

The Future of Administrative Justice Symposium
January 2008

University of Toronto, Faculty of Law

Current Issues in Tribunal Independence

OUT OF THE PRESUMPTION OF THE PAST
EMERGES THE BIG QUESTION:

In administrative justice is the Rule of Law optional?

By

S. Ronald Ellis

SPEAKING NOTES

I will begin with the caveat that one always has to enter whenever one embarks on a discussion of Canadian administrative justice, and that is that I will *not* be referring, in my comments here, to the province of Québec. The province of Québec's justicizing of its administrative justice system leaves the rest of us in the shade, and when I speak here of challenges and issues concerning administrative justice in Canada, I must be taken to be speaking about the challenges facing the rest of the provinces and territories outside of Québec, and, of course, the federal jurisdiction as well.

So let me begin. And I will do so by first framing what I see to be the administrative justice question of greatest importance – what one might colloquially refer to as “the big question”.

In my view, there is no issue of greater relevance or importance to the future of administrative justice in Canada than whether, in Canadian administrative justice systems, legislative sovereignty trumps the Rule of Law; and more particularly, whether, in administrative justice systems, the cornerstone of the Rule of Law – the judicial independence of rights adjudicators – is, constitutionally speaking, optional.

For instance, ask yourselves this: should legislatures be free to assign judicial functions to the employees of line ministries? Take for example, the judicial function of adjudicating landlord and tenant disputes and issuing final eviction orders. Should a legislature be free to assign that function exclusively, without rights of appeal, to, say, an

employee of a ministry of housing? Would we be comfortable with a constitution that had nothing to say about landlords getting eviction orders from a government employee in the housing department?

It is not a hypothetical question. That is exactly where the BC legislature, freed from Rule of Law constraints by the BC executive branch's interpretation of *Ocean Port*¹, has placed the power to evict tenants and deal with all other landlord/tenant disputes historically dealt with by Courts. The reference is BC's *Tenancy Statutes Amendment Act, 2006*,².

Or, to ask a more general question, should a provincial legislature be free to make all of its tribunal adjudicators and chairs direct employees of the government?

Again, this is not a hypothetical question and again BC provides an example. Since 2003, the BC government has claimed a statutory power to terminate the appointment of any Tribunal member, including the chair of any tribunal, at any time without cause, upon payment of a year's compensation in lieu of notice.

Many here will be familiar with the well-known labor law jurisprudence distinguishing independent contractors from employees. Considering that the BC government hires tribunal members and chairs, decides what they are to be paid, provides them with their tools, can fire them for cause, and, in the government's view, can now also terminate them at any time without cause, can anyone doubt that any self-respecting labor relations board would classify those members and chairs as employees of that government?

And that brings me to the *McKenzie* case in which Mary McKenzie, now a former BC residential tenancy arbitrator, upon whom the BC government's alleged power to terminate tribunal appointments at anytime without cause was, in 2005, first visited, is challenging the validity of that power.

The *McKenzie* case presents a number of issues, but the one of general interest this morning is Ms. McKenzie's claim that if the BC legislature in fact intended to

¹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781

² S.B.C. 2006, c. 35

authorize the BC Executive Branch to terminate members of adjudicative tribunals without cause, then it was acting beyond its constitutional powers – that, in short, its sovereign powers did *not* in the BC administrative justice system trump the Rule of Law. Such legislation, she argued, -- and the BC Supreme Court eventually decided³ – was incompatible with the unwritten constitutional requirement of judicial independence first recognized in the *PEI Reference*⁴. *McKenzie* is, of course, of special interest because it is the first occasion for a Canadian court to extend the protection of the unwritten constitutional requirement of judicial independence to an administrative tribunal.

This is the moment for me to disclose what many of you know, that I have the great good fortune to be one of Ms. McKenzie's counsel. I have been a member of her legal team since 2005 -- through the hearing of the petition in the Supreme Court of BC, in the Court of Appeal, and now in the application to the Supreme Court of Canada for leave to appeal.

The McKenzie case has taken the administrative justice constitutional question out of the realm of academic conjecture – conjecture that had largely consigned the idea of constitutional protection for the judicial independence of administrative tribunals to the *Ocean Port* dustbin – and made it a concrete issue.

And, when the BC Supreme Court in *McKenzie* distinguished *Ocean Port* and held that the constitutional requirement of judicial independence was applicable to BC Residential Tenancy Arbitrators, it confirmed that in the administrative justice system the Rule of Law does indeed have a constitutional base. Whether that confirmation will endure is, at this point in time, unclear. Although it took a beating in the BC Court of Appeal, it survived there, at least in the sense that the Court refused to deal with the merits of the Supreme Court's decision based on its findings that the questions were moot. Now the question is whether the Supreme Court of Canada will grant our application for leave to appeal, and if it grants leave, uphold the lower Court's decision.

³ *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, [2006] B.C.J. No. 2061.

⁴ *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island et al.*, [1997] 3 S.C.R. 3.

If the BC Supreme Court's views on the constitutional issue do ultimately prevail, there will be a brand-new chapter in Professor Hogg's text. Once we get past the question of whether the constitutional principle of judicial independence applies to any tribunals at all, and it seems to me to be inconceivable that it will not eventually be seen to apply to some, then we will be turning our minds to the really meaty questions: To which tribunals will it apply? Under what circumstances? And, to what effect? The answers to these questions have the potential to transform our administrative justice systems – to, as I have said elsewhere, justicize that system.

This morning, however, I do not propose to debate the merits of the *McKenzie* decision or to propose answers to any of the questions that it provokes. Nor do I plan to talk about the justicizing of the administrative justice system. What I propose to spend the next ten minutes addressing is what I see to be the very important, and little understood, historical context for the constitutional debates that *Ocean Port* was thought to have silenced, and to which *McKenzie* has undoubtedly given renewed life.

In Canadian legal history, no one has ever doubted that the cornerstone of the Rule Law is the independence of institutions or individuals exercising judicial functions. But it used to be that the actual, structural, dependency of either judges or tribunal adjudicators was seen to be perfectly compatible, in law, with judicial independence. For example, throughout most of Canada's history, security of tenure for provincial court judges and tribunal adjudicators was not seen to be necessary; its absence not thought to present an independence issue. For instance, until 1962 – the year I graduated from law school – all Ontario provincial court judges were appointed at pleasure and, until 1982, Ontario provincial court judges who served after the age of 65 – until age 75 – did so pursuant to discretionary, at-pleasure appointments by the Attorney General. And, of course, most adjudicative tribunal members traditionally served pursuant to at-pleasure appointments.

That all changed dramatically in 1985 with the decision of the Supreme Court of Canada in *Valente*.⁵ Since then, judicial independence does not exist in law unless there are objective structural guarantees of independence. It is important, however, that we

⁵ *Valente v. The Queen*, [1985] 2 S.C.R. 673

remember how, in the history of Canada's justice system prior to 1985, the law found it a simple matter to reconcile, on the one hand the importance of judicial independence, which it acknowledged to be a foundational requirement, with, on the other, the routine existence of dependent structural relationships between governments and inferior court judges and tribunal adjudicators – relationships that left judges and adjudicators in fact, if not often in practice, open to reprisals for unpopular decisions, but still, in law, independent.

Recalling how the law managed that reconciliation prior to 1985 is important to the modern debate about the appropriateness of the structural relationships between tribunal adjudicators and governments because the issues that are now being debated are, I would suggest, often obscured by the shadows cast by the thinking of that earlier era – thinking still current, I am afraid, perhaps particularly on the government side of the debate. Awareness of the existence and nature of those shadows is necessary if we are to see clearly what must come next.

So, what *was* the doctrine of judicial independence prior to *Valente*? Well, speaking a bit tongue in cheek, one would call it a hope and a prayer doctrine, and, more respectfully, a trust doctrine. The courts simply trusted that, on the one hand, the British tradition of governments not exercising their powers to rescind at-pleasure adjudicative appointments for inappropriate reasons would hold, and, on the other, that adjudicators could be counted on to do their duty and not allow their contemplation of the undisputed existence of such powers to actually influence their decision-making.

It is remarkable, but as far as I have been able to discern, true, that there is no Canadian case in which the independence of a judge or adjudicator was ever questioned until 1980, when the Supreme Court of Canada was called upon to consider a challenge to the independence of a court martial tribunal in *R. v. MacKay*⁶. The glaring, actual dependency of that court martial tribunal – a tribunal comprised of a single officer – was made plain in the following passage from the dissenting judgment of Chief Justice Laskin:

⁶ [1980] 2 S.C.R. 370.

Both the officer constituting the Standing Court Martial and the prosecutor were part of the office of the Judge Advocate General. In short, the accused, who was tried on charges under a general federal statute, the Narcotic Control Act, was in the hands of his military superiors in respect of the charges, the prosecution and the tribunal by which he was tried. ... [The officer appointed to conduct the court martial] was an ad hoc appointee, having no tenure and coming from the very special society of which both the accused, his prosecutor and his "judge" are members.

The majority applied the hope and a prayer doctrine, and the nature of that doctrine may be discerned in the following passage from the judgment of Ritchie J.

There is *no evidence whatever* in the record of the trial to suggest that the president [of the court martial tribunal] *acted* in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed. ... I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

It may also be discerned in the concurring judgment of McIntyre J. with whom Dickson J. agreed:

I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline--which includes the welfare of their men--are less able *to adjust their attitudes* to meet the duty of impartiality required of them in this task than are others.

The same belief that, absent evidence to the contrary, honourable men appointed as judges and adjudicators could be counted on to *act* independently even if they were *dependent*, and that government officials, all honorable men, could be counted on not to abuse their powers of retribution, even if they had them, may be found fully stated in an elegant judgment of Ontario Chief Justice Howland, speaking in support of the independence of a provincial court judge for a unanimous, prestigious, five-member panel of the Ontario Court of Appeal in *Valente*.⁷ It was this judgment of Chief Justice Howland's that, on appeal to the Supreme Court of Canada, Mr. Justice Le Dain and his colleagues on the Supreme Court eventually found utterly wanting, however elegant.

⁷ *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417

The watershed moment – when Canadian law recognized that a hope and a prayer was not enough – came when Justice Le Dain and his colleagues decided that the traditions of de facto independence and adjudicative duty on which the Ontario Court of Appeal had been content to rely could not, in fact, “supply the essential conditions of independence”; for that, they said, “specific provisions of law” were necessary⁸. And the provisions that were necessary were provisions that assured the independence of adjudicators by objective, structural guarantees of the three “conditions” of independence: security of tenure, financial security and administrative control.

That, in *Valente*, the concept of judicial independence in fact underwent an historic sea change is conveniently underscored by the Court’s 1992 decision in *Généreux*⁹. In that case, seven years after *Valente*, the independence of a court martial tribunal came before the Supreme Court again.

Chief Justice Lamer wrote the majority judgment, and after quoting from the relevant passages from the judgment of Ritchie, J. and McIntyre, J. in *MacKay*, He said this:

MacKay v. The Queen assists us by revealing various concerns with the independence and impartiality of the court martial system. The question raised in this appeal, however, is not resolved by this earlier case. First, the majority of this Court in *MacKay* seems to have applied a subjective test. It asked whether the Standing Court Martial actually acted in an independent and impartial manner. This is not, in light of *Valente*, the appropriate test. ... We must now therefore undertake an analysis that was not undertaken in *MacKay*.

The Chief Justice’s analysis of the objective guarantees of the three conditions of independence defined in *Valente* caused him to conclude that the court martial tribunal did not satisfy the conditions – there were no objective guarantees of security of tenure, no objective guarantees of financial security and no objective guarantees of what he called the institutional independence condition.

⁸ [1992] 1 S.C.R. 259

⁹ [1992] 1 S.C.R. 259

Since *Valente*, and cases such as *Matsqui* that followed and applied it, the law is now settled that statutory tribunals exercising judicial functions all require objective structural guarantees of the three conditions of judicial independence – security of tenure, financial security, and administrative independence – unless, in the absence of a constitutional restraint – and there’s the, lurking, big question – a legislature has clearly enacted to the contrary.

I have dwelt on the seminal nature of the change ushered in by *Valente*, because it is essential to realize that that change has radically altered the nature of the debate about the relationship between tribunals and the executive branch, and, most importantly, has presented a constitutional question that had not been seen before.

Pre-*Valente*, the judicial independence of adjudicative tribunals and their members was not, in law, as a practical matter, an issue. As can be seen in *MacKay*, under the hope and a prayer doctrine, absent evidence of actual interference or inappropriate conduct, any person who had been given and accepted a judicial function was *presumed* to be judicially independent.

Thus, the fact that an adjudicative tribunal depended on its host line ministry for the appointment and re-appointment of its members, or that the appointments of its members were at-pleasure appointments only, and the compensation was hopelessly inadequate, and the ministry staff provided the tribunal’s registrar functions and decided the time to be allowed for each hearing, and for the making of each decision, and determined whether or not the tribunal would provide written reasons, or the Deputy Minister effectively controlled the tribunal’s budget, or even the same Ministry was routinely one of the parties to the tribunal’s cases – none of that was seen capable in law of raising issues of judicial independence. Why? Because the law *presumed* that, on the one hand, the host ministry would not abuse its powers, and, on the other, that the tribunal and its members would be unaffected by the possibility that it might. In our justice system history, the *presumption* of independence had always finessed the *issue* of independence.

Post-*Valente*, none of that can any longer withstand scrutiny, the presumption is gone, the finesse no longer applies and the issue is now front and centre to be faced,

addressed, and determined. All of these structural relationships must now be seen to be, at least arguably, incompatible in law with judicial independence. And, suddenly we are faced, really for the first time in our history, with a clear question as to whether we, as a society, are prepared to mandate legislatures to remove judicial functions from the courts, or to create new judicial functions, and assign them to institutions and/or individuals who, it is now clear, are not, in law, judicially independent. Are we, that is, prepared to agree that in our administrative justice systems – systems in which we now acknowledge the bulk of the rights disputes of our citizens are decided – the rule of law is merely optional?

That is, with respect, in administrative justice terms, the big question facing all of us today. It is from the answer to that question that, in my submission, all else of fundamental importance to administrative justice will eventually flow.

Thank you.