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**Reconciling Tribunal Independence and Expertise
- Empirical Observations**

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Introduction

The literature on administrative tribunals portrays a picture of decision-making bodies that are legitimated by their expertise. It is expertise that permits administrative bodies to manage the sectors that have been entrusted to them by their enabling statutes. As discussed in a previous chapter¹, expertise also grounds a primary reason for the creation of tribunals², according to early administrative law theorists such as John Willis³ and J. A. Corry⁴. Recent literature and government reports continue to give expertise this

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¹ See Chapter XX "Defining The Administrative Tribunal "

² I use the expressions "administrative tribunal" broadly to incorporate not only administrative bodies that are adjudicative in nature but all administrative bodies. My use of "tribunal" is similar to the definition given in the *Federal Courts Act* R.S., 1985, c. F-7. Subsection 2 (1) defines the expression "federal board, commission or other tribunal" [emphasis added] as any body or persons exercising jurisdiction or powers conferred by statute or by Crown prerogative. While other expressions and other senses of the word "tribunal" have become current in describing types of administrative bodies, I have chosen to adopt this use of the term tribunal to avoid some of the limitations of the others. For example, some have adopted the use of "tribunal" to denote administrative bodies that are purely adjudicative in nature, as the Québec Charter has done (see Québec *Charter of human rights and freedoms*, R.S.Q., c. C-12, sections 56 and 23), but this does not permit for the wide range of bodies that are investigative, multifunctional, investigatory without order making powers, etc.. By contrast, the expression "statutory delegate" is much wider, however it does not appear to include those bodies that are created by Crown prerogative instead of statute even though these bodies may be subject to judicial review in the same manner as a statutory tribunal and may, through their functions, fit quite well within the broad concept of a tribunal (see for example *Masters v. Ontario* (1993), 16 O.R. (3d) 439; *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*, [1994] N.W.T.J. No.7; *Scheerer v. Waldbillig* (2006), 265 D.L.R. (4th) 749 and *McDonald v. Anishinabek Police Service et al.* (2006), 83 O.R. (3d) 132.) A good example of bodies created by Crown prerogative are the compensation programs for historical wrongs such as the one developed for Former Students of Canadian Aboriginal residential schools. Finally, the expression "administrative bodies" is very promising and captures most of the elements noted above. I sometimes use it interchangeably with tribunal. Its only drawback is that it evokes the older administrative law distinction between "administrative" and "judicial" bodies in which administrative bodies had no decision-making powers. Lastly, "administrative agency" is a term used with caution as it evokes the US notion of an executive branch agency of government for which the question of independence is not a viable issue. Consequently, in the current globalized context, using the term "administrative agency", may be confusing for the non-Commonwealth reader.

³ See John Willis, ed. *Canadian Boards at Work* (Toronto: McMillan, 1941) at v-vi [*Boards at Work*]. See also generally, John Willis, "Three Approaches to Administrative Law: the Judicial, the Conceptual and the Functional" (1935) 1 U.T.L.J. 53.

⁴ See J.A. Corry, "Introduction: The Genesis and Nature of Boards" in *Boards at Work* at xxi-xxii.

central, legitimizing function. One example can be found in the 1998 report of the Ontario Agency Reform Commission headed by Ontario MPP Garry Guzzo. In this report, the Agency Reform Commission stresses that Ontario's adjudicative and regulatory agencies should provide "everyday justice that is more specialized"⁵ and describes regulatory and adjudicative agencies in part as bodies that "provide justice that is less expensive, less complex, and less formal than the courts, with more specialized knowledge of the legislation and sector in which they work".⁶ Even more recently, the 2007 final report of the Facilitator appointed to examine the potential for "clustering" of various agencies dealing with environmental and municipal land use planning matters⁷, refers repeatedly to the importance of safeguarding the expertise of these tribunals in any clustering project that may be attempted.⁸

Mirroring the literature, the jurisprudence offers a similar view. Canadian standard of review jurisprudence is steadfast in holding expertise as the central most important factor for determining the standard of review applicable to any administrative tribunal. The greater the expertise of the tribunal relative to that of the court, the greater the deference that the decision-maker should be accorded.⁹ This principle was highlighted in *Director of Investigation and Research v. Southam Inc. et al.*, where Justice Iacobucci for the Supreme Court of Canada characterized expertise as "the most important of the factors

⁵ See "Message from the Chair" in Ontario, *Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies* (Toronto: Queen's Printer for Ontario, 1998).

⁶ See *Everyday Justice* *ibid.* at 1.

⁷ *Final Report of the Agency Cluster Facilitator for the Municipal, Environment and Land Use Planning Tribunals* (Toronto: Agency Cluster Project, August 22, 2007) (Facilitator: Kevin Whitaker), available online from the website of the Ministry of Government and Consumer services: <http://www.gov.on.ca/mgs/graphics/166283.pdf> [*Ontario Agency Cluster Report*]. "Clustering" is defined in the report as a means of sharing best practices among tribunals that work in related areas and deal with related subject matter. While clustering is not a means of merging or integrating different tribunals into one generic agency, and although the aim is not cost-cutting, clustering can be a valuable tool for coordinating and maximizing scarce public resources while retaining specialized expertise. In his study, the Facilitator sought to examine how tribunals could maximize their existing pools of resources to provide the highest level of public service while strengthening individual tribunal mandates.

⁸ Indeed, referring to the legitimizing role of expertise quite explicitly, the report states: "Perhaps the most fundamental assumption about the appropriate delivery of administrative justice dispute resolution deals with the central concept of expertise. Unlike judges who are generalists and must deal with any and all areas of law that might come before them, tribunals and tribunal adjudicators are expressly understood to be experts in their particular field or sector." (See Ontario Agency Cluster Report at 7).

⁹ See generally the key modern cases on administrative law standard of review including, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Pushpanathan v. Canada (Min. of Citizenship)* [1998] 1 S.C.R. 982 and *Director of Investigation and Research v. Southam Inc. et al.*, (1997), 144 D.L.R. (4th) 1 [*Southam*]. Particularly interesting is that although the expertise of a tribunal is measured in relation to the general knowledge of Superior Court judges, when it comes to the review of administrative bodies dealing with the judiciary itself, experience as opposed to technical knowledge has often been held sufficient to attract a high degree of deference. See e.g. *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 in which judges sitting on a disciplinary committee of other judges were held to attract the standard of patent unreasonableness. As Justice Arbour wrote on behalf of the Supreme Court: "Although this is clearly not the type of tribunal that develops an expertise from the sheer volume of cases before it, the fact that the Council is engaged in this special and unique role [of determining the matters relating to judicial independence and judicial discipline] gives it some degree of specialty not enjoyed by ordinary courts of review..." (at paragraph 51).

that a court must consider in settling on a standard of review”¹⁰, re-emphasizing what had been said earlier by the Court in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*,¹¹. Moreover, cases such as *Ocean Port Hotel*¹² depict administrative tribunals as furthering the policies of the executive branch of government, suggesting that expertise is a means of deploying policy. Through all of this - from both the literature and jurisprudence, a particular theoretical image of administrative decision-making has been created. This image is of a tribunal that is a solid, cohesive body with a purpose of developing its expertise and using its expertise to further the policy that stems from the branch of government that created it and its legislative background.

This chapter explores how the cohesive image created by the jurisprudence and literature can be fragmented once one takes an empirical examination of how the tribunal world functions on a day-to-day basis. My case study examined access to information and/or privacy commissions in three Canadian jurisdictions. The purpose of my study was to see if I could determine, empirically, factors that affect the independence and impartiality of administrative tribunals as they work on the ground. This information could aid in the policy development of legislation that provides the most authentic means of protecting tribunal independence and impartiality with the concomitant benefit of guaranteeing independent and impartial decision-making processes for the public. At this moment, the jurisprudence relies on the use of the judicial paradigm, looking primarily at structural guarantees - security of tenure, financial security and administrative control. However, I was curious as to whether the judicial paradigm should be adapted for bodies of the administrative state to respond, in particular, to factors that affect independence within the day-to-day work of the tribunal as opposed to structurally.

My observations in this chapter respond to the study’s initial research question regarding the factors that affect independence on the ground. My conclusions are twofold. First, the unitary management of a sector or industry through tribunal expertise is a goal that has desirable consequences and that is therefore sought to be obtained (or retained) by actors within the administrative justice system. However, the use of tribunal expertise can be limited by a tribunal’s desire to foster independence (or to meet the even higher threshold of presenting a satisfactory perception of independence). As a result, fragmentation of the cohesive tribunal unit takes shape physically with expertise being removed from adjudication, sometimes in ways that are less intuitive than one would anticipate. The degree to which independence and expertise conflict in a tribunal’s aim

¹⁰ *Southam* at para 50.

¹¹ [1993] 2 S.C.R. 316 where Justice Sopinka for the majority wrote at 335: “[...] the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal’s decision in the absence of a full privative clause. Even where the tribunal’s enabling statute provides explicitly for appellate review, as was the case in *Bell Canada*, supra, it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.”

¹² *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781

to deliver administrative justice seems to be a direct function of social and judicial perceptions of how to deliver fairness. Legislative action may be useful in this regard.

Secondly, my empirical research highlights a particular socio-legal struggle that has permeated administrative law jurisprudence and tribunal reality since the advent of the Charter. This struggle is the question of whether administrative justice and the concept of fairness that lies within it should be entrusted to traditional common-law principles of parliamentary supremacy and the presumption of natural justice or whether the Charter (or its values) should inform administrative justice and fairness more strongly. While this chapter may not present a conclusion to this particular question, it certainly illustrates this struggle and its implications.

***De facto* separation of policymaking and adjudicative functions The Information and Privacy Commissioner/Ontario**

My field research began with the offices of the Information and Privacy Commissioner/Ontario (IPC). I spent approximately 2-3 days a week at the IPC offices for about 4 months in 2004 with the aim of experiencing the day-to-day life behind the scenes at the commission and understanding the way that independence factored into the work that it did. I also attended judicial review hearings in the Divisional Court whenever possible to see how questions of independence and impartiality issues arose and were dealt with within the context of the standing and representation of tribunals in judicial review of their own decisions. At the IPC, as with all of the three information privacy commissions that I visited, I was interested simply in the processes of how things were done and did not aim to investigate or reveal any confidential information.¹³

The information available about the IPC, including the literature that is posted on its website and its annual reports, does not focus on the internal machinery of the Commissioner's office. This is not to say that the information provided on the website and in annual reports is not useful for giving a general sense of how the office works. On the contrary, the 2004 *Annual Report*, for example, outlines the seven key functions of IPC. These seven functions emerge from the IPC's three enabling statutes (the provincial *Freedom of Information and Protection of Privacy Act* (FIPPA)¹⁴, the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA)¹⁵ and the *Personal Health Information Protection Act, 2004* (PHIPA)¹⁶). They include acting as an appellate body that resolves appeals when government organizations refuse to grant access to information; investigating privacy complaints related to government held information; ensuring that government organizations comply with the *Acts*; conducting

¹³ Research agreements with the three commissions that I visited reflect this.

¹⁴ R.S.O. 1990, c. F.31.

¹⁵ R.S.O. 1990, c. M.56.

¹⁶ S.O. 2004, c. 3, Sched. A. The newest of the information and privacy statutes, PHIPA came into effect on November 1, 2004. It works in conjunction with the *Quality of Care Information Protection Act* S.O. 2004, ch. 3, schedule B. The two statutes have a collective goal of preventing the disclosure of health and quality of care information except in limited circumstances where disclosure is necessary.

research on access and privacy issues; providing advice on proposed government legislation and programs; and an educational function of informing the public about Ontario's access, privacy and personal health information laws and issues.¹⁷

It is obvious that administrative bodies may sub-divide into smaller units for reasons of efficiency in completing the variety of work mandated to them. The office of the information privacy Commissioner seems to be no exception. The 2004 *Annual Report* also indicates some of the delegations that the Commissioner has made. Notably, she has delegated major functions to two Assistant Commissioners, one who has been dedicated to access to information and the other to privacy matters. Staff at various levels have also been given the authority to resolve access to information appeals, investigate privacy complaints, mediate etc.. These are permissible delegations under the freedom of information, privacy and personal health information statutes.¹⁸ There is also an organizational chart that identifies the general departments of the Commissioner's office.¹⁹ From this organizational chart, one learns that the Assistant Commissioner for Privacy oversees policy, compliance and legal services, while the Assistant Commissioner for Access is responsible for the registrar, tribunal support, adjudication and mediation. Finally, the organizational chart indicates also that there is a director for corporate services who oversees administrative services, technological services, and communications at the IPC. Nevertheless, what the organizational chart is unable to illustrate is the culture of mindful separation that exists within the organization itself.

While there are many expressions can be used to describe the internal organization of the IPC, I have chosen the expression "mindful separation" rather "division" or "separation", or many others that may come to mind because it embodies the sense that one has after experiencing the daily culture of the IPC over a period of months. More specifically, one cannot help but notice that the IPC works well as an organization. It is true that the IPC has very distinct units or "separate worlds" to use the expression that was used by members of the field themselves. However, the separate workings of the different units of the IPC were brought about and maintained to the extent that they were, through a culture of respect for i) the challenges of working with a multifunctional statute in which the multi-functions are endowed in one Commissioner and ii) the different units of the IPC itself. The "mindful separation" was not something imposed upon the IPC by the enabling statutes, regulations or legislative directives; it was an ethos generated within the culture of the IPC itself.²⁰ I explain this further as I go along.

I first encountered this mindful separation when, shortly after my arrival on the field. I began my interviewing and field observation in the Tribunal Services Department (or "TSD"). The TSD was responsible for deciding access to information appeals from decisions of government institutions and investigating privacy complaints. Access to

¹⁷ See "Role The two statutes serve to and Mandate" in Information and Privacy Commissioner/Ontario, *Annual Report 2004*, available online: http://www.ipc.on.ca/images/Resources/up-ar_04e.pdf

¹⁸ See e.g. FIPPA, section 56, PHIPA, section 67.

¹⁹ See *Annual Report, 2004 supra* note 17 at 55. For convenience, this chart has been reproduced as appendix A at the end of this paper.

²⁰ There were no policy directives, instructions or directions given to the IPC to design itself this way. Its decision to structure itself this way stemmed from the economy exercised within the limits of its discretion.

information complaints were managed through a combination of the mediation services group and the adjudicators²¹ while privacy complaints were handled primarily by the mediators. At this point in my research, days into my study, I was curious to find out more about how the jurisprudential teachings that tribunals were a vehicle for policy development actually took shape on the ground. I was especially intrigued since this was a parliamentary officer. According to political theory, given their position as watchdogs over the government of the day, parliamentary officers, including information and privacy commissioners, should be designed so that they avoid ties to the executive branch of government.²² Yet, the IPC's enabling legislation provides for a "responsible minister... for the purposes of th[e] Act"²³. From the legislation, it is evident that this minister is charged with such administrative duties as creating personal information banks and compiling data regarding the procedure for requesting access to information at government institutions²⁴. It was less clear, however, if this minister of the Crown played a role, if any, in policy development.²⁵ Even more confusing was the fact that the responsible minister had, under his/her portfolio, an access to information and privacy office in the executive branch of government (within Management Board Secretariat).²⁶ How did the policy work of this government branch interact, if at all, with the work of the Information and Privacy Commissioner? Because of the nature of parliamentary officers, I expected that the IPC worked completely independently of this executive branch government office. Even more than this, I anticipated a very autonomous and cohesive approach to in-house policy development at the IPC, including implementation of the IPC's policy objectives through its decisions.

My interest in interviewing and/or observing the policy branch was met by surprise. Although my contact person did not see a problem with my learning more about the policy branch of the IPC, he was surprised that I was interested in doing so. As he put it, the policy department and tribunal services were "separate worlds". This theme was developed upon when I conducted my interview in policy branch. During my interview with a management person in the policy section, one of the main questions I pursued was

²¹ Mediation was a preliminary streamlining venue for access to information appeals. The mediators were also responsible for investigating privacy complaints.

²² The literature on ombudsman, particularly parliamentary ombudsman is instructive in this regard. See e.g. Roy Gregory and Peter Hutchesson, *Parliamentary Ombudsman: A Study in the Control of Administrative Action* (London: Allen and Unwin, for the Royal Institute of Public Administration, 1975) and D.C. Rowat ed., *The Ombudsman: Citizen's Defender*, (Toronto: University of Toronto Press, 1965).

²³ See FIPPA, section 3. Although not mandatory, the legislation allows for the Lieutenant Governor in Council to assign a Minister to this task. The Minister responsible for FIPPA is also responsible for administering MFIPPA (see MFIPPA, s. 2, definition of "Minister").

²⁴ See also section 24 MFIPPA which requires the responsible minister to compile a list of all institutions to which MFIPPA applies and to indicate for each institution, the name of the person responsible for access to information and the method for requesting access. Since 2006, the Minister of Long-term Health has also taken a role and is responsible for consultations regarding regulations. See FIPPA at 65.2

²⁵ The IPC is not the only legislative officer in the privacy field with a nebulous connection to the executive branch of government. The federal Office of the Privacy Commissioner, for example, has an obligation under s. 24(b) of the *Personal Information and Protection of Electronic Documents Act* 2000, c. 5, P-8.6, to conduct research at the request of the Minister of Industry.

²⁶ This government department is the Access and Privacy Office of Management Board Secretariat (now renamed to the Ministry of Government and Consumer Services). The Access and Privacy office website is: <http://www.accessandprivacy.gov.on.ca/english/index.html>

how policy was developed and integrated into the IPC's outcomes. My questioning explored both the relationship between Management Board Secretariat and the Office of the Information and Privacy Commissioner and the internal relationship between the Policy and Compliance Branch and the Tribunal Services Department within the IPC. Our discussion also touched on the interaction between the IPC and government institutions generally.

As for interaction with the Access and Privacy policy branch located within the executive branch of government (Management Board Secretariat), it was quite clear that there was distance between it and the IPC. Management Board had no formal channel of voicing its policy preferences to the IPC. As I was told by the IPC Policy and Compliance Branch, Management Board did not approach them with policy ideas to implement.²⁷

Generally, one of the primary tasks performed by the IPC's Policy and Compliance Branch was providing advice to government ministries on pieces of legislation that ministries were in the process of creating. The IPC's advice was sought often by government ministries and discussions focused on a specific plan, program or piece of legislation. Another main function of the policy branch was to explore cutting issues in privacy and access to information. Past issues that the policy branch examined and on which the Commissioner made comment include issues of Internet privacy, smart cards, and the protection of health information.²⁸

The IPC's policy branch obviously develops a significant amount of expertise in many areas of access to information and privacy. Following through with the theory that this expertise should be used to manage the sector, I asked how such information was employed in the decision-making process. It was here that the idea of "separate worlds" resurfaced again somewhat unexpectedly. I was told that the policy generated in the policy department was not sent to the adjudicators or mediators in the Tribunal Services Department. As well, it was very rare that an adjudicator or mediator would ask the policy branch if they had encountered or dealt with a particular issue.-- this was the exception rather than the rule.²⁹ As my interviewee explained, those in the Tribunal section (the adjudicators and mediators) were considered to be *independent*, "the mediator or adjudicator is independent and can issue their order or issue their report as they see fit".³⁰

It was clear of course that the independence that the policy branch was attributing to the TSD related to an attempt to avoid the perception that the Commissioner through her delegates in the adjudicative branch were approaching their decision-making tasks with the type of bias typically known as a closed mind. However, this seemed to fly in the face of the theory developed since the early administrative law literature and maintained through to recent Supreme Court jurisprudence like *Ocean Port*, that the main work of

²⁷ Interview notes of April 29, 2004.

²⁸ See for example, *Posting Information on Websites: Best Practices For Schools and School Boards* (March 1, 2003). The same

²⁹ Interview notes of April 29, 2004.

³⁰ *Ibid.*

administrative tribunals was to further the policy of government. In this case, as a parliamentary officer, the link to government was minimal - there was no government policy to further other than the policies that the IPC generated under the mandate given to it by its enabling statutes. But, beyond this, the IPCs development of its own policies was fragmented and this fragmentation stemmed from its *de facto* internalization of the independence, impartiality and bias jurisprudence.

As for the implications of this *de facto* separation, with the policy branch out of the picture when it comes to decision-making, it was up to the adjudicators and mediators themselves to develop their own expertise where necessary. It was obvious that this may involve in part researching what the policy group had done of one's own volition as well as developing expertise in other ways. The problem did not seem to be an acute one at the IPC where the policy questions explored by the policy branch were often much broader than the narrow questions that the adjudicators and mediators faced in the Tribunal Services Department. Many of the policy concerns of the TSD involved questions of consistency in decision-making in light of the fact that each decision, particularly those dealing with access to information, provided guidance on what information governments and health institutions should or should not make available to the public. However, the problem of how to reconcile the expertise developed in an administrative body's policy development capacity (and the utility that it may bring to the decision-making process) with the important natural justice aspect of impartial decision-making³¹ is one that can easily be seen to affect many administrative bodies.

It was heartening to see the conscientious effort made by the IPC to create a system of *de facto* separation in order to address potential concerns about impartiality. But, the experience of the IPC raises many questions on a theoretical level. First, Canadian administrative law jurisprudence actually tells us that multifunctional bodies do not necessarily have a lack of independence and impartiality simply because their functions may overlap. This jurisprudence has so far dealt with the question of the decision-maker acting as both prosecutor and judge.³² Should fairness be gauged differently when the question is one of the tribunal using its policy-making expertise, to aid in the decision-making process? Does it matter that expertise and policy creation are arguably the reason for the creation of administrative tribunals? Is this question of reconciling independence and expertise a matter for case-by-case determination? Should blanket legislative guidance be created? Alternatively, is there an argument that a constitutional protection should apply?

The question of conflict between independence and expertise was emerging as well in the Québec context of access and privacy. Had I not spent time at the Ontario IPC, however, it would not have caught my attention that this was a recurring theme. Moreover, seeing experience of the Québec *Commission d'accès à l'information* (or "CAI"), helped me to

³¹ One could argue that the question of providing independent and impartial decision making is also an aspect of human rights.

³² See, for example 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919 ; *Sam Lévy & Associés Inc. v. Mayrand* , [2006] 2 F..C.R. 543 (Fed. Ct) , aff'd [2006] FCJ No. 867 (FCA); *Currie v. Edmonton Remand Centre*(2006), 276 D.L.R. (4th) 143 (ABQB)

put into perspective the theoretical questions. My negotiated access time with the CAI was shorter than the time spent with the IPC. I was able to spend a month at the Commission's headquarters in Québec City plus an additional week or so of observing oral hearings only in Montréal. During that month, I primarily conducted interviews with key people in each department, and observed oral hearings as much as possible. I also attended the one scheduled judicial review hearing in which the CAI had standing. Although this stay was shorter than my time spent at the other two commissions, I was able to glean from my experience a good sense of how the commission in Québec worked on the ground.

The bulk of the work of the Québec CAI is conducted by five commissioners, each appointed with five-year, one time renewable terms. This was markedly different from the Ontario IPC, where there was one appointed commissioner who had legislative permission to delegate tasks, including adjudication, to staff members hired by her office. In Québec, as in Ontario, the appointment process was done by the legislature. In Québec, the members were appointed by resolution of the National Assembly, on a motion of the Premier. For the resolution to be successful it had to be approved by no less than two thirds of the legislature. The decision-making model used in Québec was a very traditional court-like adjudicative model. Oral hearings were generally used. This was quite different from the IPC process which did not use oral hearings but rather written ones and which involved sequential document exchanges among the parties. At the CAI the commissioners sat alone to determine access to information appeals. For privacy enforcement matters (that is, questions of whether personal information had been properly collected or retained), the commissioners sat in panels three after a process of preliminary investigation had been conducted by a subgroup of the commission's staff³³.

At the Quebec Commission, one of the commissioners spoke quite eloquently to me of having to wear 2 hats.³⁴ Over the 20 years or so of its existence, the access and privacy commission in Québec had developed its expertise and a strong reputation in the management of personal information. As it was explained to me during my research visit to the Commission, it was because the CAI had developed expertise and was known as an expert body in Access and Privacy that over time, government ministries and other governmental entities started to approach it for advice during the development of Bills, information management systems etc. The advice sought was generally on whether the Bill had any visible flaws with respect to its protection of personal information. This was similar to the work done by the Ontario IPC's policy branch. The CAI would meet once a month as a full set of five commissioners to examine the proposed documents brought before it. The commissioners would write and provide a report and these reports were published on their website. They could then be used non-binding guidelines.

³³ This subgroup was entitled *La Direction de l'analyse et de l'évaluation*. The subgroup had been created to create distance between the investigatory and prosecutorial roles that the Commission was required to play under its enabling statutes. For discussion of the drawbacks of this process see Doray *infra*. After the legislative reform of June 2006, the legislature made it quite clear that in its oversight capacity, the CAI could investigate potential privacy breaches and also make orders stemming from these investigations, theoretically eliminating the need for the work of the subgroup. Commissioners were also able to sit alone, instead of in panels of three, to do this work.

³⁴ Interview notes of March 9, 2005.

There were two concerns expressed to me during this interview. The first was simply that as an independent adjudicator, this commissioner knew that if a matter came before her that was similar to something that had come before the full set of commissioners in its advisory role, she may have to decide differently depending on the facts. The concern was therefore that the unified face of the Commission as an expert body would shatter upon a reading of individual decisions. Her concern was not so much that her adjudicative independence might be influenced by the commission's advisory role; rather, it had to do with the idea that deference and public confidence are given to the tribunal because it can show its expertise and that these diverging decisions could cause the public to call into question the Commission's expertise.

The second concern about the practice of giving opinions, that I encountered during my time in Québec City, was a concern that while they had had no legal challenges in this regard and although the jurisprudence does not necessarily denounce a multiplicity of functions in a single tribunal, the tribunal's advice to government and others could be perceived by the public as indicating that the tribunal would have a closed mind in future similar cases. At the same time, however, the commissioners felt that being involved in both broad advisory work and narrow adjudications helped them to improve their competence in both of these areas of their work.³⁵

At the time of my research visit, in March 2005, the structure of the CAI was under scrutiny by a legislative committee.³⁶ In response to the CAI's quinquennial report to the legislative assembly, submitted in 2002, the legislature had invited a local lawyer to look into whether the multiple functions of the commission raised questions about its independence, impartiality and effectiveness.³⁷ The CAI had never had a complaint that its multiple functions raised a reasonable apprehension of bias.³⁸ Yet, the government

³⁵ The commissioners expressed their opinion that their advisory work helped them in their adjudicative capacity in their response to the legislative assembly's response to the Commission's quinquennial report. See Commission d'accès à l'information, *Document complémentaire de la Commission d'accès à l'information sur la Consultation publique de la Commission parlementaire (Oct. 30, 2003)* The whole issue of giving advice was also problematic for the Quebec Commission for as it itself has noted in its Sept 2005 report to the legislature -- giving advice on Bills etc is not a function for which it has express legislative authority. In its 2005 report to legislature it asked for express jurisdiction to do this function.

³⁶ See Québec National Assembly, Bill 86, *An Act to amend an Act respecting Access to documents held by public bodies and the Protection of personal information and other legislative provisions* (First session, 37th Legislature), assented to in 2006-2006 Chapter 22., See also report of the Québec National Assembly, *Commission de la Culture, Observations, Conclusions et Recommendations à la suite de la consultation générale et des auditions publiques à l'égard du document intitulé: Une réforme de l'accès à l'information: le choix de la transparence* (May, 2004)

³⁷ The commissioned report was completed by Raymond Doray – see LA MISE EN OEUVRE DES LOIS D'ACCÈS À L'INFORMATION GOUVERNEMENTALE ET DE PROTECTION DES RENSEIGNEMENTS PERSONNELS AU QUÉBEC: ANALYSE CRITIQUE ET PERSPECTIVES DE RÉFORME ORGANISATIONNELLE – Avis préparé à la demande de Ministère des relations avec les citoyens et de l'immigration (June, 2003) [Doray].

³⁸ Notes from interview with CAI legal counsel, February 28, 2005.

took it upon itself to look into whether the commission should be divided into two separate branches: An adjudicative branch dealing with access to information review matters and a branch responsible for ensuring compliance with the statutes that it administered relating to personal information collection, retention and disclosure (essentially privacy matters).

The government's response was to propose Bill 86 which came into effect in June, 2006. Bill 86 created internal divisions within the Commission. Bill 86 split the Commission so that there were Commissioners dedicated solely to deciding access to information disputes and another set of commissioners dealing exclusively with protection of private information. This latter group was endowed with clear investigatory and order making powers in the event of noncompliance.³⁹ Of most relevance, Bill 86 moved the advisory function that the CAI had played with respect to government Bills and proposed management systems away from the commission altogether. This function was given to a cabinet minister who has the authority to consult the Commission in creating his or her opinions.

Conclusions

A dominant theme that can be drawn from the study is that there is clearly a tension emerging between perceptions of how tribunal expertise should be used in the development of policy and in the adjudication of disputes. While the literature has created an image of the administrative state that is premised on expert bodies that continuously develop expertise and use this expertise for purposes of public policy, the reality is that this model comes up against a claim that fairness may be diminished within this paradigm.

Administrative law jurisprudence offers little guidance on this question at the moment.⁴⁰ Nevertheless, debates about the possible conflict between independence and expertise and its implications for fairness have emerged in the context of the workings and culture of administrative bodies themselves as well as in the minds of legislatures. As for a resolution that is satisfactory to the public, the legislature, and administrative bodies, it would seem that legislative enactments that delineate not only the roles of tribunals but also permissible internal interactions as well as the reasons for these interactions, may be quite useful. However, while legislative drafting may provide a practical and straightforward solution, the deeper issues of whether there is an inherent tension

³⁹ In this respect, the bifurcation of the CAI addresses different issues than those raised relating to the bifurcation of the work of the Ontario Securities Commission. In the case of the Ontario Securities Commission, concern was raised over the fact that it was possible for those who conduct investigations in the commission to also prosecute those investigations. In the case of the CAI, by contrast, Bill 86 in its final form actually endowed the branch responsible for oversight of privacy compliance with the power to both investigate privacy complaints and produce orders in their regard. See *An act respecting access to documents held by public bodies and protection of personal information*, R.S.Q., chapter A-2.1 s. 129.

⁴⁰ Possibly the only case that has touched on the question of reconciling independent expertise so far albeit in a very different way is *CEPU v. Alberta Labour Relations Board* [2004] A.J. No. 83 (QL). See L. Jacobs, "Acting at Arms Length-Policymaking and the Legislative Process: The Case of *CEPU v. Alberta Labour Relations Board*" (*Paper Prepared for Osgoode Administrative Law CLE, September 2007*).

between two concepts that are often placed as synonyms "expert decision making" and simple "every day justice" -- particularly when that justice is adjudicative in nature, remain to be explored. Also left for another day is the larger, normative issue of whether the most appropriate response to these questions of fairness should stem from faith in the legislative process or from the development of constitutional values.

Appendix A

Organizational Chart of the Office of the Information and Privacy Commissioner/Ontario 2004

Reproduced from: Information and Privacy Commissioner/Ontario, *Annual Report 2004*,
available online: http://www.ipc.on.ca/images/Resources/up-ar_04e.pdf

