, courts have been reluctant to apply judicial norms to administrative tribunals, or have attenuated them. McCormack argued that we should give up on the courts because they are just the wrong place for the discussion of merit.

Government reforms to the appointment process, while highly laudable, should be viewed as just the beginning of the discussion of merit, not the end. Government initiatives tend to focus on fairness, transparency and accessibility. This is obviously commendable because it may encourage more qualified people to apply and create a more diverse and representative body. But it also has two weaknesses. First, it does not necessarily ensure that you have a highly qualified pool of applicants. Second, and more importantly, it perpetuates the culture of amateurism, the idea that anyone can do these jobs. In moving from a historical context of patronage appointment to issues of fairness and openness, we are still looking at the adjudicators’ jobs as plum jobs for which no special qualifications are required, but now we are making sure that everyone has a fair shot at them. Term appointments are a good example of this: they make it difficult for

someone to develop professional expertise as an adjudicator, but they do make sure that lots of different citizens have a turn at the jobs. This is in sharp contrast to other professions, which place a premium on developing experience and expertise.

Similarly, the efforts of tribunals are good as far as they go. However, these also still reflect the amateur model of adjudication. For example, the excellent training programs created by tribunals and organizations like the Society of Ontario Adjudicators and Regulators (SOAR) are designed to take someone from adjudicator kindergarten to graduation in a few days. Their focus on basics like “What is a tribunal?” reflects the wide acceptance of the idea that no special skills or knowledge are required to become an adjudicator.

McCormack suggested that three kinds of skills are required for professional adjudicators: (1) legal skills in interpreting and applying laws, (2) skills in the specialized field of the tribunal, and (3) adjudication skills. McCormack emphasized the importance of non-legal expertise and adjudication expertise, noting in particular that we need to move away from the idea that policy considerations are inherently subjective, and recognize that there is objective social science that can be brought to bear on the problems being dealt with by tribunals. Finally, McCormack proposed that we address concerns about accessibility and diversity by improving access to the training needed to become a professional adjudicator, and think of the training programs as the point of entry into the profession, rather than focusing on the selection and appointment process.

**Dr. Lilian Ma (Landlord and Tenant Board)** continued the discussion by providing insight into the recruitment and retention issues facing a real-life tribunal, the Landlord and Tenant Board of Ontario (LTB).

Ma described her own appointment as Chair as an example of the new process for public appointments in Ontario, and how it provided the basis for a positive partnership in which Ma as the Chair and the responsible minister were able “to do great things together”.

LTB is a generalist tribunal, with a highly de-centralized structure. When Ma began as Chair of LTB in 2005, it was faced with a heavy caseload, high rate of member vacancies, and low morale. The members had not received a raise in pay for many years, and were paid less than mediators, who were civil servants. There were also not enough regional managers to make sure that members received appropriate mentoring and support. Poaching by other tribunals, which offered better pay for less work, was also very common.

LTB created a Members Human Resources Committee to address these concerns, and developed a strategy for recruitment and retention. In September 2006, the members’ remuneration was increased, and morale has improved. The term of appointment has also been changed from 6 to 10 years, which encourages greater professionalization. Members now have more time to develop skills as adjudicators and then move on to other tribunals using the skills they have gained at LTB.

The continuing problems facing LTB include poaching by other tribunals and training. Ma suggested that rather than viewing each tribunal as its 'own shop', which competes for qualified appointees against other tribunals, a system-wide approach is necessary, in which tribunals would work together in recruitment and retention. Similarly, greater cooperation with the government is needed to improve training. For example, Ma suggested that training programs that are open to civil servants could be made also available to tribunal members.

**Michael Gottheil (Ontario Human Rights Tribunal)** offered a second perspective on the appointment process from a tribunal's point of view. Gottheil proposed that the new frontier of merit in tribunal appointment is the creation of a dynamic and flexible process that is tribunal-specific and tribunal-driven.

Until now, merit has stood for a broad notion that the people appointed to a tribunal should be qualified and should be selected through an open and transparent process. However, the qualifications have tended to be externally defined, not internally within the tribunal itself, and the design of the appointment process has been done on a one-size-fits-all model.

The new appointment process will be focused on the specific mandate of the tribunal and enable the tribunal to define what qualifications are needed to fulfill its mandate. The new appointment process will also be dynamic and flexible to allow the set of qualifications to change over time as the nature of the tribunal's work, the community it serves, and society at large changes.

Gottheil suggested that access to justice concerns in particular will be key to how tribunals define merit. Traditionally, when we think about merit we really look at the substantive legal area of the tribunal and for qualifications in that legal area. More recently, there is an understanding that core competencies also include an ability to adjudicate disputes and alternative dispute resolution skills. In the new approach to merit, qualifications will be defined more broadly, based on the specific tribunal's work and its users. Tribunals are different from generalist courts and from each other; each tribunal is unique. Tribunals serve clients who are not usually regular users of the legal system. For them, the tribunal is often their one shot at justice. The qualifications required will be defined by the needs of these users and the need to enhance access to justice.

Finally, Gottheil addressed the question of how we can move to this new approach to merit. The key, Gottheil argued, is a shift towards a recognition of the role of tribunals in defining merit and designing the appropriate appointment process, as well as trust by governments in tribunal chairs. The chair of a tribunal should be given the latitude to set core competencies and the final selection decision should be based on the recommendation of the tribunal chair.

**Debra Roberts (Public Appointments Secretariat, Government of Ontario)** next described the changes to the appointment process put in place by the Liberal Government in Ontario since 2003.

The basic philosophy underlying the government's approach has been to ensure that people appointed are qualified and that they are representative of the population of Ontario.

In November 2003, when Roberts assumed her role, there was a backlog in appointments and pressure from tribunal chairs to fill vacancies.

Roberts was faced with the question of what is merit and who determines merit. It became clear that the best way to ensure a meritorious and open process was to allow the tribunal chairs to have input into the selection process. Chairs are uniquely situated to understand the needs of their members.

The first key change made by PAS was the decision to advertise positions. All chair and full-time member positions are advertised. For other positions, advertising will depend on the needs of the tribunal. PAS also created a more accessible website to give information on the appointment process and vacancies. Applications for positions are now web-based and information on new appointees is posted on the website. PAS has become the point of contact for applicants and the start and end of the selection process. All resumes come into the PAS office. Paneled interviews are conducted for chairs and full-time members. Finally, background security checks are now performed for all applicants, and applicants are required to provide a declaration of any conflicts of interest they may have.

Overall, these changes have been successful in creating a more fair and open process. The new process recognizes the important role of tribunal chairs. Advertising has been successful in attracting qualified people from both Ontario and abroad.

The government has also completed reforms in the remuneration of tribunal members and term limits. The government recognized that it is difficult to attract highly qualified people without adequate compensation, but politically this was a challenging issue. Remuneration of tribunal members is now tied to senior-management pay levels in the civil service, and increases in keeping with them. Term limits, where they are applicable, have been increased to allow tribunal members to develop expertise, and have been tied to remuneration increases to reflect a member's growing experience. The current model is as follows:

- 2 year initial term for a new adjudicator;
- 3 year reappointment term (with a raise);
- 5 year reappointment term (with another raise).

There is a total 10 year limit on appointment to the same position. However, when a member is appointed to a new position, such as that of a vice-chair, the clock restarts and the term limit for the new position is again 10 years. This is a further recognition that tribunal members perform a professional role.

Looking into the future, Roberts mentioned the recent clustering project led by Kevin Whittaker. This was a pilot exercise to explore how tribunals can share resources through cross-appointments, joint websites, combined training and so on. It is hoped that this will continue. Finally, Roberts also mentioned the importance of working on improving training for tribunal members in partnership with organizations such as SOAR.

**Q/A (moderated by Lorne Sossin, University of Toronto)**

There was a brief Q&A discussion. Lorne Sossin drew attention to the changing nature of appointments to administrative tribunals and queried whether, as we move towards greater convergence in our approach to appointments across different tribunals, we will increasingly come to recognize that there is an administrative justice system and expect that, like the justice system, it would fall under the responsibility of a single government ministry, rather than the current system of separate fiefdoms, in which different tribunals are being managed by different line ministries.

Another question raised was whether it would make sense to enshrine the special expertise of the tribunal by specifying in the legislation the qualifications required of members, as has been done to some extent in the legislation for the Ontario Human Rights Tribunal. McCormack found that this may be a good way to establish legal and non-legal expertise requirements, but noted that, as Gottheil pointed out, the qualifications required may change. McCormack also pointed out that a tribunal may need different members to have different expertise. Gottheil agreed that this may be a good idea, but any legislation would need to have a balance between specificity and flexibility.

## 2. Current Issues in Tribunal Independence

**David Mullan (Professor Emeritus, Queen's)** introduced the discussion of independence by returning to Lilian Ma's statement that she was able to work with the Minister "to do great things together". One way to think about issues of independence is to ask to what extent tribunals and the government should be able to do great things together.

Mullan noted the recent controversy over the Canadian Nuclear Safety Commission's (CNSC) decision to shut down due to safety concerns the Chalk River nuclear facility run by Atomic Energy of Canada Limited AECL (a Federal Crown Corporation), and the subsequent decision by Parliament to override the decision of the CNSC because it produced urgently needed medical isotopes, and the subsequent government decision to dismiss the Chair of the CNSC, Linda Keen. Did CNSC and the government cease to be able to do great things together? When does lack of confidence in the chair of a tribunal justify his or her dismissal?

**Ron Ellis (Osgoode Hall Law School)** discussed the issues raised by the *McKenzie* case about constitutional guarantees of independence. The basic issue at stake in the case according to Ellis is whether, in administrative justice, legislative sovereignty trumps the rule of law or vice versa. Is judicial independence of rights adjudicators, the cornerstone of the rule of law, merely optional?

Ellis drew on two examples to show the urgency of this question. First, Ellis noted the recent change in the adjudication of landlord and tenant disputes in B.C. Since 2006, landlords in B.C. can obtain final eviction notices from government employees in the Ministry of Housing. Should governments be able to transfer judicial functions, Ellis asked, to governmental employees? Are we comfortable with a constitution that allows landlords, including public housing corporations, to get final eviction orders by applying to government employees?

Second, Ellis turned to the change at issue in the *McKenzie* case itself. Since 2003, B.C. has claimed the right to terminate the appointment of any adjudicator at any time without cause with 1 year's pay in lieu of notice. Should a legislature be free to make all adjudicators government employees? Given that the government hires, decides what adjudicators will get paid, and is able to dismiss them without cause, can they be viewed as anything other than government employees?

The courts in the *McKenzie* case are faced with the question of whether, if the B.C. legislature in fact intended to authorize the executive branch to terminate adjudicative tribunal members without cause, it was acting beyond its constitutional powers. At trial, the B.C. Supreme Court said yes. At the Court of Appeal, the decision took a beating but survived. If the Supreme Court of Canada grants leave and agrees with the B.C. Supreme Court, there will be a new chapter in constitutional law. Once we get past the question of whether a constitutional requirement of judicial independence applies to any tribunals at

all, and it seems inconceivable that it will not eventually be seen to apply to some tribunals, then we will have to deal with the questions of what kinds of tribunals it does apply to, under what circumstances, and to what effect. The answers to these questions have the potential to transform our administrative justice system, to “justicize” it. *McKenzie* has given these questions renewed life.

Ellis next provided a historical context for the evolution of judicial independence in Canadian law. No one has ever doubted that judicial independence was the cornerstone of the rule of law. However, prior to the watershed Supreme Court of Canada decision in *Valente*, provincial court judges and administrative tribunal members were regarded as independent in law, even though they were dependent in fact. For example, prior to 1962, all Ontario provincial court judges were appointed at pleasure, and until 1982, judges who served after the age of 65 until the mandatory retirement age of 75 were appointed at pleasure. Most adjudicative tribunal members were also appointed at pleasure. All of this changed in 1985 with *Valente*.

Ellis urged that we must not forget how the law used to reconcile dependency in fact with independence in law through what he called the “hope and a prayer” doctrine, or the trust doctrine. Courts believed that honourable men appointed as judges and adjudicators would perform their duties diligently and not allow the government’s powers to effect their decisions. Governments, in turn, were trusted to refrain from abusing their powers to interfere with the courts’ and tribunals’ independence. Absent positive evidence of impropriety, the law *presumed* that judges and adjudicators were independent even if they were in fact dependent.

The revolutionary insight in *Valente* was that independence must be protected through specific provisions of law that provide objective structural guarantees of independence. It is essential to realize that this change has implicitly radically altered the nature of the debate about the relationship between tribunals and governments, and has raised a new constitutional issue:

In our justice system history, the *presumption* of independence had always finessed the *issue* of independence.

Post-*Valente*, none of that can any longer withstand scrutiny, the presumption is gone, the finesse no longer applies and the issue is now front and centre to be faced, addressed, and determined. All of these structural relationships [between line ministries and ‘their’ tribunals] must now be seen to be, at least arguably, incompatible in law with judicial independence. And, suddenly we are faced, really for the first time in our history, with a clear question as to whether we, as a society, are prepared to mandate legislatures to remove judicial functions from the courts, or to create new judicial functions, and assign those functions to institutions and/or individuals who, it is now clear, are not, in law, judicially independent.

Are we, that is, prepared to agree that in our administrative justice systems – systems in which we now acknowledge the bulk of the rights disputes of our citizens are decided – the rule of law is merely optional?<sup>3</sup>

**Laverne Jacobs (University of Windsor)** continued the discussion by sharing insights into the tension between expertise and independence from her empirical research into tribunal culture. Jacobs’ research picks up where *Valente* leaves off by examining what conditions, in addition to those identified in *Valente* of security of tenure, financial security, and administrative control, are required for independence in an expert tribunal.

Jacobs’ research focused on access to information and privacy commissions, using a quantitative and empirical approach. Jacobs conducted interviews with tribunal staff and observed the day-to-day work at the Information and Privacy Commissioner (IPC) of Ontario and the Québec *Commission d’accès à l’information* (CAI).

Jacobs’ research identified a “*de facto* separation of policy-making and adjudicative functions” at the tribunals that was driven by concerns about safeguarding the independence of adjudicators. IPC has a multi-functional mandate that includes education of the public, disputes regarding access to government information, privacy complaints, and a policy function on access and privacy matters. Jacobs noted that a common discourse at IPC was one of “separate worlds”. The expertise developed by the policy branch was not applied directly in the adjudicative function of the tribunal. Adjudicators making decisions were seen as “independent” and there was thus a “hands-off” approach, which separated the policy-making expertise from the adjudicative function.

CAI also had a dual mandate at the time of Jacobs’ research. However, the legislature, motivated by a report submitted by CAI, began examining bifurcating the adjudicative and policy functions because of a perceived conflict between the two. There was a concern that decision-makers would form a ‘closed mind’ because of policy work, such as reviewing and providing comments to the government on legislation. Although there was a clear understanding that an adjudicator would be free to change her mind if she was asked to make a decision concerning legislation that the tribunal has previously provided policy guidance on, the government ultimately decided in 2006 to bifurcate the tribunal and the policy function was transferred to a government ministry.

The lesson of Jacobs’ research is that there may be unexpected tensions, both in theory and in actual practice, between expertise and independence, and between “expert decision-making” and simple “every day justice” for ordinary citizens. It remains to be determined whether this tension can be resolved and, if so, whether legislative provisions, which delineate different roles and functions within tribunals, or constitutional guarantees of independence, would provide the best theoretical resolution and practical guidance to tribunals.

---

<sup>3</sup> Ellis, *The Big Question*.

**Audrey Macklin (University of Toronto)** made the case for greater empirical research of the kind undertaken by Jacobs, and also returned to McCormack's questioning of the role of the courts in defining merit, by examining two basic questions about the role of legal rules in creating the conditions for independence:

- (1) Are the existing legal rules adequate to ensuring independence?
- (2) Are legal rules *per se* to some degree inadequate to the task of creating independence?

With respect to the first question, Macklin highlighted key issues in independence that have not yet been addressed by legal rules: the appointment and re-appointment process. What kinds of legal rules can be used to address these problems? One radical possibility that Macklin noted is the possibility of a human rights complaint for discrimination on the basis of political opinion (or lack thereof), as was brought by one tribunal member in Nova Scotia. While this option may seem far-fetched, it does provide a striking new way of looking at patronage appointments. Macklin also reflected on her experience as a member of the Immigration and Refugee Board (IRB), where the political nature of re-appointment decisions undermined the authority of the chair and vice-chairs and corroded the internal structure of the IRB. Legal rules are needed to safeguard both the external and internal independence of tribunals, but it is also important to recognize the need to ensure that the internal management of the tribunal is not undermined by external influence.

One reason for optimism, in Macklin's view, is that as the judicial appointment process and judicial independence are developed in case law and in political reforms, there may be more willingness to apply the same kind of attention to at least some tribunals. Here an analogy can be drawn between the duty to provide reasons: as judges were increasingly required to provide written reasons, so were tribunals.

Macklin then discussed the potential inherent limitations of legal rules. Even the best rules can be circumvented where there is lack of political will or where the principles underlying the legal rules have not been absorbed by the organization's culture.

We can imagine circumstances, Macklin argued, where the *Valente* rules are neither necessary nor sufficient. For example, the Crown Attorney's office is a part of the Ministry of the Attorney General, a line ministry. But in Ontario, the independence of the Crown Attorney's office is fairly well established.<sup>4</sup> In Nova Scotia, by contrast, independence at the Crown Attorney's office became a serious problem and led to the recommendation of creating a separate Director of Public Prosecutions in the Marshall Inquiry in 1989.

What makes the difference? The internalization of the underlying principles seems to be particularly important. Legal rules may never get to what it takes to create a culture of

---

<sup>4</sup> [It should be noted here that the division between the dual role of the Attorney General as both a cabinet member and Attorney General has not been unproblematic in Ontario, and both court decisions and political leadership, most notably by the Hon. Roy McMurtry, have helped to entrench the principles of independence.]

independence. This suggests that the work being done by Jacobs is crucial to a better understanding of independence. Macklin urged the importance of studying both structures that work and those that don't work. More than legal skills may be needed for this task: we should bring sociological and ethnographic research to bear on these questions.

**Adam Dodek (Visiting Scholar, Osgoode/Toronto) (Commentator)** next asked whether, when it comes to independence, it is possible to have too much of a good thing. The usual question is: "How do we maximize independence?" Dodek suggested that we should focus instead on the question: "How do we do great things together?"

We tend to focus on independence as the opposite of dependence, and identify it with self-reliance, autonomy, and ability to fulfill one's own mandate. These are the ideal types that animate the discussion of independence.

Independence, however, can also connote lack of connection, lack of relationships, separateness, being cut-off from parts of society, and orphaning. Independence can be used in the context of administrative justice to orphan a tribunal, to deprive it of a champion, to leave it out in the wind. The most common ways governments interfere with tribunals is simply by ignoring them, leaving them starved for cash, etc.

One notable example of this danger arose in Ontario in connection with the reforms to the Ontario Human Rights Commission (OHRC). There was a perception that OHRC was not independent enough. A proposal was made to make the Commissioner an independent officer of the Legislature, on the same footing as the privacy commissioner and Ombudsman. But this was an elevation of form over substance. This could have meant that the responsibility for OHRC would be transferred from yet another ministry, the Ministry of the Attorney General, to the office of the legislature. It would have also meant that the budget would have been transferred from MAG to the legislature. This would have been detrimental to human rights in Ontario. Human rights need champions, and had OHRC become an independent officer of the legislature, these champions would have been lost. Independence can sound very good in and of itself, and it can be tempting for governments to pursue it at the expense of actually creating a stronger system for rights protection.

The imperative for the future of administrative justice is the urgent crisis in the civil justice system, which is no longer affordable to most Ontarians. The reality is that the administrative justice system is where most people see any sort of justice. Whether administrative justice is seen as part of the judicial branch or the executive, it must be seen as part of the justice system as a whole, and it must be recognized that changes within it can have impact elsewhere.

Dodek concluded by urging us to think of independence as a spectrum, to think of relationships, and as much as possible try to institutionalize those relationships. Independence alone will not lead to effective administrative justice and too much independence can be a bad thing.

## **Q/A (moderated by David Mullan)**

A Q&A discussion followed the presentations. Mullan noted that the whole issue of independence has very different dimensions for tribunals than it does for the courts and warned that excessive demands for independence can be counterproductive. The more we demand independence, the more we may be moving independence in the direction of the courts.

Lord Justice Carnwath noted that there seems to be a much broader understanding of administrative justice at work in Canada. He understood administrative justice as reviewing decisions of the administration, but in Canada it seems administrative justice is a broader concept for adjudication outside of the regular court system.

Jacobs confirmed the broad conception of administrative justice in Canada. Review of public administration is more common and prominent in Quebec. Many parts of the administrative justice system in Canada are hived-off parts of the courts, such as landlord and tenant dispute resolution.

A question was asked about whether the broad nature of administrative justice has major implications for independence. Independence from whom? Why can't the government make landlord and tenant decisions?

Ellis replied that what is at stake is the ability of an adjudicator to make decisions that are contrary to government policy in applying the statute. The culture of independent thinking, the environment in which an adjudicator works that fosters that sense of objective and independent thinking, is just not part of the culture of the employee in a ministry.

Ma noted that "to do great things together", a tribunal chair and the Minister can use mechanisms such as memoranda of understanding to clarify roles and responsibilities and to institutionalize relationships. In practice, the utopia of absolute independence may not exist. However, 'comfort zones' can be created to preserve the separation of roles, and with the right person, this can be made to work. From a structural point of view, we have to find a practical way to apply theoretical ideas. The most important thing is to make it work for the users of the tribunals.

Ellis noted that what troubled him is that such arrangements are so idiosyncratic and contingent on particular persons and a particular political environment. At the moment, we are living in a renaissance period in Ontario. But the trouble is what happens when the government changes. Without some legal structure in place, you can suddenly wind up with dysfunctional, uncaring tribunals. It can all turn on a dime.

Another question was about the relationship between the culture of a tribunal and legal rules, and the extent to which legal rules can develop to recognize the relationships and structures in place on the ground. For example, in *CUPE* courts seem to have recognized

an independence norm that had developed in Ontario with respect to private, interest arbitrators. But there is a tension between freezing any culture through legal rules and adapting legal rules to new developments.

Macklin agreed that there is a constant feedback between institutional culture and legal rules. Legal rules can catch up to the reality on the ground or they can kick-in to constrain it.

The discussion concluded with a question about whether imposing the requirements of the rule of law on all tribunals is too inflexible and too much of a good thing. It seems most applicable to adjudicative tribunals. In the context of multifunctional tribunals, which combine adjudication and regulation, greater partnership is needed between the tribunal and the government, and greater flexibility.

Ellis stressed that the important thing is to have legal structures in place that are true to the rule of law, as is the case now in the U.K. You can make practical accommodations within these structures. The rule of law as laid down in *Valente* is flexible and has different consequences for different institutions. But structures are a must. And one of the structures that should be in place is a constitutional safeguard of independence for institutions charged with determining people's rights.

### **3. New Developments in Tribunal Reform**

**Justice John Evans (Federal Court of Appeal)** began the discussion of tribunal reform by recalling the many reports and studies that have been produced on the subject in Ontario. Margot Priest, in her paper on the “Tribunal from Hell”, catalogued and summarized many of these studies and recommendations. “If words were actions,” Justice Evans said, “we would have the very best tribunal system in Canada.”

Justice Evans reminded the conference that tribunals in Ontario, and in Canada in general, have been leaders in fields such as worker’s compensation, human rights, pay equity, and immigration and refugee determination. There is, however, currently some inertia, a failure of political will, and a persistent ambivalence about the place of tribunals. There used to be a belief that tribunals, if they were subsumed in the justice system, would end up at the bottom of the heap as inferior courts. Tribunals were administering controversial social programs, and were at the sharp end of the new regulatory and welfare state. Collective labour bargaining is but one example of the controversial role of tribunals. The view was, therefore, that if tribunals were included in the court system, their ability to administer their mandate would be undermined. As a result, the tribunals were defined in opposition to the courts. However, saying “we’re not like courts” only gets you so far. Today, tribunals must face the challenge of establishing an identity in the eyes of the courts, the government and the public.

#### **A. U.K.**

**Lord Justice Carnwath** provided a comparative U.K. perspective on many of the issues that had been raised in preceding conference discussions.

Lord Justice Carnwath began outlining the recent reforms in the U.K. by noting that it took more than 50 years to move from the recognition in the Franks Report that tribunals are not merely “appendages of the government” and are part of the “machinery of adjudication rather than the machinery of administration” to the full-fledged realization of these ideas in the recommendations of the Leggatt Report in 2001 and the resulting legislative reforms.

When it comes to “doing great things together”, the U.K. has had to face head-on the difficulties in institutionalizing the relationship between the executive, the courts, and the tribunals due to the decision to abolish the historical role of the Lord Chancellor, who as the head of judicial system, the speaker of the House of Lords, and a member of the cabinet combined through a convenient fiction in a single person the legislative, executive and judicial branches of government. The approach has been to develop a “Partnership Model” between the Lord Chief Justice and the Secretary of State, and, it is expected, the Senior President of the Tribunals and the Secretary of State. There will be an advisory board established that will give the judiciary input into the administration of the justice system.

Judicial appointments in the U.K., including appointments to tribunals, have been dealt with in the past by the Lord Chancellor, and there have not been serious problems with patronage. In 2005, the *Constitutional Reform Act* set up a new judicial appointments commission that is entirely independent. The commission provides advice to the Secretary of State on all judicial appointments, with very limited grounds for the Secretary of State to refuse an appointment.

Remuneration and security of tenure have also been fairly good in the U.K. system. There are no time-limited appointments and tribunal judges can be removed for cause. Recommendations with respect to remuneration are made by the Review Body on Senior Salaries. Tribunal judges' pay is related to that of court judges. The system is seen to be fair and there is general satisfaction. The Secretary of State has recently agreed to extend statutory protections against reductions in salary to tribunal judges.

Lord Justice Carnwath emphasized that in his view the key starting point is to decide what the role of tribunals and tribunal members is. The rest will fall into place. In the U.K., it's clear that it is to administer justice.

## **B. Quebec**

**France Houle (University of Montreal)** discussed three key reforms created by the 1996 *Act respecting administrative justice* in Quebec: the founding of the Conseil de la justice administrative (CJA), the creation of two sets of procedural guidelines for administrative and adjudicative tribunals, and the establishment of the Administrative Tribunal of Québec (TAQ).

CJA has a dual role: it deals with complaints against administrative judges for breach of the Code of Ethics, and it provides recommendations for procedural improvements to the government.

The two sets of procedural guidelines for administrative and adjudicative tribunals reflect a distinction drawn between adjudication and public administration in Quebec, and were an important part of the reforms.

The creation of the TAQ followed three major reports by working groups in Quebec led by Professor Dussault (1971), Professor Ouellette (1987), and Professor Garant (1994). While Dussault began with the idea of creating a new administrative court, the current model and organization of the TAQ follows the recommendations of Ouellette and Garant. Ouellette proposed the creation of new administrative tribunals, rather than courts, in order to maintain simplicity, flexibility, expertise, and other unique qualities of administrative tribunals. He proposed four administrative appeal tribunals. Garant's recommendations built on this by proposing to create a single tribunal with four divisions based on the Ouellette proposals.

The four divisions of TAQ are:

1. Social affairs division – social benefits and indemnities (9,200 annual decisions; 57 full-time members and 26 part-time members)
2. Immovable property division – municipal taxation (1,200 annual decisions, 21 members)
3. Territory and Environment – land issues (200 decisions, 3 members)
4. Economic Affairs – permits and licenses (100 decisions, 4 members)

TAQ is a purely adjudicative tribunal. Any fields concerned with policymaking have been left out, including labour relations, worker's compensation, regulatory boards and landlord and tenant disputes (the Régie du logement has a limited policy function in determining the allowable annual rent increase).

The Minister of Justice is responsible for TAQ, it is part of the justice system, but is not necessarily seen as part of the judiciary. The move to the Ministry of Justice was seen as very important for ensuring the independence of TAQ members.

The appointment of TAQ members has evolved since its inception. Initially, in 1996, members were appointed for a 5 year term. In 2005, the government successfully passed a legislative amendment to create tenured appointments for TAQ members. TAQ members are now appointed during good behaviour. This was a somewhat unexpected change, especially because the 5 year term was found to be constitutionally acceptable in the *Barreau de Montréal* decision. The reasons behind the change are unclear. It may reflect the close connection between the bar and notaries and the current Liberal government in Quebec.

As part of the trade-off for the creation of tenured appointments, TAQ members and the President of TAQ agreed to undergo and administer performance reviews for members. TAQ has formed a committee and began a pilot project in 2006 in partnership with the École nationale d'administration publique (ENAP). The performance review process is confidential: the members' identities are concealed with file numbers and only the President of TAQ is able to match up members with the file numbers. The evaluations are performed by sending out surveys to parties, lawyers and colleagues based on numbers that are statistically valid. A preliminary report was made public in March 2007, which was largely positive. A telephone survey was also done with unrepresented parties who had appeared before TAQ, again with positive feedback. In the next stage of the project, ENAP will send individual reports on each member to the President.

Houle reflected on the fact that TAQ is slowly becoming more and more like a court of justice. Although it was intended to maintain its flexibility and specialization as a tribunal, today it is increasingly controlled by lawyers and notaries. TAQ is thus moving back towards the initial model of an administrative court that was proposed by Dussault. This development raises the question of how we want to structure public administration. Do we want tribunals to be part of the justice system and judiciary? If so, then they will become like courts, and this may attenuate the goals of flexibility, specialization and

efficiency. Houle underlined the need to create a link between government and tribunals, while also maintaining an appropriate separation between them. These issues had been raised in preceding discussions by Dodek and Jacobs. Houle suggested that we may want to look to the French model, in which there is a separate administrative branch, which allows for both a link and a separation between government and administrative tribunals.

### C. B.C.

**Philip Bryden (University of New Brunswick)** next discussed the conditions and strategies that made possible the Administrative Justice Project (AJP) in B.C., which began in 2001 and culminated in the introduction of the *Administrative Tribunals Act* in 2004.

Bryden identified three key factors:

- (1) Factors peculiar to B.C. political environment;
- (2) Evolution of thinking about tribunal reform;
- (3) Particular aspects of the way the AJP was set up that allowed it to be successful.

Bryden focused in his discussion on the last two factors. The thinking about tribunal independence had evolved in B.C. to the view that independence was not just a justice requirement. Rather, independence was seen as part of the conditions necessary to enable tribunals to fulfill their mandate. This connection between independence and effective administration helped to overcome a serious practical and political challenge of convincing a wide range of different ministries to participate in tribunal reform. Together with Attorney General leadership, this approach was successful.

Another effective part of the approach to reform by the AJP was to give serious thought to the role of specific tribunals and re-examine whether it would be more effective to accomplish the underlying goals through a tribunal, a court or some other structure. For example, the Expropriation Compensation Board was abolished and its jurisdiction was returned to the courts because it was recognized that the tribunal applied general legal principles.

If it was decided that a tribunal would remain in place, the AJP also re-examined what kind of powers and support the tribunal would need to fulfill its mandate. This led to consideration of how to create an effective appointment system, ensure independence, create a principled approach to remuneration, and set out the powers and procedures of the tribunal. Finally, the relationship between the government host ministry, the tribunal and the courts was given systematic consideration, and as a result attention was given to right of appeal or judicial review and *Charter* jurisdiction.

The solutions used in the reforms in B.C. were a mix of legislative changes and more informal changes. Not all issues, such as re-appointment, could be addressed in sufficient depth because of pragmatic political considerations.

Whether or not we agree with all of the answers at which the reform program arrived in B.C., the key point is that these issues were considered in a systematic manner.

#### **D. Ontario**

**Ivana Petricone (ARCH)** reflected on the current situation in Ontario and the impetus for reforms here.

One of the current strengths of administrative justice system is the strong legal aid system for administrative tribunal users. Community legal clinics like ARCH and Downtown Legal Services provide representation to people of low income who often appear before administrative tribunals.

Part of the mandate of community legal clinics is law reform advocacy on behalf of their clients. The Government Agencies Appointments Group (GAAG) was created to press for administrative justice reform in Ontario because of the increasing problems in administrative tribunals during the previous government. Some progress has been made:

- Preliminary steps by the government in merit-based process
- Government has acknowledged that tribunal adjudicators are professionals (remuneration, appointment terms, greater resources created for tribunals)
- Clustering is being studied, and while it is controversial, it may be useful in terms of improving accessibility
- Legislative provisions in Human Rights Code statutorily imbed a merit-based appointment process

The agenda for future reform would include:

- Legislative scheme for all tribunal appointments (a parallel process could be created for tribunals to the one already in place for judicial appointments).
- Independence continues to be a problem. For example, the social benefits tribunal makes decisions that affect the ministry, and government officials from the ministry appear as opposing parties in the cases, but the ministry is also responsible for the administration the tribunal. Tribunals, and the disadvantaged groups who rely on them, need champions.
- Improving access to legal counsel, to forms, to websites, to interpretation services.
- Expansion of duty counsel services and advice lawyer services.
- More academic research in the area.

**Cristie Ford (UBC) (Commentator)** summarized and offered comments on three dominant themes in the discussion: systematizing learning, independence, and access to justice.

Systematizing learning within the administrative justice system is a key part of the reform challenge. The common wealth system, as Lord Justice Carnwath pointed out, is bottom-up; but some reforms have had a top-down component. The challenge is to understand

how a more systematic top-down reform agenda can glean and incorporate the knowledge on the ground in tribunals. The performance review project at TAQ may be instructive.

The next theme has been independence. Ford has suggested that we need to think of independence together with accountability. In Canada, we tend to focus more on safeguarding the structural independence of tribunals from ministries and the executive. In the U.S., however, there has been a converse concern about the accountability of administrative agencies. Rather than orphans, the agencies are seen as unaccountable, renegade cowboys. The *Administrative Procedures Act* has attempted to reign in the agencies through notice and comment rule-making and allow for greater public participation and transparency. In Canada, we only have notice and comment rule-making in securities commissions and some limited duty to consult is recognized in other contexts. Should we have a statutory duty to consult? Do we want more accountability? The reforms in the U.K. and Canada do not currently imagine greater input from citizens.

Finally, on access to justice, both the reforms in B.C. and the U.K. to the administrative justice system have been part of wider reforms to the justice system as a whole. In many ways, tribunals in B.C. are being pushed by government to the forefront of the justice system, as the government tries to reframe access-to-justice as access-to-dispute-resolution. Planned reforms to the civil justice system in B.C. include the creation of information hubs for users of the justice system, mandatory case conferences, and new procedural rules. These reforms will have enormous implications for administrative justice as well. Administrative justice is now expected to be out in front of the courts in resolving disputes effectively and efficiently.

One interesting new development in the B.C. reforms has been to limit the jurisdiction of tribunals to interpret and apply the *Human Rights Code*. The *Administrative Tribunals Act* already restricts tribunals jurisdiction to interpret and apply the *Charter*: only the labour relations and securities tribunals have full *Charter* jurisdiction, including the power to invalidate portions of their own legislation for being in breach of the Charter. The new amendments impose similar limitations for the *Human Rights Code*. The idea is to streamline the system: *Charter* issues go straight to the courts (not tribunals), and human rights issues go straight to the human rights tribunal (not other tribunals). These reforms were implemented by a politically conservative government and this has shaped the way they have been seen. Critics of the reforms say that they take the *Charter* and the *Human Rights Code* out of the "peoples' courts" (i.e., the administrative tribunals) and treat them as holy grail. In support of the reforms, it can be argued that they reduce costs associated with multiple levels of review; ensure that human rights and *Charter* questions are adjudicated by those with expertise in the area; and arguably that they take the Charter and human rights legislation more seriously as a result.

Interestingly, Ford noted, although there was a lot of concern by poverty law advocates and equality-seeking groups around the changes to *Charter* jurisdiction in 2004, there has not been the same strong opposition to the more recent human rights reforms. Possible reasons for this are that lawyers and poverty advocates found that they prefer having *Charter* and human rights issues decided by expert decision-makers; that there have been

improvements to tribunals in terms of accessibility and fairness, hence alleviating the need to resort to challenges based on the *Charter* and the *Human Rights Code*; that direct applications to court have turned out to be an easier route; and/or that poverty advocates and equality-seeking groups are focused on access to counsel as the most pressing problem they face.

**Q/A Justice John Evans (Federal Court of Appeal) (moderator)**

The first question was from Michael Gottheil, who asked about the procedures in place for negotiating and setting budgets for tribunals. The budget can exert significant pressure on the tribunal and its Chair and affect independence of the tribunal. Lord Justice Carnwath replied that in the U.K., this is still being worked out through the “Partnership Model”. It is hoped that the advisory board will alleviate the pressure in negotiations and provide greater input for courts and tribunals. Houle stated that in Quebec, the legislation specifies where money for TAQ comes from, although not how much. However, the budget has been stable and has even increased. Bryden said that in B.C., two things have been done to address budgetary issues. First, the number of people involved in the negotiations has been reduced due to the rationalization of the system and it has been clarified that tradeoffs cannot be made between budgetary allowances and certain kinds of decisions being reached by tribunals. Second, there has been a memoranda of understanding project to provide greater structure to the negotiation process.

Ellis commented on the importance of change in the U.K. in which the tribunals’ administrative services have been joined and taken away from the other ministries. Social benefits tribunals in B.C. and Ontario, by contrast, continue to operate under the host ministry, which makes all appointment decisions, sets the budget, etc. but also has a direct interest in the result of the cases before the tribunal.

## 5. Roundtable Discussion on Next Steps for Reforms in Ontario

**Kathy Laird (Ontario Human Rights Tribunal)** began the discussion by asking whether we have the right ingredients for reform in Ontario.

The first comment was from Raj Anand, who noted that access to justice underlies the debates about reforms. The ultimate issue is what does any given reform do for the citizen who needs to use these tribunals? For example, how can it be satisfactory to move human rights jurisdiction to one tribunal, if that tribunal doesn't have resources, or leave human rights complainants to their own devices by scaling back the role of the human rights commission in bringing forward complaints, as was done by Bill 107 in Ontario?

Ford commented that in the B.C. the human rights tribunal does have, relatively, fairly good resources. The government would argue that lawyers give issues of jurisdiction more importance than clients, who just want an effective resolution.

Mary McKenzie provided an update on the *McKenzie* case. She is able to speak about the case now as it has evolved into public interest litigation in which her own personal interests are no longer engaged. She confirmed that the government did not appeal the B.C. Court of Appeal decision, which declined to address the substance of the appeal on the basis of mootness, but went on to declare the lower Court's decision on the statutory interpretation and constitutional issues to be "unnecessary obiter dictum" of "no precedential value". Ms. McKenzie and the legal team of S.R. Ellis, Q.C., Frank Falzon, Q.C., and Barbara McIsaac, Q.C., have filed an application for leave to the SCC. Ms. McKenzie emphasized that while we commonly refer to *independence*, the *McKenzie* case is ultimately about ensuring that there are basic structural safeguards for the *impartiality* that Canadians expect of quasi-judicial tribunals. She added that the BC government's explicit assertion, in the *McKenzie* case, of a statutory power to dismiss any and all tribunal adjudicators mid-term and without cause, if upheld, effectively transforms the status of "term" appointments to appointments at pleasure. She pointed out that in the recent decision of the Federal Court of Appeal in *Pelletier*, the Court stated that a government's decision to terminate an at-pleasure appointment is nothing more nor less than a political decision. She queried how, under those circumstances, quasi-judicial adjudicators who serve at pleasure can command public confidence in their impartiality.

The next question came from Patricia Hughes, who returned to the question of whether an administrative tribunal is a generic animal or whether we should think more about how tribunals differ in function? In U.K., the tribunals are treated the same, while in Quebec a distinction is drawn between adjudicative and regulatory or policy-making tribunals. In some discussions, we seem to be glossing over that issue and it does seem like a threshold issue. Do we want the same kinds of protections and structures by treating all tribunals the same way? Are we going to lose something of accessibility, flexibility and expertise?

Sossin replied that we may actually focus too much on trying to describe the animal that is a tribunal. It's really the rule of law to the people who come before bodies that matters. It's the litigants' rights that are at stake. We need to start from the basic idea that when important rights are at stake, a range of rule of law requirements is engaged.

Governments can have flexibility in devising different structures, but they can't contract out of rule of law protections. The big mistake is to start with the question "Does judicial independence as articulated in *Valente* apply?" Rather we should focus on "What rule of law protections apply when anyone comes before a decision-maker?"

Lord Justice Carnwath noted that it was not an easy process in U.K. to figure out what tribunals are in and what tribunals are out. The Leggatt report focused on a core set of tribunals. Now, in creating the chamber structure, there has been remarkable agreement around what the structure should be.

Bryden pointed out there is often little relationship between what we do on the ground and the theory. For example, professional discipline bodies adjudicate important rights, but the members are elected decision-makers. In *Suresh*, the Supreme Court held that the Minister of Citizenship and Immigration must apply s. 7 of *Charter* protections in performing risk assessments for deportees. To say let's figure out what the rights are and let the structure flow from it, may have little relationship to what's on the ground.

Laird stated that the AJWG's approach has been to focus on rights-tribunals that make really important decisions in people's lives. There was support voiced from the audience for this approach. It was felt that we should focus on a core group of tribunals that deliver justice and make important decisions in people's lives. Complications around who's in, who's out, and what the framework is, can be resolved once we make the leap to recognizing that a core of administrative justice is part of the justice system. A sense of urgency to push ahead with the reform agenda in Ontario was also expressed, especially because many people feel that the current conditions are pretty good and inertia is setting in. We need to move beyond "satisfaction."

Mullan, however, advocated thinking about different categories of tribunals and attempting to create a rational structure by building on past work, such as the Ratushny report.

Don Chiasson offered an international perspective on judicial independence. In many countries with a burgeoning justice system, the debate we are faced with in Ontario would seem very subtle. The answer for these nations is the more robust approach of creating a separate and independent court system that's also seen to be independent. The forum comes first and then the rest of the structure and culture fall into place.

Another approach suggested was to focus on the adjudicative function of tribunals and thus create reforms for a more broad range of tribunals, including those that also have a regulatory function.

Ellis said that the difficulty with this approach is that it's difficult to accomplish this within a reasonable horizon. It is more realistic to start with purely adjudicative tribunals, the straightforward cases, and deal with them.

Lord Justice Carnwath said that this was, in effect, the process in the U.K. and that Ellis' approach sounds quite sensible.

The Symposium concluded with an agreement to continue sharing ideas and proposals reform, and the need to create greater understanding and recognition of the importance of Administrative Justice.

## APPENDIX “A”

### ADMINISTRATIVE JUSTICE BIBLIOGRAPHY

#### INTRODUCTION

The Administrative Justice Bibliography (AJB) is an on-line, categorized and annotated bibliography of articles, chapters of books, text and treatise sections, reports, press clippings, theses, conference presentations, jurisprudence and other materials, selected by the editors as being of special potential interest to scholars, advocates and administrators working in the field of administrative justice tribunal design and reform.

The AJB’s mission is to be a central and permanent collection of *administrative justice* materials that are often otherwise found in disparate, and sometimes research-obscure and/or transitory places. Mainstream, administrative law materials that are readily available elsewhere will not, for the most part, be found here.

The AJB is a project of the Administrative Justice Working Group, an *ad hoc* assemblage of Ontario administrative-justice professionals who have come together in an effort to contribute their collective experience to optimizing the fairness, independence, impartiality, competence and efficiency of the administrative justice system and its tribunals through non-partisan advocacy on behalf of that system. The Group’s members are current or past administrative-justice practitioners who bring to the work of the Group an independent perspective together with substantial experience in the design of tribunal structures, in the academic analyses of administrative justice issues, in the leadership, management and administration of tribunals, and in advocacy before a variety of such tribunals.

The AJB does not purport to be an exhaustive collection even of administrative justice materials. It is permanently a work in progress and consists only of materials that come to the attention of the editors and are deemed by them to be of special interest. The collection is unabashedly biased towards the Administrative Justice Working Group’s reform goals.

The AJB was launched at the Administrative Justice Working Group’s Symposium, *The Future of Administrative Law*, to be held at the Faculty of Law, University of Toronto on January 17-18, 2008.

The AJB can be accessed at: <http://www.law.utoronto.ca/programs/ajb.htm>. Comments, feedback and additional suggestions for sources to include are most welcome!