

**The Future of Administrative Justice**  
**January 17-18, 2007**  
**University of Toronto Faculty of Law**

**Current Issues in Tribunal Independence**

What independence means for administrative agencies and tribunals has been a matter of contention for a long, long time. However, it is only recently that administrative law scholars in this country have begun the task of organizing all the various elements of tribunal and agency independence systematically as a stand alone component of Canadian administrative law. In part, the spur for that came from the explicit recognition of an entitlement to adjudication by an **independent** and impartial tribunal in section 11(d) of the *Canadian Charter of Rights and Freedoms* (as well as section 2(f) of the *Canadian Bill of Rights* and section 23 of the *Quebec Charter of Human Rights and Freedoms*).

While section 11(d) of the *Charter* and section 2(f) of the *Bill of Rights* have very little direct purchase on administrative agencies and tribunals, the affirmation of this entitlement in a largely criminal law context has prompted creative scholars and lawyers (and sometimes judges) to make claims that the concept of an independent and impartial tribunal is part of the principles of fundamental justice that do reach the wider range of adjudicative bodies that are subject to section 7 of the *Charter* and section 2(e) of the *Bill of Rights*. And, of course, by virtue of section 23 of the *Quebec Charter*, the entitlement is a *quasi*-constitutional imperative for all adjudicative tribunals in Quebec.

The reality is, however, that the constitutional and *quasi*-constitutional dimensions of any entitlement to an independent and impartial tribunal in administrative law settings remain unsettled. It is also clear that the base for arguments for constitutional protection has now broadened to include underlying principles of our constitution based on conceptions of the rule of law or derived from the preamble to the *Constitution Act, 1867*. Ron Ellis has been at the forefront of that drive and we are fortunate to be able to hear from him today. Ron will canvas the jurisprudential basis for the claim that tribunal independence has a constitutional foundation. This then leads to other questions. If tribunal independence is a constitutional imperative, to what tribunals does it apply? And, for those tribunals to which it does apply, what are its components, and are those components unwavering or dependent on context?

Claims for independence do not, of course, necessarily depend on this kind of constitutional base save in the face of explicit legislative abrogation. The common law of judicial review of administrative action now clearly recognizes independence as a component of procedural fairness. Challenges based on a lack of independence come in various forms.

Internally, problems can arise when adjudicators are pressured by others within a tribunal or agency to reach a particular decision in a matter over which they are presiding. Such pressures may be illegitimate and come most commonly from the Chair, colleagues, the tribunal as a collectivity, lawyers to the tribunal, and other staff. They may be direct or

they may be subtle as, for example, in the context of a pending decision on reappointment or preferment. They may be focussed on a particular case or they may be generalized in the form of directives or guidelines developed by the Chair or on the basis of a consultative process. On the other hand, tribunals and agencies, and particularly those with high volume jurisdiction, have an institutional obligation derived from their public interest mandate and the interests of their constituencies, to operate efficiently, consistently and in accordance with proper principles. Developing practices and techniques that aid in that enterprise of necessity involves some modification or compromise of the independence of individual members.

Tribunals and agencies may also need to develop organizational structures and, in particular, compartmentalize various functions in order to minimize the risk of challenges (sometimes constitutional, sometimes common law, and sometimes statutory) based on an inappropriate overlap of functions as, for example, in the case of tribunals and agencies that are charged with the task of investigating, prosecuting and adjudicating violations of their constitutive statute.

In their presentations today, both Laverne Jacobs and Audrey Macklin will focus on these aspects of independence. Laverne will provide us with some insights derived from empirical research that she has been conducting into the institutional practices of tribunals with overlapping adjudicative and policy-development roles. Audrey will bring a perspective based on her own experiences with the Immigration and Refugee Board, both as a long-time observer and one time member.

As events of the past few weeks have also illustrated starkly, the threats to independence are frequently external and can involve government interference with the day-to-day functioning of independent administrative agencies such as the Canadian Nuclear Safety Commission. Indeed, it is timely that we reflect upon that specific issue today. To guard against that kind of interference, our law (sometimes in the context of constitutional or *quasi*-constitutional litigation, sometimes on a purely common law basis) has identified indicators of immunity from external interference – security of tenure, financial security, and sufficient insulation from government interference in the day-to-day workings of the agency or tribunal.

However, the demands of those three components can vary dramatically from situation to situation. There is also the reality that the effective functioning of tribunals and agencies and the fulfillment of legislative mandates may depend in varying degrees on an effective working relationship, indeed sense of collaboration between the tribunal or agency (and its chair in particular) and the responsible Minister, be it an Attorney General or line Minister with responsibility for the regulated activity. This poses dilemmas for not only the common law but also for legislators, government officials, and tribunals and agencies themselves faced with the challenge of working out the details of such arrangements for a variegated set of regulatory tasks.

At root, of course, much of our concern with independence traces itself back to the process by which members of administrative tribunals and agencies are appointed. At

times, this can lead to challenges to individual appointees on the basis of bias and, even in rare instances, as illustrated by the “Retired Judges” case,<sup>1</sup> to the entire corps of a particular tribunal. However, the reality is that judicial review is a very poor surrogate for appropriate appointment (and reappointment) processes. Yet, despite almost universal recognition of the need for change and improvement in this area, progress has been dreadfully slow and sporadic. The attraction to governments of patronage appointments is an extremely powerful one and so very difficult to resist irrespective of the stance that present governments may have taken while in opposition. Adam Dodek was a political advisor to the former Attorney General of Ontario, Michael Bryant, and, as well as commenting on the other presentations, will offer his views on the tensions that exist between the political agendas of governments and independence as a criterion and often essential characteristic in the choice of members of agencies and tribunals.

More generally, I am delighted to be the moderator of a group of four experts on the range of issues that are now grouped together under the nomenclature of tribunal independence and I look forward to hearing their remarks.

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<sup>1</sup> *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539