CASE COMMENTS

MCKENZIE V. BRITISH COLUMBIA (MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL): A CONSTITUTIONAL GUARANTEE OF TRIBUNAL INDEPENDENCE?

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I. INTRODUCTION

On 8 September 2006, Mr. Justice McEwan of the British Columbia Supreme Court released his reasons for judgment in *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General).*[1] Mr. Justice McEwan's decision explored the question of whether subsection 14.9(3) of the *Public Sector Employers Act*[2] authorized the termination without cause of Mary McKenzie's five year term appointment as a residential tenancy arbitrator upon payment of 12 months' salary in compensation. He held that it did not. He was also invited to rule on the question of whether the Canadian Constitution permitted the British Columbia Legislative Assembly to enact legislation that would authorize the termination without cause of the term appointment

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[1] 2006 BCSC 1372, 272 D.L.R. (4th) 455, 12 W.W.R. 404 [*McKenzie*].

[2] R.S.B.C. 1996, c. 384 (as amended) [*PSEA*].

of a residential tenancy arbitrator upon the payment of compensation. He ruled that it could not, and issued a declaration that subsection 14.9(3) of the *Public Sector Employers Act* is of no force and effect in relation to the termination of Ms. McKenzie's appointment as a residential tenancy arbitrator.

The respondent Ministers[3] and the Attorney General of British Columbia filed notice of appeal of Mr. Justice McEwan's decision on 29 September 2006. The Court of Appeal's decision will be eagerly awaited by persons interested in administrative law not only in British Columbia but also across the country. My purpose in the following commentary is not to suggest that the *McKenzie* case is or is not correctly decided, or to propose the course of action that ought to be followed by the Court of Appeal (and ultimately, perhaps, the Supreme Court of Canada). Rather, it is to situate the *McKenzie* decision within the context of the debate over the independence of administrative tribunals that has evolved in this country since the Supreme Court of Canada, in its 1995 decision in *Canadian Pacific Ltd. v. Matsqui Indian Band*,[4] identified the institutional independence of administrative tribunals as a principle deserving of protection by the common law.[5]

A comment on Mr. Justice McEwan's decision in *McKenzie* fits well within a volume dedicated to the work of Dugald Christie and his search for access to justice for people who cannot easily take advantage of the justice available from our superior court system. One of the important reasons for developing at least some kinds of administrative tribunals was society's desire to provide individuals with an opportunity to have their disputes addressed in a forum that was easier for them to use, less formal and less

[3] Since the time of the original decision to terminate Ms. McKenzie's appointment, responsibility for administration of the *Residential Tenancy Act* passed from the Minister of Public Safety and Solicitor General to the Minister of Forests and Range and Minister Responsible for Housing. Both Ministers are respondents to the judicial review application and both joined the Attorney General in filing notice of appeal.

[4] [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129 [*Canadian Pacific*].

[5] For a discussion of the distinction between "individual" and "institutional" or "structural" independence, see P. Bryden, "Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*" (2003) 16 Can. J. Admin. L. & Prac. 125.

expensive than the court system. How well that goal is reached in the case of many tribunals is a question worth addressing, but I will not consider it in this comment. Rather, the *McKenzie* case raises a different but related question: Does the move to decision-making by administrative tribunals necessarily entail the sacrifice of the constitutional safeguards of adjudicative independence that we offer to litigants who have their disputes judged by our courts?

My comments will be in five parts. First, I will offer a brief description of Mr. Justice McEwan's reasons in the *McKenzie* case. In the second part of the comment, I will discuss some of the implications of the Ministry's concession that the decision to terminate Ms. McKenzie's appointment, and the reconsideration of that decision, were procedurally flawed. In Part Three, I will explore the question of whether, as a matter of statutory interpretation, subsection 14.9(3) of the *PSEA* authorizes the termination without cause of term appointments held by the members of the administrative tribunals embraced by its coverage. In the fourth part of the comment, I will turn to the constitutional question, and consider whether the unwritten constitutional principle of judicial independence identified in the Supreme Court of Canada's decision in *R. v. Campbell*[6] extends to at least some administrative tribunals. Finally, in Part Five, I will discuss briefly what the precise content of a constitutional guarantee of tribunal independence might be, assuming that such a guarantee is determined to exist in the first place. This part of the essay is frankly speculative in nature, since Mr. Justice McEwan says relatively little about it in his reasons for judgment and previous decisions offer at best limited guidance.

II. THE DECISION IN THE *MCKENZIE* CASE

Although Mr. Justice McEwan devotes considerable attention in his reasons to the circumstances surrounding the purported termination of Mary McKenzie's appointment as a residential tenancy arbitrator, the key facts can be set out relatively briefly. Ms. McKenzie was first appointed as a residential tenancy arbitrator in 1994, and on 1 January 2004 she was reappointed to a

[6] [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 [*Campbell*].

five year term. In addition to their statutory term appointments, residential tenancy arbitrators are bound by one year "service agreements," a practice that Mr. Justice McEwan regarded as potentially inconsistent with the concept of a "term" appointment.[7] Since this practice was not the subject of submissions before him, Mr. Justice McEwan made no ruling on the point.[8] On 18 February 2005, the Director of the Residential Tenancy Office, Ms. Mary Duffy, met with Ms. McKenzie and presented her with a letter stating that Ms. Duffy was recommending to the Minister that Ms. McKenzie's appointment be terminated no later than 31 March 2005, which was the date of expiration of Ms. McKenzie's most recent service agreement. This letter indicated that the province was in a position to pay Ms. McKenzie $76,761.66 in compensation pursuant to subsection 14.9(3) of the *PSEA*, that sum being the average of the annual fees Ms. McKenzie had been paid during her service as a residential tenancy arbitrator. Ms. McKenzie sought legal advice and her counsel took the position that the recommendation to terminate her appointment was not legally valid. On 14 April 2005, a Ministerial Order was issued rescinding Ms. McKenzie's appointment as a residential tenancy arbitrator. No reasons were given for this decision, and the Ministry at no point alleged that Ms. McKenzie was being terminated for cause.

On 31 May 2005, Ms. McKenzie filed a judicial review application challenging the termination of her appointment. In response to this application, counsel for the Residential Tenancy Branch agreed that the original Ministerial Order terminating Ms. McKenzie's appointment would be quashed, but informed McKenzie's lawyer that the Assistant Deputy Minister responsible for the Residential Tenancy Branch, Mr. Gary Martin, would once again be recommending that the appointment be terminated because Mr. Martin and Ms. Duffy had "lost confidence"[9] in Ms. McKenzie as a result of a number of exchanges concerning changes in the operation of the Residential Tenancy Office. Ms. McKenzie was invited to make submissions with respect to this

[7] *McKenzie*, *supra* note 1 at para. 44.
[8] *Ibid.*
[9] *Ibid.* at para. 52.

recommendation. While maintaining the position that action taken to terminate her appointment without cause was not legally valid, Ms. McKenzie's counsel did respond in writing to the substance of the allegations concerning Ms. McKenzie. On 30 September 2005, Ms. Lori Wanamaker, Associate Deputy Minister of the Ministry of Forests and Range and the Ministry Responsible for Housing, issued a decision purporting to confirm the original decision to terminate Ms. McKenzie's appointment. While the written terms of this decision indicated that Ms. Wanamaker had relied on Ms. McKenzie's affidavit and her counsel's submissions concerning the termination decision, in fact these materials had not been put before Ms. Wanamaker.

As a result of these events, the respondents conceded before Mr. Justice McEwan that both the initial Ministerial Order terminating Ms. McKenzie's appointment and the purported reconsideration of this decision were procedurally flawed. Despite this concession, the parties invited Mr. Justice McEwan to consider whether termination of Ms. McKenzie's appointment without cause could be authorized by subsection 14.9(3) of the *PSEA* and, if so, whether such authorization was constitutionally valid.

Mr. Justice McEwan considered the relationship between the provisions governing the appointment of residential tenancy arbitrators found in section 86 of the *Residential Tenancy Act*[10] and subsection 14.9(3) of the *PSEA*. For reasons set out in more detail in Part Four of this comment, Mr. Justice McEwan concluded that subsection 14.9(3) was "inoperative" in these circumstances and therefore did not authorize the termination of Ms. McKenzie's appointment without cause.

Notwithstanding this conclusion, Mr. Justice McEwan went on to consider the constitutional question. The first issue he had to address was whether the Supreme Court of Canada's decision in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*[11] conclusively determined that the unwritten constitutional principle protecting judicial

[10] S.B.C. 2002, c. 78 [*RTA*].

[11] 2001 SCC 52, [2001] 2 S.C.R. 781, 204 D.L.R. (4th) 33 [*Ocean Port*].

independence could not be extended to administrative tribunals. Mr. Justice McEwan ruled that it did not. He wrote:

> The question left unanswered by *Ocean Port* was what to make of tribunals that are not "government" decision makers. In finding that tribunals such as the Liquor Appeal Board are not constitutionally required to be independent, the court was addressing a decision-making entity with functions that could not conceivably be folded straight back into the courts, owing to its nature. Its policy-making and policy-driven adjudicative responsibilities are of a type that could only ever be supervised, not performed, by courts.[12]

Mr. Justice McEwan reviewed Supreme Court of Canada decisions concerning judicial independence that were decided after *Ocean Port*, and particularly *Ell v. Alberta*,[13] in which the Court extended the constitutional protection of judicial independence to justices of the peace. The conclusion Mr. Justice McEwan drew from this jurisprudence was: "It now seems clear that essentially anything broadly labelled a "court" or with at least one foot within the "judicial branch" of government will attract constitutional protection."[14]

Mr. Justice McEwan then considered whether the constitutional protection of judicial independence could be extended to residential tenancy arbitrators. He ruled:

> A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the *PEI Reference* and in *Ell*. The work of residential tenancy arbitrators is a judicial function that "relates to the basis on which [that] principle is founded."[15]

Having found that the constitutional protection of judicial independence extended to residential tenancy arbitrators, Mr. Justice McEwan did not attempt to offer a comprehensive statement of the content of that protection. It was sufficient for purposes of the *McKenzie* case to find that this protection

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[12] *McKenzie*, *supra* note 1 at para. 149.
[13] 2003 SCC 35, [2003] 1 S.C.R. 857, 227 D.L.R. (4th) 217 [*Ell*].
[14] *McKenzie*, *supra* note 1 at para. 145.
[15] *Ibid.* at para. 152, quoting *Ell*, *supra* note 13 at para. 20.

included the right to sufficient security of tenure that it was not open to the British Columbia legislature to authorize the mid-term termination of the appointment of a residential tenancy arbitrator without cause upon payment of 12 months' salary by way of compensation.

III. THE BREACH OF PROCEDURAL FAIRNESS

It is, in my view, important to discuss at the outset certain aspects of the *McKenzie* case that are not in dispute. The Ministry conceded that the fairness doctrine applies to the decision to terminate Ms. McKenzie's appointment. The Ministry also conceded that the original decision to terminate Ms. McKenzie's appointment was procedurally flawed as a result of the Ministry's failure to provide reasons for this decision, and that the "reconsideration" decision was procedurally flawed because the decision maker did not have before her, and therefore did not take into account, all of the relevant information.

As a practical matter, these concessions represent a significant constraint on the ability of tribunal "management" to secure the termination of the appointment of an adjudicator who does not perform according to management expectations.[16] Moreover, they fit somewhat awkwardly with the Ministry's substantive position that it was entitled to terminate Ms. McKenzie's appointment without cause as long as it paid the compensation set by subsection 14.9(3) of the *PSEA*. In my view the Ministry's position reflects what might be described as a "private sector" model of the employment relationship, in which an employee has no right to continuation of the employment relationship but is entitled to financial compensation for the termination without cause of that relationship. In some senses this represents an

[16] It is important to note that the Ministry at no point alleged that Ms. McKenzie herself was not performing the adjudicative aspects of her work. Mr. Justice McEwan concluded: "[I]t is manifest that the Petitioner was terminated simply for having the temerity to stand up for herself ... . The Respondents simply had no regard for the Petitioner or her concerns and perceived her to be an obstacle to the implementation of their plans. These included a unilateral alteration of her terms of employment within her five-year term that, in an employment context, might well have amounted to constructive dismissal." *Ibid.* at para. 60.

advance from the more traditional position that appointments held "at pleasure" could be terminated without cause and without payment of compensation. Nevertheless, it falls short of what might be described as the "public sector" or "collective bargaining" approach to the employment relationship, in which the employer's right to terminate employment is generally restricted to situations in which the employer can demonstrate "just cause" for termination. If the Ministry's position is that it did not need to show cause for terminating Ms. McKenzie's appointment, one might wonder why it conceded that it was obliged to hear her out and provide reasons for its decision to do so.

The short answer is that Supreme Court of Canada decisions such as *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*[17] and *Knight v. Indian Head School Division No. 19*[18] stand for the proposition that the obligation to adopt fair procedures in the termination of a person's status as a public official does not depend on the existence of a legal right to continuation of the public employment relationship. The practical difficulty these decisions engender flows not from their establishment of a general proposition that procedural fairness applies even to decisions to conclude employment relationships that can be terminated without cause, but from the awkwardness of determining what kind of information exchange is necessary to satisfy the fairness requirement. Private sector employers who decide to terminate an employee for reasons that do not constitute just cause for dismissal typically do not discuss the reasons for their action with the employee because they do not believe that anything the employee says will alter their chosen course of action, and it is considered unproductive for both the employer and the employee to have a meaningless discussion. Upon reading Mr. Justice McEwan's reasons, I found it difficult to avoid the conclusion that Ms. Duffy and Ministry officials had determined a course of action and nothing Ms. McKenzie or her counsel could have said would have affected their decision. Under these circumstances, giving Ms. McKenzie an opportunity to make

[17] [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.
[18] [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489.

representations and offering "reasons" for a preordained conclusion seems more akin to adding insult to injury than a vindication of the values underlying the fairness doctrine.

One might argue that the justification for the procedural steps the Ministry followed in terminating Ms. McKenzie's appointment lies in the separation between Ms. Duffy (and later Mr. Martin), who recommended the termination, and the Minister or the Minister's delegate, Ms. Wanamaker, who made the actual decision. Thus, it might be suggested that even though Ms. Duffy's view of the appropriate course of action may have been fixed, the person charged with the termination decision itself was open to persuasion. The difficulty with this characterization of the termination process is that it presupposes a clear separation between tribunal "management" and the Ministerial decision-makers in respect of appointments, a separation that is difficult to maintain in practice. One of the major objectives of administrative justice reform in British Columbia was to strengthen the role of chairs of tribunals relative to Ministries in relation to day to day tribunal management and tribunal appointments. This objective finds statutory expression in the conferral on tribunal chairs of responsibility for effective management and operation of the tribunal by section 9 of the *Administrative Tribunals Act*[19] and in the requirement found in subsection 3(1) of the *ATA* that chairs be consulted with respect to the initial appointments of tribunal members. Unless we want to undermine the operational authority of tribunal "managers," it seems to me that a recommendation with respect to the termination of an appointment is more than a mere suggestion that the appointing authority might wish to consider taking action. Rather, it is a determination that is presumptively entitled to considerable weight.

What lessons can be drawn from this aspect of the *McKenzie* case? First of all, it seems that if tribunal chairs or "managers" are contemplating action in relation to a tribunal appointee that might include a recommendation that the appointment be terminated, it is better to have a formal discussion with the appointee before such a recommendation is made. In my view, attaching procedural fairness to the making of the recommendation gives the appointee

[19] S.B.C. 2004, c. 45 [*ATA*].

a more realistic opportunity to influence the outcome than treating the recommendation merely as the initiation of a process with procedural fairness applying only to the formal decision to terminate the appointment. Secondly, it seems that the concession that the fairness doctrine applies to the decision to terminate an appointment reinforces the argument that the termination decision itself is reviewable, albeit probably using the "patently unreasonable" standard of review. The Supreme Court of Canada in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*[20] concluded that the decision to appoint retired judges as interest arbitrators exercising statutory authority was reviewable using the "patently unreasonable" standard, and I would have thought that the logic of this decision would apply equally to terminations of appointments. I understand that counsel for Ms. McKenzie advanced the argument that the court could review the substantive decision to terminate Ms. McKenzie's appointment, but Mr. Justice McEwan did not consider it necessary to address this argument in his reasons for decision.[21]

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[20] 2003 SCC 29, [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 193 [*C.U.P.E.*].

[21] In commenting on an earlier version of this paper at the conference at which it was originally presented, Professor David Mullan observed that the suggestion that decisions terminating "at pleasure" appointments are judicially reviewable represents a fundamental alteration of our traditional understanding of what it means to hold an office "at pleasure." I concede that it would be inconsistent with our fundamental understanding of "at pleasure" appointments if review using the "patently unreasonable" standard amounted to a requirement that a decision terminating an appointment could only be justified if "just cause" could be demonstrated. In my respectful view, however, it is conceivable that, without requiring the decision-maker to show "just cause" for termination, a court could find that some types of reasons for terminating an "at pleasure" appointment should be regarded as incompatible with the statutory scheme conferring authority to terminate the appointment. By analogy with the reasoning of the majority of the Supreme Court of Canada in *C.U.P.E.* (*supra* note 20), that would render such decisions "patently unreasonable." I acknowledge that this would represent a significant shift in our thinking about "at pleasure" appointments. On the other hand, the dissenting judgments in *Nicholson* (*supra* note 17) and *C.U.P.E.*, and Mr. Justice Sopinka's concurring reasons in *Knight* (*supra* note 18), all suggest that the views of the Supreme Court of Canada majority in those cases represent a change in judicial thinking about the legal limits surrounding the power to grant and terminate appointments, and I see no reason in principle why this thinking should be incapable of further evolution.

IV. CAN TERM APPOINTMENTS BE TERMINATED WITHOUT CAUSE?

The initial question before the court in *McKenzie* was whether subsection 14.9(3) of the *PSEA* authorized termination of a residential tenancy arbitrator's appointment without cause upon payment of the compensation set out in the subsection. In Mr. Justice McEwan's view, this required him to reconcile subsection 14.9(3) of the *PSEA* with the relevant provisions of the *RTA*, notably sections 86 and 86.3. At the relevant time, these provisions read as follows:

***RTA*, s. 86**

86(1) The minister may appoint individuals as arbitrators for the purposes of this Act.

(2) An arbitrator may be appointed to hold office for an initial term of 2 to 4 years and may be reappointed for additional terms of up to 5 years.

(3) An individual is not eligible for appointment as an arbitrator unless

(a) he or she has successfully completed a merit based process established or approved by the director, or

(b) he or she has previously been appointed as an arbitrator under this Act.

(4) An arbitrator must be

(a) paid fees in the amount and manner specified by the director, and

(b) reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in the performance of duties or exercise of powers under this Act.

(5) An arbitrator is not an employee of the government.

***RTA*, s. 86.3**

86.3 The minister may terminate the appointment of an arbitrator for cause.

***PSEA*, s. 14.9(3)**

14.9(3) The appointment of a person referred to in subsection (1) may be terminated without notice before the end of the term of their appointment on payment of the lesser of

(a) 12 months' compensation, or

(b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term.

At the time the *McKenzie* litigation commenced,[22] subsection (1), referred to in the opening words of subsection 14.9(3), read:

14.9(1) Division 3 of this Part does not apply to

(a) a coroner under the *Coroners Act*,

(b) the fire commissioner under the *Fire Services Act*,

(c) an arbitrator under the *Residential Tenancy Act*,

(d) a governor or director of the *Workers' Compensation Board under the Workers Compensation Act*, or

(e) a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal.

On its face, subsection 14.9(3) of the *PSEA* does not explicitly authorize termination of an appointment without cause. It clearly establishes limits on the compensation payable to individuals holding term appointments, but it is not crystal clear about the circumstances under which those appointments may lawfully be terminated without notice. Likewise, section 86.3 of the *RTA* does not explicitly state that the appointments of residential tenancy

[22] Effective 1 October 2006, s. 14.9(1)(c) was repealed by s. 115 of the *Tenancy Statutes Amendment Act*, S.B.C. 2006, c. 35, s. 115.

arbitrators can be terminated *only* for cause. Termination under section 86.3 could be distinguished from termination under subsection 14.9(3) on the basis that when appointees are terminated for cause there is typically no legal obligation to pay compensation. Nevertheless, it seems to me that whether or not one accepts the proposition that subsection 14.9(3) authorizes termination without cause upon payment of compensation depends upon certain background assumptions about the nature of tribunal appointments.

One possible assumption is that the government is entitled to establish whatever terms and conditions it likes for tribunal appointees, and that it can vary the degree of security of tenure of these appointees on whatever basis it sees fit. On this theory, the relatively weak security of tenure afforded by a right of limited compensation when terminated without cause is adequate security of tenure because the government deems it to be sufficient. The other possible background assumption is that guarantees of security of tenure are a fundamental attribute of impartial adjudication and that courts should strain to ensure that any compromise of the right to retain an appointment for the full term subject only to termination for cause is made clear and explicit in statutory language.

One can see the contrast between these assumptions at work in the judgment of the British Columbia Court of Appeal in *Preston v. British Columbia*,[23] on the one hand, and the decision of the Ontario Court of Appeal in *Hewat v. Ontario*,[24] on the other. In *Preston*, the Court held that where a statute did not explicitly set the terms of a tribunal member's appointment, the grant of an appointment under an Order in Council for a term of years did not prevent the termination of the appointment prior to the expiry of the term as a result of the operation of section 20 and subsection 22(b) of the British Columbia *Interpretation Act*,[25] though it did

[23] (1994), 92 B.C.L.R. (2d) 298, 116 D.L.R. (4th) 258 (B.C.C.A.) [*Preston*].

[24] (1998), 37 O.R. (3d) 161, 156 D.L.R. (4th) 193 (Ont. C.A.) [*Hewat*].

[25] At the time of the *Preston* case (*supra* note 23), s. 22 of the *Interpretation Act*, R.S.B.C. 1979, c. 206 read: "Words in an enactment authorizing the appointment of a public officer include power to (a) fix his term of office; (b) terminate his appointment or remove or suspend him; ... (d) fix his remuneration and vary or terminate it." Section 22 of the *Interpretation Act*, R.S.B.C. 1996, c.

oblige the government to pay compensation to the appointee for the balance of the term. In contrast, the Court in *Hewat* held in similar circumstances that once the government had appointed a tribunal member for a term of years, it relinquished its right to terminate that appointment for the balance of the term except for cause.

It should come as no great surprise that administrative tribunal decisions in British Columbia have tended to find the line of reasoning in *Hewat* more persuasive that the approach taken by the British Columbia Court of Appeal in *Preston*. For example, in *Reon Management Services Inc. v. British Columbia*[26] the Expropriation Compensation Board distinguished *Preston* and concluded that where a term appointment was expressly set out in the tribunal's enabling legislation, its members did enjoy security of tenure during the term of their appointments. Likewise, in *Re Farmer Construction Ltd.*,[27] a decision quoted extensively by McEwan J., the Labour Relations Board concluded that the right to terminate a Labour Relations Board member's appointment without cause upon payment of compensation should not be read into what is now subsection 14.9(3) of the *PSEA*. The Board reasoned as follows:

> Given that S. 54 [now subsection 14.9(3) of the *PSEA*] mandates payment of up to 12-months' "compensation" for premature termination of appointment, the assumption advanced is that it implies a power to terminate without cause. Compensation for lost wages is not normally paid where termination of employment is for cause. However, does this practice mean that the word "without cause" must necessarily be read into the amended S. 14.9? In our view, it does not. One possible explanation for why the Legislature would have intended to pay limited compensation for mid-term

238, currently reads: "Words in an enactment authorizing the appointment of a public officer include power to do the following: (a) set his or her term of office; (b) terminate his or her appointment or remove or suspend the public officer; (c) reappoint or reinstate the public officer; (d) set the public officer's remuneration and vary or terminate it; (e) appoint another in his or her place or to act in his or her place; (f) appoint a person as the public officer's deputy."

[26] (2000), 22 Admin. L.R. (3d) 29, 70 L.C.R. 14 (B.C. Expropriation Compensation Board).

[27] [2004] B.C.L.R.B. Dec. No. 214, 2004 CarswellBC 3350 (B.C. Labour Relations Board) [*Farmer Construction*].

revocations of tribunal appointments is that revocations for cause are extremely rare, whereas mid-term revocations for tribunal re-structuring purposes, as occurred in Ell and BCT.Telus, are not unheard of. It may be that the Legislature intended to limit the amount of compensation payable in the event that tribunal appointments were revoked mid-term in such circumstances. As indicated in Ell and BCT.Telus, mid-term revocation of tribunal appointments for purposes of bona fide tribunal re-structuring or systemic reform is not arbitrary removal and therefore does not offend the principle of institutional independence.

Thus, it is possible to interpret S. 14.9 without having to read the words "without cause" into that provision. Reading the words "without cause" into S. 14.9 is inconsistent with the general provisions of the ATAAA (SS. 1-10), in particular with S. 2, S. 3 and S. 8. Those provisions recognize the need for an independent, arm's length relationship between appointing authorities and adjudicators, including the common law institutional independence requirement for fixed term appointments with removal being subject to a cause requirement. By contrast, reading the amended S. 14.9 as implying an ability to terminate adjudicators mid-term without cause implies that the nature of the relationship between an appointing authority and a tribunal appointee as being simply an employment relationship, with the "employer" being able to terminate the appointment before the end of its term without notice or cause, on payment of compensation. The Ontario Court of Appeal rejected this characterization of the appointing authority-tribunal member relationship in Hewat.

In our view, the absence of the words "without cause" in the amended S. 14.9 renders it at least equivocal whether the Legislature intended to imply a power to terminate the appointments of tribunal adjudicators mid-term without cause, on payment of a maximum 12 months' compensation. Applying the Ocean Port analysis that it should not lightly be assumed that the Legislature intended to breach the fundamental principle of institutional independence absent a clear and unequivocal expression of intention to do so, we find that S. 14.9 should not be read as implying an ability to revoke tribunal appointments mid-contract without cause.[28]

[28] *Ibid.* at paras. 66-68 [emphasis in original].

Although Mr. Justice McEwan was not prepared at the end of the day to endorse the Labour Relations Board's interpretation of subsection 14.9(3) of the *PSEA*,[29] he concluded that the specific provisions of subsection 86(3) of the *RTA* prevailed over the general provisions of subsection 14.9(3) of the *PSEA*, and that the latter provision was therefore "inoperative" in relation to Ms. McKenzie's appointment, rendering the mid-term revocation of her appointment "unlawful."[30] With the greatest of respect, the use of the word "inoperative" in this context is rather ambiguous. It seems to me that Mr. Justice McEwan was indicating that subsection 14.9(3) could not be construed in the circumstances of the *McKenzie* case to authorize the termination of Ms. McKenzie's appointment without cause, and that under those circumstances, the only lawful basis for the termination of her appointment would be "for cause" under subsection 86(3) of the *RTA*. This would leave open the possibility, contemplated by the Labour Relations Board in *Farmer Construction*, that subsection 14.9(3) *could* justify the termination of an appointment with compensation under other circumstances, such as the statutory abolition or restructuring of a tribunal.

V. DOES THE CONSTITUTION PROTECT THE INDEPENDENCE OF SOME TRIBUNALS?

In light of his conclusion on the statutory interpretation question, it is perhaps surprising that Mr. Justice McEwan acceded to the parties' request and addressed the constitutional issue before him. Whatever the ultimate result of the appeal, this aspect of Mr. Justice McEwan's reasoning deserves consideration because it is the first time a Canadian court has explicitly ruled that the unwritten constitutional guarantee of judicial independence applies to at least some administrative tribunals. I find it convenient to address the constitutional issues raised in the *McKenzie* case in two stages. The first concerns whether the Canadian constitution offers guarantees of independent adjudication by residential tenancy arbitrators, and potentially by

[29] See *McKenzie*, *supra* note 1 at para. 112.
[30] *Ibid.* at para. 114.

the members of other administrative tribunals. The second, which is addressed only tangentially by McEwan, J. in *McKenzie*, concerns the precise content of those guarantees.

It is helpful, in my view, to begin the first stage of the inquiry by relating the constitutional protection of tribunal independence to the evolving constitutional protection of judicial independence. Once this has been done, it is necessary to consider whether the Supreme Court of Canada's decision in *Ocean Port* authoritatively resolves the question of whether the unwritten guarantee of judicial independence can be extended to at least some administrative tribunals. Finally, if one concludes that there is some room for constitutional protection of adjudicative independence, the question becomes what tribunals could be included within the scope of that protection.

A. Evolving Constitutional Protection of Judicial Independence

This brief comment is not the place for an extended discussion of the protection of judicial independence offered by the Canadian constitution, but it is useful to make some general observations about how that protection has evolved. The first point to bear in mind is that, unlike the American and Australian federal constitutions, the *Constitution Act, 1867*[31] does not explicitly confer jurisdiction with respect to particular types of decisions on courts. The extent to which superior courts have guaranteed jurisdiction with respect to certain types of decisions must be inferred from the Judicature provisions of Part VII of the *Constitution Act, 1867*, and in particular sections 96 to 100.[32] These provisions are only partially associated with the protection of judicial independence. Section 96 confers the power to appoint judges of provincial superior courts on the federal administration.

[31] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

[32] *Constitution Act, 1867*, *supra* note 31. For present purposes I will leave to one side the complex jurisprudence concerning whether bodies other than "courts" can grant remedies for breaches of the *Charter* under s. 24 or determine that provisions of their enabling legislation of no force and effect for purposes of s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].