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). Mr. Justice McEwan’s decision explored the question of whether subsection 14.9(3) of the Public Sector Employers Act 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 Philip Bryden is the Dean of Law at the University of New Brunswick. An earlier version of this paper was presented at the Continuing Legal Education Society of British Columbia’s Administrative Law Conference held in Vancouver, British Columbia on 23 November 2006. I am grateful to the conference chairs, Frank Falzon of Frank A.V. Falzon Law Corporation in Victoria, British Columbia and Angus Gunn, Jr. of Borden Ladner Gervais LLP in Vancouver, British Columbia for encouraging my work in this area.


3 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 Ministers3 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

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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.


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. Campbell5 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

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. Since this practice was not the subject of submissions before him, Mr. Justice McEwan made no ruling on the point. 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" 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

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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\(^\text{10}\) 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)\(^\text{11}\) conclusively determined that the unwritten constitutional principle protecting judicial

\(^{10}\) S.B.C. 2002, c. 78 [RTA].

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

¹² McKenzie, supra note 1 at para. 149.
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. 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

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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


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 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

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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)*\textsuperscript{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.\textsuperscript{21}


\textsuperscript{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, 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

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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, on the one hand, and the decision of the Ontario Court of Appeal in Hewat v. Ontario, 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, though it did

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 Columbia26 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.”
Compensation Board).
Relations Board) [Farmer Construction].
revocations of tribunal appointments is that revocations for cause are extremely rare, whereas mid-term revocations for tribunal restructuring purposes, as occurred in EII 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 EII 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, 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.” 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

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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.


\(^{32}\) 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].
Sections 97 and 98 require superior court judges to be selected from the Bars of the respective provinces in which they are appointed. It is only in sections 99 and 100 that one sees reference to security of tenure and security of remuneration.

Section 96 litigation has tended to be more concerned with protecting the authority of the federally appointed judiciary than with guaranteeing litigants access to an independent and impartial judiciary for the resolution of their disputes. The famous three-part test set out by Mr. Justice Dickson (as he then was) in *Re Residential Tenancies Act* is explicitly directed toward the extent to which authority exercised exclusively by section 96 courts at Confederation can be eroded by the removal of that jurisdiction from the courts and its conferral on provincial tribunals. While section 96 jurisprudence has the incidental effect of preserving access for litigants to adjudication by an independent judiciary, prior to the 1980s it was seldom justified in these terms.

Early section 96 case law tended to focus on preventing erosion of the jurisdiction of superior courts over first instance adjudication of certain types of disputes. Over time, however, barriers to first instance adjudication by tribunals over different types of disputes have tended to be lifted, and in their place the focus of the jurisprudence has become the preservation of superior court review authority at the constitutional and jurisdictional levels.

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34 One early exception is the well-known article by Professor William Lederer, “The Independence of the Judiciary” (1956) 34 Can. Bar Rev. 769 and 1139, a work that significantly influenced the thinking of later constitutional scholars such as Nobel Lyon, Gerald Le Dain, Robin Elliot and John McEvoy.
level, as well as the retention of some element of “core” jurisdiction. 39

The section 96 jurisprudence has nothing to say about the institutional independence of provincial courts established under subsection 92(14) of the Constitution Act, 1867, and the prospect of constitutional guarantees of the independence of provincial courts only became a reality with the coming into force of subsection 11(d) of the Constitution Act, 1982. The independence guarantees of subsection 11(d) are not restricted to courts; they are expressed as a right of “[a]ny person charged with an offence” to be “presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” 40 It is equally apparent that subsection 11(d) is not applicable to courts adjudicating civil disputes. The Campbell decision, 41 in which the Supreme Court of Canada identified a general guarantee of judicial independence flowing from the commitment in the preamble of the Constitution Act, 1867 to the establishment of a government “similar in principle to that of the United Kingdom,” was litigated up to the level of the Supreme Court as a subsection 11(d) case.

In the Ocean Port case, Chief Justice McLachlin suggested that there is nothing in Chief Justice Lamer’s reasons in Campbell that would extend the principle of judicial independence to tribunals as distinct from superior courts and provincial courts. 42 While this is technically correct, it glosses over the fact that in the United Kingdom, inferior courts historically did not enjoy the protection offered to high court judges by the independence guarantees found in the Act of Settlement. 43 Accordingly, it is difficult to identify a historical justification for extending independence guarantees to provincial courts as well as superior courts. As a result, it seems to me that the unwritten guarantee of

41 Supra note 6.
42 Ocean Port, supra note 11 at paras. 30-32.
43 Act of Settlement, 1701, 12 & 13 Will. III, c. 2.
judicial independence is best understood as something that flows from the structure of the institutional arrangements established by our constitution, rather than as an incident of our system of government's historical relationship with that of the United Kingdom.

Moreover, as Mr. Justice La Forest observed in his partially dissenting reasons in Campbell, "If one is to give constitutional protection to courts generally, one must be able to determine with some precision what the term 'court' encompasses." If one approaches this definition from a functional or structural standpoint, it is difficult to discern what constitutionally relevant distinction can be drawn between a provincial "court" exercising limited civil jurisdiction and a provincial "administrative tribunal" established to adjudicate disputes arising under a particular statute.

B. CAN OCEAN PORT BE DISTINGUISHED?

The major jurisprudential barrier to the possibility of extending the unwritten constitutional guarantee of judicial independence to administrative tribunals is the Supreme Court of Canada's decision in the Ocean Port case. Ocean Port involved a challenge to the independence of the British Columbia Liquor Appeal Board. In rejecting the application of the judicial independence principle to the Board, Chief Justice McLachlin contrasted courts and administrative tribunals and in some passages appeared to suggest that tribunals could never be protected by a general guarantee of independence. Thus, she wrote:

This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: [R. v. Campbell]. Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges—both in fact and perception—by insulating them from external influence, most

44 Campbell, supra note 6 at para. 323.

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected. ⁴⁵

Later in her judgment, Chief Justice McLachlin described the functioning of the Liquor Appeal Board in the following terms:

The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board’s licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government. ⁴⁶

This characterization of the work of the Board gave some comfort to Mr. Justice McEwan, because it suggested that Chief Justice McLachlin’s remarks could be confined to tribunals whose activities were fundamentally governmental rather than judicial in character. ⁴⁷ With the greatest of respect, Chief Justice McLachlin’s characterization of the work of the Liquor Appeal Board is problematic. It seems that the Board did not engage in licensing activities; rather, its function was to hear appeals from liquor license suspensions. The part-time adjudicators did not

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⁴⁵ *Ocean Port*, supra note 11 at paras. 23-24.
⁴⁷ *McKenzie*, supra note 1 at para. 149.
understand themselves to have a significant policy-making role, and in fact when the Board was abolished as a result of the Campbell government’s core services review of administrative tribunals, its functions were essentially transferred to the courts.48

Be that as it may, it is conceivable that Chief Justice McLachlin’s rejection of the application of the independence principle to tribunals can be understood as a rejection of the application of a principle that was designed for judicial institutions to governmental bodies that are not court-like in nature, even though they may incidentally carry out adjudicative functions. Chief Justice McLachlin’s decision in Bell Canada v. Canadian Telephone Employees Association49 does not give a great deal of support to this assessment of the significance of the Ocean Port case. Bell Canada involved a challenge to the independence of the Canadian Human Rights Tribunal. In a rather ambiguous passage, Chief Justice McLachlin wrote:

Bell also argues that the Tribunal is bound by a constitutional principle—the “unwritten principle of judicial independence”—which confers on it the same degree of independence as a court established under s. 96 of the Constitution Act, 1867: [R. v. Campbell]. Bell presents no authority for this argument. As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function.50

This passage is not an outright rejection of the argument that the principle of judicial independence can apply to a tribunal that is essentially a body that adjudicates rights disputes between parties, but neither is it a ringing endorsement of the idea.

It seems to me that the strongest basis on which to distinguish Ocean Port is reliance on the passage from Mr. Justice Major’s reasons in Ell in which he states: “The scope of the unwritten

48 For a more elaborate discussion of this aspect of the Ocean Port decision, see Bryden, supra note 5 at 128, note 14.
50 Ibid. at para. 29.
principle of independence must be interpreted in accordance with its underlying purposes. In this appeal, its extension to the office held by the respondents depends on whether they exercise judicial functions that relate to the bases upon which the principle was founded. As Mr. Justice McEwan concluded, if one considers the adjudicative functions performed by residential tenancy arbitrators, it is difficult to see how those can be distinguished from the adjudicative functions performed by provincial court judges exercising civil jurisdiction.

C. WHICH TYPES OF TRIBUNAL COULD RECEIVE CONSTITUTIONAL PROTECTION?

The key passages from Mr. Justice McEwan’s reasons concerning the extent of the unwritten constitutional guarantee of judicial independence deserve repetition here:

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.

Tribunals that are assigned responsibilities lifted straight from the courts’ jurisdiction are obviously different. If the Respondents are correct, the same function, depending solely on whether it is located in a court or in a tribunal, may require the constitutional protection of a fair and independent arbiter, or may be left to whatever cowed or needy sycophant the government, in its absolute discretion, thrusts into the judgment seat. This is such an affront to the notion of “a fair and public hearing by an independent and impartial tribunal,” guaranteed in writing elsewhere in the constitutional firmament, and is so fundamentally illogical and arbitrary, that it cannot be reconciled with the concept of the rule of law itself.

51 Ell, supra note 13 at para. 20, quoted by McEwan J. in McKenzie, supra note 1 at para. 137.
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.”

These passages refer to four different types of situations, and it is useful to separate them because they have different consequences for the types of tribunals that might be embraced by the constitutional principle recognized by Mr. Justice McEwan. The first is a situation in which jurisdiction has been removed from a court and conferred on a tribunal, a situation that hearkens back to section 96 jurisprudence. The second is a setting in which a tribunal is trying legal disputes between private parties. The third relates to situations in which a tribunal exercises “judicial” functions that could be folded back into the courts as distinct from “governmental” or “regulatory” functions that could not. And the fourth is a situation in which a tribunal is adjudicating on a “judicial” or “quasi-judicial” basis. There is a great deal of overlap among these situations, and all apply to residential tenancy arbitration, but considered in isolation they apply to quite different tribunals.

The first type of situation would represent the narrowest extension of the Campbell principle. In effect, it would mean that a province could not take adjudicative authority away from a court and confer it on a body that did not have at least some of the indicia of independence enjoyed by courts. It would not, however, prevent a province from establishing a novel adjudicative scheme (the protection of human rights, for example) that was never governed by courts and to confer that jurisdiction on a tribunal that did not enjoy guarantees of independence.

The second type of situation would cover only tribunals that adjudicated disputes between private parties, but would not include tribunals that deal with disputes between private parties and governmental bodies, even if those disputes could just as easily be addressed by courts. Thus, residential tenancy

52 McKenzie, supra note 1 at paras. 149-150, 152 [emphasis in original].
arbitrators, labour relations boards and human rights tribunals would be guaranteed some measure of independence by the constitution, but expropriation compensation boards and tribunals dealing with license suspension appeals would not.

The third situation would distinguish tribunals that carry out functions that could not be performed by courts from tribunals whose essential character is indistinguishable from courts. The difficulty here is to determine whether a tribunal is so integrated into a governmental or regulatory scheme that its adjudicative activities cannot easily be teased out from its broader regulatory mandate. Once could argue, for example, that the activities of the Liquor Appeal Board in *Ocean Port* were so intimately bound up with the province’s scheme for regulating liquor licensing that its adjudicative role cannot be meaningfully separated from that scheme. As a result, its independence would not be entitled to constitutional protection, whereas a tribunal that simply adjudicated disputes in accordance with rules set out in a statutory scheme would be entitled to such protection.

The distinction between the third situation and the fourth is that the constitutional protection of tribunal independence would depend on the “judicial” or “quasi-judicial” character of the function it was performing, rather than its place within an overall regulatory scheme. The idea here would be that if a government holds out to parties the prospect of independent adjudication through a “quasi-judicial” tribunal, it is not entitled to undermine that promise by failing to put in place structures that give parties confidence that the adjudicators will not be subject to manipulation or illegitimate pressure.

The fourth approach to the extent of constitutional protection of tribunal independence is probably closest to the thinking that underlies the Supreme Court of Canada’s decision in *Ell*, but it is also the line of reasoning that is most difficult to reconcile with the Supreme Court of Canada’s decision in *Ocean Port*. If the British Columbia Court of Appeal is of the view that the *Ocean Port* decision is distinguishable, it would be very helpful for it to settle on which line of reasoning is most consistent with the establishment of appropriate boundaries for the protection of tribunal independence.
VI. WHAT IS THE POSSIBLE CONTENT OF CONSTITUTIONAL PROTECTION OF TRIBUNAL INDEPENDENCE?

Mr. Justice McEwan did not identify the content of the constitutional protection of tribunal independence with any precision, and it may be unwise to speculate on how far this protection extends beyond a guarantee that term appointments cannot generally be terminated except for cause. It seems to me, however, that if constitutional guarantees of institutional independence are extended to at least some tribunals, it is inevitable that courts will be called upon to elaborate on the content of that protection. Therefore, I propose to make at least a few general observations about this complex topic.

First of all, it is important to remember that what courts would be doing in this setting is expounding a principle that flows from the structure of the constitution rather than its text. It seems to me that this argues for a modest rather than an expansive definition of the content of this principle. More fundamentally, it seems to me that one has to settle on one of two approaches to the role courts ought to take in expounding this principle. The first is to establish a set of minimum standards of institutional independence for tribunals, but to leave legislatures with considerable scope to establish different types of institutional structures and to elaborate different degrees of independence from, and accountability to, the political arm of government. The second is to establish a broad institutional framework for independent adjudication by tribunals. Under this approach, legislatures would still be afforded some flexibility in working out the fine details of the scheme, but they would have to do so within the broad outlines of structures imposed by the courts. The first approach puts primary responsibility for institutional design in the hands of legislatures, but establishes certain minimum ground rules. The second is based on the belief that minimal standards cannot meaningfully fulfill the requirements of independent adjudication so legislatures need more detailed guidance on the structures that must be put in place to create appropriate administrative justice institutions.
I think it is fair to say that the early jurisprudence on judicial independence under subsection 11(d) of the Charter and the “flexible” approach to independence reflected in the leading cases expounding the common law approach to tribunal independence reflect the “minimalist” approach to adjudicative independence. On the other hand, I believe that Chief Justice Lamèr’s reasons in Campbell are best understood as a reflection of dissatisfaction with the “minimalist” approach to judicial independence and a shift very firmly in the direction of the “institutional framework” approach. The Campbell approach has required Canadian courts to impose on legislatures a fairly elaborate set of institutional arrangements for the setting of judicial remuneration and has resulted in a series of disputes about whether or not governments are respecting the guidance offered by the Supreme Court. I suspect that few judges would prefer a return to the pre-Campbell approach to the establishment of judicial remuneration. On the other hand, it is not obvious to me that Campbell and its progeny represent an outstanding success story with respect to the attempt to “de-politicize” the process of setting judicial salaries.

The “minimalist” approach is almost certain to start from the premise that tribunal independence ought to be defined along the broad lines of judicial independence. This means that independence is a means to an end—the provision of institutional guarantees to litigants of the impartiality of adjudicators—rather than an end in itself. Likewise, it means that the centre-piece of these guarantees is likely to be security of tenure, security of remuneration, and administrative independence. It is likely as well that the content of the guarantees will be flexible, and one that is coloured by the nature of the issues at stake and practical experience with the tribunal in question.

An extremely interesting example of the “institutional framework” approach can be found in a two-part article by Ron

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55 See Bryden, supra note 5 for a more detailed discussion of the relevant factors.
Ellis entitled “The Justicizing of Quasi-Judicial Tribunals.” These views deserve a more extensive treatment than would be appropriate here, and I suspect that some commentators would argue that Mr. Ellis offers an excessively expansive view of the role the constitution ought to play in establishing the institutional arrangements for administrative adjudication. Nevertheless, I can commend them to readers as an extremely thoughtful assessment of the types of elements that a constitutional guarantee of tribunal independence ought to contain.

VII. CONCLUSION

Even if the British Columbia Court of Appeal’s eventual decision in the McKenzie case does not address the constitutional question explored by Mr. Justice McEwan, the procedural fairness and statutory interpretation aspect of the case will have enormous significance for administrative tribunals in British Columbia and, to some extent, in other parts of the country. If the Court of Appeal does reach the constitutional issue, its decision will have significant ramifications for tribunals across the country, especially if it affirms Mr. Justice McEwan’s conclusion. In that event, it is difficult to imagine that the Ministry would fail to seek leave to appeal to the Supreme Court of Canada, or that the Court would deny leave if it were sought. While it is possible to reconcile the Supreme Court’s decisions in Ocean Port and Ellis, at a fundamental level there is some tension between the approaches to the scope of constitutional protection of judicial independence taken in these two cases. It is not obvious how the Supreme Court will reconcile that tension if called upon to do so. Nevertheless, this is an issue that will not go away, and that counsel are to be commended for the thorough and thoughtful way in which they have presented the arguments in this case.