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Article

Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals [a1]

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The paper's themes: why the abandonment of Ontario's "super" tribunal proposal was an idiosyncratic event; why Canadian administrative justice systems are in fact in dire need of radical reform; and why the truly super, Provincial Tribunal concept, as exemplified by Québec's TAQ, represents the required radical reform. The author proposes a new taxonomy for administrative law agencies, categorizing them as "rights tribunals", "regulatory tribunals" or "government agencies". He argues that the established Canadian norms of tribunal design and administration are, in the context of "rights tribunals", flatly incompatible with the rule of law to the point of being a national disgrace and an international embarrassment. He also argues that the "tag team" of government obsession with de facto control of tribunals, and party obsession with tribunal patronage appointments, has over the years imbedded an array of indefensible government practices with respect to rights tribunals that are sometimes difficult to distinguish from outright corruption or at least egregious breaches of the public trust.

*16 1. INTRODUCTION

This paper addresses three issues: first, what happened to Ontario's super tribunal proposal; second, why fundamental reform is needed in Canadian administrative justice systems (Québec excepted); and, third, why the creation of really super, "Provincial Tribunals" would be the right reform.

2. ONTARIO'S SUPER TRIBUNAL

In February, 2001, the Ontario Labour Ministry presented for public consultation a formal proposal for the creation of an Ontario "super" tribunal: the Unified Workplace Tribunal. After about five months of public controversy, the government concluded that there was no "consensus of support" within the stakeholder communities and the the proposal was formally withdrawn.

The proposed Unified Workplace Tribunal was referred to in Ontario as a “megatribunal” or a “super tribunal” and, from the title of the program for which this paper was written, one assumes that the appearance of the Ontario proposal would have been, at least in part, the occasion for the program, although, at the time the program was planned, the planners would presumably not have anticipated the precipitate demise of that proposal. From Paul Lordon's presence as a panel member, one may also assume that the program designers had in mind, as well, the New Brunswick “super” labour tribunal of which Mr. Lordon was the inaugural chair, and, from Odette Laverdière's presence, also the truly super, Québec tribunal, the tribunal administratif du Québec (commonly referred to as TAQ) of which Mme. Laverdière is the Vice-President.

The author is particularly acquainted with the Ontario proposal and will briefly address the fundamental flaws in that proposal — flaws that, in his opinion, make its failure an idiosyncratic event that ought not to discourage future consideration of other super tribunal proposals.

Included in the CBA program materials for this panel session was a copy of the submissions on the Unified Workplace Tribunal filed by the Ontario Bar Association's Administrative Law Section during the period ***17** of public consultation.[1] The author recommends these submissions to anyone with a particular interest in the reasons for the demise of the Unified Workplace Tribunal proposal. They are a measured and comprehensive analysis of the proposal's inherent flaws.

The fundamental problems with the Unified Workplace Proposal that are reflected in the OBA's submission may be summarized as follows:

> 1. There was no research or analysis supporting the reasons for the proposal, even though the anecdotal evidence seemed to be counter-indicative. The failure to ground the proposal in adequate research included the apparent failure to inquire into the experiences with super tribunals in other jurisdictions, including Québec and New Brunswick, and the failure to evaluate Ontario's own recent experience in consolidating related tribunals on a smaller scale. Anecdotal evidence within the labour bar had suggested the existence of significant implementation issues in respect of some of the latter consolidations.

> 2. The proposal's stated purposes were not convincing. This was evidenced most plainly by the surprising fact that on its own terms the proposal in fact failed to address, at all, two of the principal objectives claimed for it — elimination of multiple remedies and one-window access. The purposes also seemed inconsistent

with specialized jurisdictions, one of the special advantages of the administrative justice system.

3. With the stated purposes not convincing, the proposal invited speculation as to the real reasons for the proposal, including the possibility that it may have been motivated by other objectives that might run contrary to the principles of adjudicative independence. By inviting that speculation, the proposal was seen as endangering the integrity and credibility of the system, and that aspect of the proposal was a key problem amongst stakeholders.

4. The proposal failed to address a number of critical issues: (1) how the dilution of specialization and expertise inherent in the proposal would be addressed; (2) how the proposal's call for standardized process would be squared with the administrative justice system's need for flexible process responsive to the particular needs of each tribunal's particular mission; (3) how the proposal would deal with the conflicting standards of review that ***18** were currently applicable to the decisions of the various targeted tribunals; (4) whether there would be an objective selection process for identifying those existing adjudicators who would and those who would not be appointed to the new tribunal (the failure to address this issue raised further concerns as to how the integrity of the system would be impacted); (5) the failure to guarantee that the new tribunal's 30 to 50 adjudicators would be appointed from the ranks of the 150 incumbents in the targeted tribunals further contributed to the latter concerns; and (6) the failure to provide transitional provisions that would ensure the continued independence of incumbent adjudicators over the many months it would take for the new tribunal to be rolled out and the selection of the incumbents to be appointed to the new tribunal completed.

5. And, finally, the insubstantial and private nature of the proposal's development process, coupled with the surprising shortness of the public consultation process (less than three months), left observers with the impression of a government rushing to judgment. And that, again, fueled speculation as to what was really behind the initiative.

Thus, as suggested at the outset, there are substantial reasons for seeing this aborted Ontario proposal as an anomalous event that offers no important lessons concerning the inherent, substantive merits of super tribunals in general.

3. THE OVERARCHING SUPER TRIBUNAL — THE "PROVINCIAL TRIBUNAL"

In the author's view, a particular problem with the Ontario proposal and, for that matter, with the New Brunswick tribunal as well, is that the application to them of the "super tribunal" or "megatribunal" label obscures what is, in his view, the more important issue: the relevance and importance of the Québec or Australian models of super tribunals. The latter models reach beyond the amalgamation of families of tribunals engaged in related missions and encompass the merger of a wide range of tribunals engaged in a variety of disparate missions. [2]

***19** The Québec experiment with such a model is, of course, the most recent, and, for Canadians, the most relevant experiment. The tribunal administratif du Québec (otherwise known as TAQ) — Canada's one, bona fide, really super tribunal — and its supervising council, the Conseil de la justice administrative, were created by the Province of Québec's "Act Respecting Administrative Justice" (Bill 130) enacted in December 1996. The TAQ was assigned the adjudicative responsibilities of a high proportion of the Québec tribunals involved in the adjudication of rights in four major areas: (1) social affairs; (2) immovable property; (3) territory and environment; and (4) economic affairs. [3]

Interestingly, at the time this paper was presented, the U.K. government and administrative justice system were just then in the throes of considering a proposal for a central, super tribunal organization in essentially the Australian or Québec mold. [4]

It is the principal theme of this paper that the Québec type of super tribunal should be seen as a necessary and preferred strategy for the radical reform required not only of Ontario's administrative justice system, but of administrative justice systems across the country. From a rule of law perspective, our present administrative justice systems are a national disgrace, and we are long overdue for something truly radical to be done about them.

However, the striking indifference the rest of Canada has been displaying towards the Québec initiative is not promising for similar reforms in Canada. If one could ask the readers of this paper what they know about this, now five-year-old, dramatic Canadian administrative justice reform, the author is sure that the answer from every side would be "not much". Such a response would not be surprising. There is, as far as the author has been able to discover, zero English language information, analysis or commentary on Québec's new tribunal. [5] And it would be doubly not surprising since that indifference concerning what Québec's experience with TAQ might have to offer for other Canadian administrative justice systems is symptomatic of a traditional indifference

on the ***20** part of academics and lawyers outside of Québec, with the structure, administration and operation of administrative justice tribunals, generally.

The studied silence in the rest of Canada on the Québec development may also reflect the hope of Canadian line-ministry bureaucracies everywhere, that if they ignore the Québec initiative it will somehow just go away.

Before going further with this discussion, there is need for a name change. "Super Tribunal" is not, perhaps, an un-useful catch-all tag but it has at best a vaguely mocking tone to it and invokes a comic book icon which, in this context, is difficult to take seriously. The name the author proposes for the overarching super tribunal concept is "The Provincial Tribunal". [6]

Of course, the creation of such tribunals implicitly involves a massive restructuring of our systems. The question then naturally arises; why would anyone want to do it? In effect, what would begin to justify merging, say, 30 or 40 Ontario rights tribunals [7] into one Provincial Tribunal? Why would anyone think that fundamental reform of this magnitude is needed?

4. WHY FUNDAMENTAL REFORM IS NECESSARY

So, what, then, would indeed begin to justify merging 30 or 40 Ontario rights tribunals into one Provincial Tribunal?

(a) Québec, Australia, and the U.K. — Are We Out Of Step or Are They?

It may be difficult for those non-Québecers who are largely complacent about the rule of law qualities of their own province's administrative justice system — from all the historical evidence, apparently a substantial majority — to conceive of such a significant reform ever being justified, whatever particular advantages it might offer. Before proposals for changes of this magnitude could enter the realm of serious consideration, a substantial consensus would have to emerge amongst the systems' users, the bar, and politicians, that the existing systems are fundamentally ***21** flawed. Until that day comes, talk of "provincial tribunals" will remain relatively futile.

But the systems are fundamentally flawed, and the complacency one finds within the practicing bar and amongst politicians about the sufficiency of Canadian administrative justice systems is a complacency that, from a rule of law perspective, is simply unwarranted.

To begin with, notice needs to be taken of the fact that Québec, Australia and now the U.K., have all found flaws in systems comparable to ours that they thought sufficient to warrant this dramatic restructuring (or, in the U.K.'s case, sufficient to now provoke serious contemplation of such a restructuring).

The consensus in Québec concerning the existence of intolerable systemic flaws in their administrative justice system arose from three major reports. The first was the Dussault Report in 1971. [8] This report of a working group on administrative tribunals, chaired by René Dussault, who is now a justice of the Québec Court of Appeal, reverberated in Québec administrative law circles for years, without, it appears, much in the way of concrete result. But, in 1986, the Conference of Members of Québec Administrative Tribunals — the Québec equivalent of CCAT and SOAR and now BCCAT [9] — released a report on its General Inquiry on Members of Administrative Tribunals. That report provided very disquieting hard data on the status and independence of administrative justice adjudicators. This lead to the appointment of a second Working Group on Administrative Tribunals, a committee created by the Québec government to advise it on the practical solutions to the problems of administrative tribunals. The latter committee was chaired by the respected Professor Yves Ouellette, and in 1987 the committee issued a report which is now, of course, known as the "Ouellette Report". [10]

***22** The groundwork had been laid by the Dussault Report and the unacceptable flaws in the Québec administrative justice system had been fully delineated in the Conference's Inquiry. With the release of the Ouellette Report, the momentum for major reform began to build, culminating in the enactment of Bill 130 in December 1996.

History shows that, whenever a proposal for fundamental reform of a Canadian administrative justice system arises, powerful influences are always arrayed in support of the status quo. In Canada, over the years, those influences have defeated, or fatally undermined, virtually every proposal of that kind. How those influences in Québec were eventually reconciled to TAQ is a Québec story that the rest of us need to hear. Perhaps, one day it will be told.

So, the first question for the complacent out there is, what grounds are there for your believing that flaws warranting serious consideration of fundamental reform of the kind Québec found in its system, and that the Leggatt review found in the U.K. system — and that the Australians found in their system some 25 years ago— are not to be found in the administrative justice systems in your own jurisdiction? In answering that question, you would have to begin with contemplation of the plethora of Canadian studies calling vainly over the years for fundamental reform of Canadian administrative justice systems like your's. [11] In truth, there are no grounds for confidence that it is Québec, the U.K. and Australia who are the ones out of step on this question.

(b) The Conflict of Interest Indigenous to all Administrative Justice Systems

Any critical examination of our administrative justice systems must begin with acknowledgement of the systemic conflict of interest found naturally in all administrative justice systems.

A government's purpose in establishing an administrative justice agency is the implementation of a particular policy. However, when it chooses to implement that policy by enacting statutory rights and creating an ostensibly arms length agency to adjudicate disputes concerning those rights, it chooses as its instrument of policy an instrument of justice. In doing that, it thereby calls forth an innate conflict of interest — a conflict between, on the one hand, the interests of governments in seeing their ***23** policy goals efficiently — indeed, expediently — implemented in accordance with their own vision of that policy, and, on the other, society's interest in ensuring — society's need to ensure — that justice instruments operate in ways that are congruent with the rule of law.

An interesting illustration of that innate conflict and of how it can lead in real life to nefarious conduct by governments was brought to light a few years ago in a disarmingly frank public disclosure by a senior and respected bureaucrat. The bureaucrat was Thomas M. Eberlee, a public servant with a distinguished career at the Deputy Minister level — first in the Ontario government and later, the author believes, in the federal government. It was October 1987, and Mr. Eberlee, who at the time was serving as a vice-chairman of the Canada Labour Relations Board, was speaking in Montreal to the Conference on Independence and Accountability. The Conference had been sponsored by the Canadian Institute for the Administration of Justice on the occasion of the release of Québec's Ouellette Report. Mr. Eberlee spoke on the subject: “The Status of Members of Administrative Tribunals”. [12]

In that speech, Mr. Eberlee offered the view that tribunal members are probably given the status commensurate with the job the government wants the tribunal to do — or, as he added, commensurate with the job the government wants the tribunal “not to do”. “In the final analysis”, he said, “there is almost invariably a set of tensions between what a tribunal eventually thinks it ought to do and what the powers who have ultimate authority over it really want it to do”.

To demonstrate the point, he talked about the creation of the Anti-Discrimination Commission in Ontario in the 1950s in which he had had a hand. The Commission was the forerunner to the Ontario Human Rights Commission. Its statutory role was to plan and carry out “education” programs designed to eliminate discrimination, and to advise the Minister of Labour in connection with the administration and enforcement of the existing, separate, fair employment, fair accommodation and fair remuneration statutes.

Mr. Eberlee recalled that “the Minister of the day certainly”, and “the government to a lesser extent” were not particularly enthusiastic about the prospect of the Commission carrying out its statutory mandate in, to use his word, an “ideal” manner. To prevent that outcome they “made sure”, he said, “that the status of the Commission was carefully ***24** circumscribed”. Thus, the members selected for appointment to the Commission were middle-rank civil servants already overburdened with other work. The Commission was given no staff resources and its annual budget was limited to $8,000.

Referring to this as a “grotesque under-implementation of the Commission's governing statute”, Mr. Eberlee noted that, not only did the government get away with what he called “this flimsy façade” for two or three years, but in fact had earned “kudos” from the opposition and the media for the interest it had demonstrated in the protection of human rights.

Mr. Eberlee went on to say that fortunately this situation was not allowed to continue, and that he doubted whether anything comparable would apply to administrative tribunals “today” — that is, in 1987.

On the question of whether anything comparable might be going on today — that is, in 2001 — readers who are familiar with the history of the Anti-Discrimination Commission's successor, the Ontario Human Rights Commission, starved every year of the resources that would actually be required to meet its statutory responsibilities in a reasonably timely manner, may not be as sanguine — or perhaps as polite — as Mr. Eberlee.

This conflict between government goals and the rule of law may also be seen illustrated in the following passage from a report of a Select Committee of the Ontario Legislature on the Ontario Municipal Board. The passage was quoted in a 1987 article by Professor Ed Ratushny.[13] The statement is by the chair of the Select Committee, J. McBeth. It reads as follows:

> Since it is important for members [of the Municipal Board] to be responsive to government policy, they should hold office during pleasure — not for life or a fixed term. The Government should not interfere with the conduct of individual proceedings, but it should have the right to remove a Board member whose conduct and record indicates he is not responding to government policy. [Emphasis added.]

Along the same lines are the 1995 assertions by the Ontario Premier and one of his Ministers of a government's need to have biased adjudicators in rights tribunals. The Minister in question was the then Minister of Community and Social Services in the newly elected Conservative government. His statement was made in response to criticism of ***25** what was seen by opposition parties to have been particularly egregious partisan appointments to adjudicative positions on the Ontario's Social Assistance Review Board (now the Social Benefits Tribunal) — the tribunal that hears appeals from the decisions of the Ministry of Community and Social Services' welfare officials. The Minister is recorded as saying:[14]

> These appointments were done on the basis of principles, not politics. We wanted individuals who would take a tough stand on welfare and welfare fraud.

The Ontario Premier, responding later to questions from the media on the same issue, is reported to have said that one of the appointees in question had been selected for her new post, not because she was a Conservative but because she "agrees with the Government's position on welfare". "It helps ... that she has views similar to the government's views", the Premier told reporters. "Whether she's a Tory or not is not as important as her belief that welfare should be a hand up". [15]

The ongoing influence in Ontario of this innate conflict between a government's interest in the efficient and expedient implementation of its policies in the manner it desires, and the rule of law, may also be seen in a telling provision in the appointment agreement that has recently been proposed by the Ontario government in its relationship with all Ontario adjudicators and regulators. [16] The agreement explicitly reserves a general discretion to make "idiosyncratic removals" [17] like those countenanced by the Select Committee on the Ontario Municipal Board (supra). Paragraph 12 of that agreement reads:

> ***26** The parties agree that consideration will be given to the renewal of the Appointee for one further term. Any such consideration will be based in part on the performance of the Appointee and the needs of the agency. Nevertheless, the Parties acknowledge that any such renewals are at the discretion of the governor-in-council [effectively, the Minister and/or the Premier's Office]. [Emphasis added.]

Another common strategy for ensuring a tribunal's pliability on policy issues from a government's perspective may be seen illustrated in a passage from the Hansard record of a session of the Ontario Legislature's Standing Committee on Government Agencies in 1998. [18]

The Standing Committee was reviewing a number of individuals that the Ontario government was proposing to appoint to adjudicative positions in administrative justice tribunals. The candidate whose proposed appointment was under review had been designated by the government for appointment as a member of the Social Assistance Review Board, referred to earlier. The record shows that, at the time of his appearance before the Committee, the candidate was a "program supervisor" with the Ministry of Community and Social Services. That ministry is the Social Assistance Review Board's host ministry and, as previously noted, is the ministry whose officials make the policy and decisions that the Board is charged with reviewing. The candidate had been

a career public servant with that Ministry for 24 years. The arrangement was that, once the candidate's three-year appointment was confirmed, he would be given a leave of absence from his position with the Ministry. The following question to the candidate from an opposition-party Committee member captured the issue squarely.

> But you ... would be in a position where you are interpreting government policies, Ministry of Community and Social Service policies as enunciated by the minister, yet expecting to be able to go back to that minister's employment. What is your view of that in terms of conflict of interest?

The candidate's response was that he would not be in a conflict because he would be on a leave of absence from the Ministry. The Committee's government majority saw nothing surprising in these circumstances and the appointment was approved in the ordinary course.

An account of an especially egregious illustration of where a government's pursuit of its own policy through what is ostensibly an instrument of justice might ultimately take it was reported in the Toronto Star on February 1, 1998. The headline read: “In two days, Karla Faye will die.” Thankfully, the report was from Texas. Convicted murderer ***27** Karla Faye Tucker, about to be executed, had made a final appeal for clemency to the Texas Board of Pardons and Paroles.

The Star reported as follows:

> · The Texas Board had explicit, statutory jurisdiction to grant such applications.
>
> · The current Board had confirmed that it had a get-tough-against-crime philosophy. “I have been told that I have a no-nonsense attitude about crime and I agree with that”, the Board Chair is reported to have said. The Chair was the Brownsville Police Chief and was appointed Chair of the Board in 1995 by the then Governor, George W. Bush.
>
> · The Board as currently constituted has the lowest parole rates in State history and has denied every inmate clemency request it has received — 16 in 1997.

> · In an application by Tucker to the Texas Court of Criminal Appeals, Tucker alleged that the Board "lacked standards, definitions, criteria and uniformity" which would allow her to present her case.
>
> · The Board has 18 members, 16 of whom are Bush appointees, and it is acknowledged that Board members do not meet together or hold hearings in which they can be jointly addressed. The current Board has never held a hearing.
>
> · The Court of Criminal Appeals found that it had no jurisdiction to review the Board's procedures, but a concurring judge of that Court acknowledged that Tucker's allegations "were pretty much accurate". "I would say", he said, "that clemency law in Texas is a legal fiction at best".

This Texas example is of some particular local interest because, with law and order issues being such hot political buttons, parole boards provide especially fertile possibilities for a board getting sideways with the political goals and interests of the governments that create them. Many readers may remember the problems the Canadian National Parole Board got into some years ago. Perhaps, however, not as many would remember the Ontario N.D.P. government's problem with the Ontario Parole Board in March 1995.

The Ontario Parole Board had the misfortune to parole a person who, while on parole, killed a police officer. It had the further misfortune to have the report of an investigation by an Ontario crown attorney into the Board's decision-making in that case released in March 1995, three months before the 1995 provincial election. The police officer had been a very popular officer in Sudbury, Ontario, and the trial in Sudbury had ***28** created community outrage at his killer having been out on parole at the time. For the N.D.P., the Sudbury area was of strategic political importance in the forthcoming election.

The investigative report was not unduly critical of the Board or of the panel that had made the decision. The principal problem it identified was a breakdown in communications between the Board and the Corrections Branch of the Ministry of the Solicitor General — in fact a failure of the Corrections Branch to provide the Board with certain critical information. Nevertheless, on or about March 8, 1995, the Solicitor General fired the Chair of the Parole Board, without notice, and

in a punitive manner. The Minister made a particular point of assuring the public that the disgraced Chair would receive no further compensation.

An account of all of this may be found in the Toronto Star of March 9, 1995. The Chair's firing took place late in the afternoon and the Star reported that earlier in the day the Minister had been defending the Board. He is reported to have said at that time that “members of parole boards need to be supported by the public in the difficult decisions they make”. Then he suffered a change of mind and announced the firing. It is widely believed that he did so in public without prior notice to the Chair. In an interview after the firing, the Minister told the Star that he personally “could find no specific flaws in the Chair's performance or flaws in his policy.” “But”, he said, “public confidence in the Board was shattered and some people wanted the Chair fired.” “Certainly”, he said, “the police community, the sense from the police officer's family of wanting accountability, and talking to my colleagues, provided the impetus I needed to make this very difficult decision”.

In June 1995, the N.D.P. government was defeated, and on October 24, 1995, the Solicitor General for the newly elected Conservative government announced a list of 34 new, full-time and part-time appointments to the Ontario Parole Board. The list included a number of businessmen, five former police chiefs, and seven former police officers. Included, was a brother-in-law of the slain Sudbury police officer.

One of the exacerbating underlying factors in this incident was the fact that the parolee murderer was of Aboriginal origin, and so too was one of the members of the Board's panel that had granted the parole. The latter member had been appointed to her position by the N.D.P.

(c) Indefensible Things That Happen

The strongly felt need on the part of governments to ensure that they retain de facto control of tribunals has, in Canada, always been allied ***29** with the patronage system's seemingly intractable fixation on administrative justice appointments. This tag team of government/bureaucratic control and political patronage has meant endless trouble for rule of law concepts in Canadian administrative justice systems. No account of the reasons why radical reform is necessary would be complete without some specific reference to the indefensible things that actually occur, either routinely or frequently, under their influence.

The author's personal best-seller list is as follows:

1. Arbitrary replacement of competent and experienced tribunal members with unqualified party friends.

2. Re-appointment of members with strong party connections who have demonstrated during their first term that they cannot or will not do the job.

3. The frequent, unexpected and always unexplained refusal, in arbitrarily selected instances, to re-appoint a high-performing member while at the same time re-appointing colleagues of that member with comparable qualifications and experience — the so-called “idiosyncratic removals” referred to above.

4. The refusal to provide any separation packages when long term members are summarily dismissed through the idiosyncratic removal process.

5. The appointment of new members without prior consultation with the Tribunal Chair, and the failure to respect Chair recommendations on re-appointments.

6. The routine failure to give adjudicators prior notice of decisions to renew or not to renew their appointments.

7. Arbitrary use of short term re-appointments of one year, six months, or three months for reasons never stated.

8. Disregarding in the selection process important, relevant qualifications, such as judicial temperament, familiarity with the legal system, etc. [19]

***30** 9. Appointing people with known biases or conflicts of interest. (See above.)

10. Refusing to countenance open, objective and competitive selection processes.

11. Maintaining member compensation at debilitating, non-competitive and endlessly eroding levels.

12. The pervasive propensity of line-ministry and government officials to attribute unpalatable tribunal decisions to ideological biases of decision-makers.

There is no point in dwelling on that list. None of the items will be news to readers familiar with government administration of rights tribunals. But, in the author's opinion, perhaps the most important thing about that list is its demonstration of the pervasive lack of respect that bureaucrats and politicians have both for tribunals and their members and for the individuals and businesses who depend on those members for the protection of their legal rights.

Perhaps, though, the reader might just look again at the first two items on that list. In the author's former life as a law teacher, an outraged young student once asked him, “why don't we call indefensible practices of that nature what they really are — corruption, or at the very least egregious breaches of public trust?” The author remembers saying, “I don't know why, I have never understood it myself”.

***31 (d) A New Taxonomy — “Rights Tribunals” and Others**

To usefully discuss where the conflict between governments' pursuit of their policies and interests and the principles of the rule of law has lead us over the years in Canadian administrative justice systems in general, it is, in the author's submission, necessary to introduce some refinement in our traditional terminology.

It has become usual to acknowledge that in our Canadian administrative law systems we have a continuum of types of agencies ranging from highly adjudicative tribunals at one end of the continuum to highly regulatory agencies at the other. “Adjudicative” tribunals are understood

to be tribunals whose responsibilities are the administration of programs principally devoted to delivering fixed, statute-defined benefits or rights to — or imposing fixed obligations on — typically private sector individuals or corporations. "Regulatory" agencies, on the other hand, are understood to be principally concerned with the administration of broad powers to protect or promote the public interest within the scope of the policy program for which they are responsible, as that interest is adjudged by the administrators to whom those powers have been delegated.

It may be noted that, while the literature and common usage — particularly government literature and common usage — has often labeled all administrative law agencies as "regulatory" agencies, [20] there is now acceptance of the fact that there are, indeed, "adjudicative" agencies, as well as "regulatory" agencies. Recent government documents in Ontario have, for instance, taken to using the label "Regulatory and Adjudicative Agencies" when referring to the full spectrum of Ontario administrative tribunals. [21]

But, while the "regulatory and adjudicative" label is now used in the title of Ontario government policy documents, thus offering some acknowledgment that there is a basis for distinguishing the two categories, the policies themselves do not distinguish.

The author has concluded that what is required is a more discriminating taxonomy. The generic "adjudicative" label is not, for example, especially helpful. Its application to some tribunals but not to others suggests some lesser status or significance for the adjudication roles of the so-called regulatory tribunals. "Regulatory" tribunals are usually, to ***32** some degree or another — often to a large degree — also "adjudicative" tribunals.

In developing this new taxonomy, the author proposes that we begin by dropping the "adjudicative tribunal" label. His suggestion is that we give tribunals whose dominant responsibility is to hear and decide disputes about the statutory rights or benefits of typically private sector individuals or corporations the generic label of "rights tribunals". To him, that seems the most pertinent description for such tribunals.

If we are to engage in a categorization of this greater precision, it will also be necessary to then consider more carefully the nature of the distinction between "rights tribunals" and non-rights tribunals.

It is the author's opinion that there are only two sets of circumstances where it would be appropriate from a rule of law perspective not to recognize a tribunal that has the statutory power to determine legal rights and obligations as a "rights" tribunal. One of these is the circumstance where the tribunal in question is responsible for administering a program that is devoted to modifying or influencing economic behaviour in the private sector and has been assigned what, the late Lon Fuller, the respected Harvard legal philosopher, has referred to in his article, The Forms and Limits of Adjudication, [22] as a "polycentric task". [23]

The other circumstance that would warrant withholding the "rights tribunal" label is where the government has delegated powers to a tribunal that are essentially political in nature.

In his article on the forms and limits of adjudication, Fuller started with the proposition that the fundamental distinguishing characteristic of an adjudicative form of decision-making is the fact that it confers on a party that is to be affected by the decision a "peculiar form" of participation in that process — that of "presenting proofs and reasoned arguments". [24] In Fuller's view, it was only if the nature of the question at issue validly allowed for effective participation in that way that a decision on that question could be usefully — or appropriately — assigned to an adjudicator. Only in those circumstances could the question to be addressed be what we would now refer to as "justiciable".

***33** In Fuller's analysis, a "polycentric" problem is not merely a problem of unusual complexity or difficulty. It is a problem with the peculiar characteristic that any resolution of the problem that is contemplated will be seen to change the nature of the problem.

The example he cited of most relevance to Canadian administrative justice system is that of a tribunal, in a price control regime, faced with the task of setting a price on aluminum. This is a task, he said, that is not appropriate for adjudication because the "forms of adjudication" — parties presenting proofs and reasoned arguments — "cannot encompass and take into account the complex repercussions that may result from any change [in the price of aluminum]".

> A rise in the price of aluminum may affect, in varying degrees, the demand for, and, therefore, the proper price of, thirty kinds of steel, twenty kinds of plastics, an infinitude of woods, other metals etc. Each of these separate effects may have its own complex repercussions in the economy. In such a case it is simply impossible to afford each affected party a meaningful participation through proofs and arguments ... It is a matter of capital importance to note that it is not merely a question of the huge number of possibly affected parties, significant as that aspect of the thing may be. A more fundamental point is that each of the various forms that award might take (say a three-cent increase per pound, a four-cent increase, a five-cent increase, etc.) would have a different set of repercussions and might require in each instance a redefinition of the parties affected. [25]

Fuller suggested that the nature of a polycentric problem is best understood by visualizing a spider web. "A pull on one strand", he said, "will distribute tensions in a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would

certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap". "This", he said, "is a polycentric situation because it is many centred — each crossing of strands is a distinct centre for distributing tensions". [26]

Fuller did not claim that all polycentric problems are not properly amenable to adjudication. He suggested that some polycentric elements are probably present in almost all problems resolved by adjudication. It is a question, he said, of knowing when the polycentric elements have become so dominant that the proper limits of adjudication have been reached. That limit is reached, in Fuller's view, when the nature of the problem is such that the process of presenting proofs and reasoned arguments ***34** by affected parties is no longer appropriate or effective. At that point, adjudication must give way to what has to be, in effect, what Fuller referred to as an "intuitive" exercise of "managerial direction". And a decision of that nature requires a broad process of information collection that should not be constrained within the party-driven limits of an adjudicative process.

Fuller observed that it is in the field of administrative law that the solution of polycentric problems by adjudication has most often been attempted. "The instinct for giving the affected citizen his 'day in court' pulls", he said, "powerfully toward casting exercises of governmental power in the mold of adjudication, however inappropriate that mold may turn out to be". He believed that, generally speaking, problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication. [27]

Energy boards dealing with applications for increases in the price of natural gas would seem the most obvious Canadian instances of tribunals clearly dealing with Fuller's polycentric, non-justiciable problems.

Agencies, on the other hand, with a delegated political role are those that have been given the power to determine policy — to exercise a policy discretion — and to create the rules and regulations that will govern the implementation of the policy they have determined. It is my impression that, the Ontario Securities Commission with its current set of powers may be one example of such an agency, and the CRTC [28] is, perhaps, another. Each of these may also be seen to be addressing polycentric and non-justiciable problems.

It is important in this context to remember, however, the distinction between decision-makers who have been given a policy discretion, and those who have a statutory duty to make judgments about the nature, relevance or application of statute-specified policy criteria.

As an example of a judgment about the nature, relevance or application of a statute-specified policy criterion, one might consider a workers' compensation rights tribunal whose constituent statute requires it to decide whether a proven connection between a worker's disability and his or her work is "significant". Only if the connection is found to be significant would the worker be entitled to benefits. In deciding whether the connection is significant, the tribunal adjudicator is called upon

to make a judgment, not to exercise a discretion. That issue, and ones like it, are entirely amenable to affected parties providing proofs and reasoned ***35** argument and they require an unbiased adjudicative decision — they are not political or polycentric issues. They are justiciable issues. So too, in the author's opinion, are most of the issues that agencies like the Ontario Municipal Board — agencies often thought to be on the "regulatory" end of the agency continuum — are, in fact, predominantly called upon to decide.

In this revised taxonomy, the author would reserve the label "regulatory tribunal" for agencies predominantly involved with the resolution of polycentric or non-justiciable issues involving statutory rights and obligations. And, he would apply the label "government agency" to tribunals acting principally, in truth, as a government's agent in the exercise of delegated political powers. All others the author would classify as "rights tribunals". Thus, the author is proposing three categories of administrative law agencies: rights tribunals, regulatory tribunals, and government agencies.

It is, of course, true that not all of our administrative law agencies will fit precisely into any one of these particular categories. They are all notoriously products of purely ad hoc designs and many will have elements of all three categories. But this categorization is nonetheless useful.

First, by anyone's definition, the largest proportion of our administrative law agencies clearly fall within the rights tribunal category. The difficulty of finding the correct category for other agencies need not impede consideration of the justice principles that should apply to agencies that are self-evidently rights tribunals.

In Ontario, for example, this category would, in the author's opinion, obviously include, in no particular order:

- the Ontario Rental Housing Tribunal

- the Social Benefits Tribunal

- the Workplace Safety and Insurance Appeals Tribunal

- the Boards of Inquiry under the Human Rights Act

· the Labour Board

· the Criminal Injuries Compensation Board

· the Consent and Capacity Board

· the Child and Family Services Review Board

· the Environmental Assessment and Appeal Boards

· the Financial Services Commission (automobile insurance arbitration, and pension appeals)

· the Ontario Board of Parole

· the Ontario Criminal Code Review Board

· the Pay Equity Hearings Tribunal

***36** · the Crop Insurance Appeal Board

· the Information and Privacy Commission

· the Health Professions Appeal and Review Board

· the Mining Lands Commissioner, and, arguably,

· the Ontario Municipal Board,

to mention only the most obvious.

Secondly, these three category definitions provide a point of reference for distinguishing agencies in a manner that allows for a clearer consideration of the appropriate role for and implications of justice principles generally. Tribunals in the categories of regulatory tribunals or government agencies are unlikely not to be engaged, somewhere in their processes, in the adjudication of justiciable issues.

However, as previously noted, the overlap in agency roles should not be allowed to interfere with the application of justice principles to agencies that are clearly rights tribunals. From a justice perspective, despite our Canadian history of allowing the evident regulatory role of some agencies in our administrative law systems to obstruct the application of appropriate justice principles to any agencies, including the rights tribunals, our principal concern must now be with the rights tribunals.

Indeed, agencies that are so far removed from an adjudicative role, and so inherently regulatory in nature, that we could all agree that rule of law standards can only be awkwardly applied, if at all, should simply be understood not to be part of our administrative justice systems. Forcing the design and administration of administrative justice institutions to accommodate the reasonable

requirements of every administrative law agency prevents the proper application of systemic, justice principles to those agencies that are, in point of fact, clearly rights tribunals.

To simplify the analysis of Canada's performance with respect to its various administrative law systems from a rule of law perspective, the author proposes to confine the analysis to the rights tribunal elements of that system — the tribunals that predominate in our systems, certainly in our provincial systems, and which are, beyond argument, instruments of justice. How the adjudicative part of the work of regulatory tribunals and/or government agencies should be integrated with the justice system is a more difficult question that will have to be left for another day.

(e) Administrative Justice Standards

Any critical analysis of the structural norms and administrative norms respecting Canadian rights tribunals must be concerned at the ***37** outset with identifying the standards against which they fall to be measured. Of course, it is essential to start, in that respect, with the recent Supreme Court of Canada's decision in Ocean Port. [29]

In Ocean Port, the Court appears to have invited governments to ignore the principles of natural justice in their statutory structuring of tribunals — even, perhaps, of rights tribunals. In that decision, in what in future cases the Court will hopefully recognize as a purely obiter statement, the Court has ostensibly lumped all tribunals under the rubric “administrative tribunals” and apparently finds them all to have the “primary function” of “policy-making”. [30] It holds that the extent to which such tribunals are to be governed in their quasi-judicial decision-making by the principles of natural justice is a matter to be determined by an interpretation of their constituent statutes. [31] Governments are, therefore, apparently free through explicit legislation to effectively render any of those principles inoperative with respect to any particular tribunal, perhaps including, as indicated, rights tribunals.

Accordingly, the question of the compliance of rights tribunals with principles of natural justice appears, for the moment at least, to have been left ultimately as an issue for the political arena, rather than for the courts. And, from the point of view of civil libertarians, this clarification has at least the merit of making the politicians' responsibilities perfectly clear. It has the added merit of removing government resentment and defiance of court interference as a motivating element in the design of tribunal structures.

The Ontario government's recent “orangutan” provisions governing its appointment of independent interest arbitrators provides a chastening example of where the latter motivating element is apt to take us. Those provisions are widely acknowledged to be the Ontario government's considered response to the Ontario Court of Appeal decision in the so-called “Retired Judges” case. [32] They first appeared in Bill 13, an ***38** Act that ended labour disputes involving the Toronto District School Board and the Windsor-Essex Catholic District School Board.

After naming two particular individuals to be the interest arbitrators who were to resolve the latter disputes, Bill 13 addressed the issue of what was to happen if either named individual proved unable or unwilling to take on or complete the assignments. The remedy the Bill provides is for the Minister to make another appointment. In selecting a new arbitrator in those circumstances, the Bill spells it out that the Minister may appoint a person who:

> (a) has no previous experience as an arbitrator;
>
> (b) has not previously been or is not [now] recognized as a person mutually acceptable to both trade unions and employers;
>
> (c) is not a member of a class of persons which has been or is recognized as comprising individuals who are mutually acceptable to both trade unions and employers.

The "orangutan" label for this statutory language — language that is now appearing more generally in Ontario labour legislation — was apparently coined by the Toronto union labour bar.[33] The label presumably reflects that bar's tentative view that under these provisions the government might even be free to appoint an orangutan as an interest arbitrator.

Then there is Nova Scotia where the intransigent independence and impartiality of interest arbitrators in the health field has driven the government there to the lengths of enacting a statute that makes the cabinet the interest arbitrator,[34] an instance that no doubt some would argue represents the orangutan prediction fulfilled.

But, of course, notwithstanding Ocean Port's possible removal of inherent legal restraints on a government's design and administration, even of its rights tribunals, there are various domestic and international rule-of-law standards applicable to rights tribunals that must continue to be regarded as of at least strongly persuasive authority.

In the first place, viewed from a different angle, the Ocean Port decision itself may be seen to bolster the requirement that rights tribunals be impartial and independent. Ocean Port acknowledges that "confronted ***39** with silent or ambiguous legislation, courts generally infer that the Parliament or the legislature intended the tribunal's process to comport with principles of

natural justice". [35] "In such circumstances", the Court writes, "administrative tribunals may be bound by the requirement of an independent and impartial decision-maker, one of the fundamental principles of natural justice". [36] [Emphasis added.]

It is, in the author's submission, readily arguable, therefore, that, at least in the absence of orangutan language, rights tribunals, as distinguished from regulatory tribunals and government agencies, will be found to require independent and impartial decision-makers. While, in Ocean Port, the Supreme Court has — carelessly in the author's respectful view — characterized the "primary function" of all administrative tribunals to be one of "policy making", the fact is that rights tribunals have no more a policy-making function than do courts. And, if a tribunal is found to be a rights tribunal, is it not likely that an intention to disregard "one of the fundamental principles of natural justice" would have to be stated very plainly indeed before such an intention could be reasonably attributed to a legislature?

Furthermore, may one also not expect that, in due course, in another case, faced on the facts with an administrative tribunal that is in point of fact clearly a rights tribunal but whose decision-makers are, by reason of statutory provisions of an orangutan nature, neither impartial nor independent, the Supreme Court will be moved to reassert the role of the courts as the ultimate guardians of the rule of law in our administrative justice systems.

Obviously, as we have seen, orangutan language may well be used. However, such language at least makes the issue plainly visible and, thus, more amenable to resolution through the political process.

In addition to the common law support for the application of principles of natural justice in the structuring and administration of rights tribunals that is explicit or latent in the Ocean Port decision, there are a number of other well-known standards respecting the design of rights tribunal structures and the determination of rights tribunal administrative norms that ought to be highly influential in Canada.

First off, there is, of course, s. 23 of the Québec Charter of Human Rights and Freedoms. As Ocean Port has noted, that section entrenches in Québec the right to a "full and equal, public and fair hearing by an independent and impartial tribunal". And, governments may fairly expect ***40** to be asked:, "if Québec, why not Ontario — or Nova Scotia, or British Columbia ...?"

And, one must not forget Provision 2 (e) of the Canadian Bill of Rights which provides that "no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". Thus, a federal government countenancing the subversion of the independence or impartiality of a federal rights tribunal will have an additional obstacle, as compared to its provincial counterparts.

Then there is art. 6 of the European Convention on Human Rights that provides that "everyone is entitled to an independent and impartial tribunal established by law".

And, finally, and perhaps — at least in the area of moral suasion — most importantly, there is the Universal Declaration of Human Rights. As we know, the DHR has impeccable Canadian credentials. The first draft was prepared by a Canadian, McGill law professor John Humphrey, the first head of the U.N. Secretariat's Division for Human Rights. And it is well to recall that in a resolution of the General Assembly of the United Nations passed on December 10, 1948, the Universal Declaration of Human Rights was proclaimed to be "the common standard of achievement for all peoples and all nations" in respect of human rights. Article 10 of the Declaration provides that in the determination of their rights and obligations "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal ..."

In fact, of course, all of these standards place impartiality and independence at the forefront of the essential requirements for rights-determining tribunals.

We might also want to look southward to the U.S. federal administrative law system and its institution of federal administrative law judges. The adjudicative responsibilities of U.S. federal administrative law judges are for the most part equivalent to the adjudicative responsibilities of rights tribunals in Canadian administrative justice systems. But U.S. federal administrative law judges are appointed through a highly competitive and objective selection process established by the Administrative Procedures Act of 1946 (the "APA") in which the standards of relevant qualifications are very high. The selection and appointment process is administered — and the selections made — by the independent, U.S Office of Personnel Management through its Office of Administrative Law judges. Administrative Law Judge appointments are also lifetime, ***41** tenured appointments, indistinguishable from the tenured appointments of Canadian judges. [37]

Interestingly, the status of U.S. federal administrative law judges was, historically, the product of a desperate fight during the 1930s and early 1940s between President Roosevelt's New Dealers and their opponents. One commentator has described this fight as "not a pretty sight". [38]

The New Dealers, committed to finding good, practical working solutions to major social and economic problems, and confident of the rightness of their motives, were impatient with any talk of rule of law restrictions on the efficiency of their new agencies. However, the work of the new agencies inevitably impacted negatively on the rights of many individuals. As the above mentioned commentator says, "while many benefited, there was also pain", and she cites as an example her personal awareness, growing up in Tennessee, of the Tennessee Valley Authority taking and flooding private homes and farms to make its lakes and dams, with little in the way of due process available to the displaced owners and tenants.

The fight was to restrict the powers of government in this newly emerging administrative state by imposing requirements of fair process. It was lead by the New Dealers' Republican opponents, outraged by the massive intrusion of government represented by the New Deal's big agency strategy, and by the Republicans' civil libertarian allies, deeply concerned by the threat that strategy posed for individual rights.

Ultimately, the New Dealers surrendered on the rule of law point. To ensure that the government's single-minded pursuit of its policy goals would not be permitted to ride roughshod over the rule of law, they agreed to allow tenured, rigorously independent, highly competent and respected administrative judges, charged with the responsibility for ensuring the application of the rule of law, to stand between government and persons affected by the implementation of government policies. The Administrative Law Judge provisions in the 1946 APA are rooted in that surrender. [39]

***42** It is probably indicative of something significant in our Canadian psyche that in the history of the development of Canadian administrative law agencies one looks, the author thinks, in vain for any similar struggle — or any comparable champions — for the ascendancy of rule of law principles.

(f) Against these Standards, How do Canadian Administrative Justice Systems Measure Up?

When the Canadian administrative justice systems are measured against these respected standards, Canada does not fare well.

What one finds is a pervasive, and so far unbreakable, Canadian tradition (Québec now excepted) of allowing government interests in controlling rights tribunals, together with the governing party's patronage needs, to almost always trump justice system principles that, in other settings, and in other jurisdictions, would be regarded as axiomatic.

In the 1992 Law Society of Upper Canada, Special Lecture on Administrative Law, Toronto's respected administrative law counsel, Andrew J. Roman, was asked to respond to a keynote article by Margot Priest. At the time, Priest was an agency chair in Ontario, and her keynote article "Structure and Accountability of Administrative Agencies" [40] is now required reading for anyone interested in these issues. The article includes a detailed account of all the Canadian studies and reports that had over the years recommended fundamental reform of various Canadian administrative justice systems.

In his commentary on the Priest article, [41] Roman acknowledged his astonishment at the "shocking number of studies, reports, and committees there have been examining administrative agencies". Until he had seen them all collected together in the Priest article, he had "no idea", he said, "of

[their] sheer volume and repetitiveness". He quotes Professor Ratushny's comment, in respect of the same multiplicity of futile studies, in Ratushny's 1990 Report on the Independence of Federal Administrative Tribunals and Agencies. [42] That comment reads in part as follows:

> ***43** Countless studies, papers and reports, in this jurisdiction and others, have examined many aspects of the independent administrative function and have made innumerable recommendations for reform. While there has been no lack of concern with the general problem, as Dean Landis observed in his 1960 report to President-elect Kennedy, "the concrete results achieved by these voluminous studies bear a very small ratio to the time and effort that the studies and investigations themselves have consumed." [43]

It may be noted that since Priest wrote her article in 1992, there have been two further, formal studies in Ontario — the Wood Task Force Report [44] and the Guzzo Report [45] — and one additional study that one knows of in Nova Scotia [46] All three of these have, as far as one can tell, by and large suffered the same fate as all the others.

It is true that when the Guzzo Report with all its promise burst on the Ontario scene in 1998, [47] the Ontario government "accepted" its recommendations and made a public promise to implement them. And, indeed, there has been much Guzzo Report implementation activity ever since. However, in the course of that activity, any recommendation that threatened the government's or line minstries' control of agencies — or gave promise of inconveniencing the patronage policy — has in fact either been abandoned or turned on its head. [48]

***44** Andrew Roman, reflecting in his article on the reasons why we have seen so "astonishing" little improvement despite all of these studies, concluded that "one reason is that the status quo well serves those who control these agencies — the civil servants and the Cabinet". [49]

It is apparent, one may safely say, that government preoccupation with the control of agencies, as reflected in Mr. Eberlee's account of the Ontario government's implementation of its Anti-Discrimination Commission statute in the 1950s, did not go away. It seems obvious that it remains the dominant motivation in the governments' design and administration of Canadian rights tribunals to this day. And it is this motivation that, in the author's submission, accounts for the fact that none of the of the studies that have over the years recommended fundamental reforms that would better serve the rule of law have ever — until 1996 when Québec broke the mold — had any success. Roman spoke truly, when he attributed the failure of all reform recommendations over the years to the fact that "the status quo well serves those who control these agencies — the civil servants and the Cabinet".

The result is that, with respect to the rights tribunals in our Canadian administrative law systems, the following norms prevail. In describing those norms, the author intends to speak rather more bluntly than has been customary in administrative law circles since Margot Priest described her hypothetical "tribunal from hell" in 1992, [50] and Andrew Roman said it was not from hell but from Ontario. [51]

The problem of getting really frank criticism in this field from people who know what they are talking about is nicely captured by a comment by Roman in his paper responding to Priest. "She has been more polite", he said, "than I would have been". "But, of course", he said, "as she is the chair of a tribunal and I am a practising lawyer we must each have different inhibitions. She has to be polite to politicians [and, he might have added, bureaucrats]; I have to be polite to tribunals". [52]

Before speaking bluntly about the prevailing norms in our administrative justice systems, it is important for the author to acknowledge that in those systems, despite everything, one finds some highly competent ***45** tribunals acting with vigorous independence, and many competent and courageous adjudicators. However, to the extent that these exist they must be regarded as idiosyncratic. They will be seen, in the author's opinion, to have prevailed — often because of anomalous circumstances — despite the system in which they are functioning, not because of it.

The author must also concede much more personal familiarity with the Ontario system, and the federal system, as that system impacts in Ontario, than with the systems in other Canadian jurisdictions. However, based on everything one reads, and on anecdotal evidence from within other systems, the author would be very surprised to find much that was fundamentally different in the latter jurisdictions.

The systemic norms, widely understood but rarely acknowledged, that in fact prevail in the design and administration of rights tribunals in Canada and about which the author intends, as he said, to speak bluntly, may be fairly stated to be as follows:

· First, biased adjudication of rights is to be accepted not only as normal and legitimate but also as essential;

· Second, egregious conflicts of interest between host ministries and their rights tribunals are to be simply ignored;

> · Third, adjudicative qualifications for new appointees, such as judicial temperament or knowledge of law and of the legal system, are not to be thought important, indeed are thought to be inimical to a tribunal's role;
>
> · Fourth, competence and excellence are to be routinely discounted and disrespected; and
>
> · Fifth, rhetoric to the contrary notwithstanding, no more than the thinnest illusion of independence is to be countenanced. Independent decision-making on truly controversial issues is, typically, left to be only achieved — when it is achieved — through the “herculean” personal “feistiness” of individual adjudicators willing to risk their careers. [53]

***46** Is that too strong? Not in the author's experience, and not, the author believes, in the experience of anyone working in the administrative law field. As the author has said, it is true that one can find tribunals and individual that manage to beat the system. But such tribunals and individuals will be found to be truly the exceptions — no doubt some important exceptions but exceptions, nonetheless.

In the author's opinion, if our rights tribunals structures and administrative norms were ever to be objectively measured on all the facts against the standard set, for instance, by the Universal Declaration of Human Rights, they would surely fail.

The reader will see, therefore, that the author has no difficulty in believing that our administrative justice systems are in dire need of the kind of fundamental reform that the introduction of a Provincial Tribunal would bring. The difficulty is to know how a consensus in support of that view might be built.

5. HOW A “PROVINCIAL TRIBUNAL” WOULD HELP

The final question this paper will address is the question of the advantages that super provincial tribunal would present, were a sufficient consensus to develop concerning the flaws in our systems to make consideration of such tribunals feasible.

The principal feature of a provincial tribunal from which most of the advantages would flow is its scale. As indicated previously, we are talking about a tribunal that in Ontario would assume the functions of 30 to 40 existing tribunals — that in Australia determines rights in more than 350 different statutes.

The first thing that naturally comes to mind, of course, is the cost savings that might result. If one takes 30 or 40 management structures and collapses them into one, one would likely be anticipating some cost savings. However, the greater sophistication and complexity of a provincial tribunal's management structure, the need to organize the tribunal into specialized divisions and sub-divisions so that the advantages of specialization and expertise that are the hallmarks of an administrative justice tribunal may be retained, and the modernization of adjudicator compensation levels that would be required of a modern tribunal of this nature, all suggest that the cost savings might prove to be largely ephemeral. It would be interesting to know if Québec has made any before-and-after cost comparisons. As Ontario's Minister of Labour said with respect ***47** to of the Unified Workplace Tribunal proposal, [54] this should not be regarded as a cost-saving measure.

More to the point is the pre-eminent status and high public profile that such a tribunal would implicitly enjoy. That inherent status and profile presents a number of important advantages. The status of such a tribunal would, for instance, require — and attract — leaders with impeccable qualifications and reputations, and the tribunal would have to be provided with the wherewithal required to provide the compensation packages fairly reflective of those qualifications and status. That status and profile would also mandate a sophisticated and effective management structure.

The necessarily high public profile of such a tribunal would also serve to provide the administrative justice system for the first time with a single public focus and would therefore bring that system more to the forefront of public consciousness. The provincial tribunal's performance would thereby become more of the general public's business than has been possible with a large number of small tribunals impacting only on small segments of the public. Such a performance profile would create pressures for achieving performance excellence that would be difficult to resist. The quality of administrative justice would — dare one hope? — have the potential for becoming an actual political issue.

The scale of the tribunal would, in addition, foster the development of sophisticated technology, and allow for the intelligent, centralized management of common resources and support services that are now spread in small isolated pieces in 30 or 40 different places.

The scale would also significantly enhance the independence and impartiality of the adjudicative environment. Responsible for all the adjudicative decisions under 50 or 60 different statutes, a provincial tribunal, assuming it was able to achieve a general reputation for reliable work, could readily absorb the criticism from the occasional controversy. Moreover, with the inherent

credibility associated with its size and professional sophistication, its controversial decisions would be inherently more acceptable to negatively affected parties and their communities.

(One of the problems with single-focus tribunals responsible for all the controversial decisions in their area of specialization expertise is that they are inherently vulnerable to political pressure from disgruntled parties and their allies. They are also hard pressed to achieve — and retain — the public reputation that leads to controversial decisions being accepted, even by those who think them wrong, as at least a bona fide, and probably competent exercise of the tribunal's duty.)

The scale of a provincial tribunal would also dictate sophisticated ongoing training and education programs. It would also result in improved ***48** efficiencies — and effectiveness — in the utilization of adjudicative resources through proportional process, the deployment of adjudicators at varying and appropriate skill levels, and through the enhanced flexibility that comes with cross-appointments and internal secondments.

Furthermore, bringing the adjudicators from 30 or 40 tribunals within one organization would mandate a rationalization of member compensation systems and structures and the approval of member compensation levels that are reasonably competitive, thus making the positions once again a viable career option. The size of the organization would also mandate an independent grievance procedure that would protect individual adjudicators from unfair institutional decisions affecting them, including re-appointment decisions.

The physical size of the tribunal, the societal significance of its mandate, and the political clout that goes with all of that, as well as the price that would be paid by such a tribunal and by its high profile leaders — and by the government of the day — should its public reputation falter, should give it the power to reject the patronage culture of appointments, and the motive to embrace competitive and objective selection processes and appropriate qualification standards.

With all these adjudicators operating in one cost centre, it will also no longer be possible to cloak the actual cost of ill-considered policies. Take for example, the policy recently adopted by the Ontario government of allowing only one re-appointment. [55] This means that experienced adjudicators are to be arbitrarily dismissed after six years of service. No effort has been made to justify this policy. Neither has there been any attempt to calculate the cost. The cost will be found in the loss of tribunal efficiency, the distraction of senior management, the cost of constantly repetitive recruitment and training activities, and the dilution of the quality of tribunal decision-making through the reduction in the average experience level and the alienation of career-minded adjudicator candidates. One does not have to think very hard about this to know that, over an entire system, the cost of such a policy — both in dollars and in the quality and fairness of decisions — will prove to be remarkable. [56] In a provincial tribunal context, those costs would immediately be seen to be intolerable.

***49** It will be apparent from these observations that, in talking about a provincial tribunal, the author has in contemplation an institution staffed by professional adjudicators — as is now, effectively the case, in Québec. And, in his view, a government that was not prepared to countenance professional adjudicators — as most Canadian governments apparently are not — could never be interested in the idea of a provincial tribunal. A provincial tribunal staffed by amateurs cannot be imagined. In the author's opinion, for most rights tribunals, the day of the public-spirited amateur should be understood to be gone. The demands on adjudicators in the greater proportion of these tribunals are now self-evidently too complex and demanding for amateurs.

Of course, most importantly, the transfer of adjudicative functions of rights tribunals to a provincial tribunal would mark the end of the line-ministries' influence over appointments and re-appointments and the loss of their control over the budgets and administrative resources of those tribunals. The ministries would also cease to play the dominant role in the design of tribunal structures. Thus the de facto control which host Ministries have traditionally enjoyed over the operation and effectiveness of these tribunals would disappear, and with that would go the outrageous conflicts of interest that have held Canadian administrative justice systems in ruinous thrall for almost fifty years.

It can, of course, be argued that line ministries have a legitimate need to be able to influence the decision-making of rights tribunals, particularly in respect of the tribunal's interpretation of policy-implementing statutes for which the ministries are responsible.

Some would argue that a line-ministry's proper response to a tribunal interpretation that in its opinion has gone awry should be simply the amendment of the statute. However, as we know, legislating amendments is not always a practical or expeditious remedy. In the author's view, therefore, in the design of a provincial tribunal, there is a case to be made for devising overt channels for line-ministry participation as a party in the tribunal's adjudicative processes. It is not impossible to imagine such channels and some sample possibilities may be seen in an earlier attempt by the author to design a specific Provincial Tribunal model.[57] Giving a line Ministry a legislated right to intervene as a party in particular proceedings or to initiate judicial reviews, with appropriate protection of individual parties from extra cost exposures, are two of a number of such possibilities.

*50 6. IN SUMMARY

The making of so-called super tribunals by a well-planned consolidation of a family of rights tribunals with related missions may, indeed, add something significant to the efficiency or effectiveness of adjudication in particular areas of rights adjudication.

However, until the day that professional and societal influences beyond the line-ministry bureaucracies and cabinet ministers begin to share a serious concern that our rights tribunals — however big they are — do not in terms of structure and administrative norms measure up to even minimal rule-of-law standards — are, in fact, from that perspective an international embarrassment — the reforms that are really needed will continue to be stifled.

But, if that day comes, as it did in Québec, and in Australia, and is now dawning in the U.K., then the reformers who emerge on that day will have to find the means to shatter the half-century tradition of bureaucratic control and patronage abuse. And, when they look for those means, they will find that the super Provincial Tribunal concept has what is needed.

Footnotes

a1 This paper was originally delivered as a plenary panel presentation at the Canadian Bar Association, Employment, Labour and Administrative Law CLE program. Behind the Curtain: Decision-Making in Employment, Labour and Admnistrative Law (Ottawa, November 23, 2001). The Panel topic was “Super Tribunals: Labour and Others”. The panel was moderated by Palbinder K. Shergill, of Vancouver, B.C. Panel Members: Odette Laverdière, J. Paul Lordon and the author.

aa1 Toronto labour arbitrator and administrative justice practitioner. First chair of the Ontario Workers' Compensation Appeals Tribunal from 1985 to 1997; first President of the Society of Ontario Adjudicators and Regulators from 1992 to 1996; associate professor of law at Osgoode Hall Law School, 1975 to 1981.

1 At the time of the submission, the Ontario Bar Association was still known as the Canadian Bar Association — Ontario.

2 The Australian reference is to the creation in 1975, at the Australian Commonwealth level, of the “Administrative Appeals Tribunal” (AAT) which by 2001 was responsible for reviewing decisions under more than 350 statutes. (See description of AAT in Justice Deirdre O'Connor's paper: Administrative Decision Makers in Australia ... delivered to the 2nd International Conference on Administrative Justice in Québec City in June 2001.)

3 For a current description of TAQ see, in the Progam Materials for the CBA's CLE program referred to above, Laverdière, Le Tribunal administratif du Québec: Une supertructure au centre de la réform de las justice administarive du Québec.

4 In September 2001, the U.K. government released and submitted to a public consultation process a report of the review of tribunals by Sir Andrew Leggatt. The report is entitled “Tribunals for Users: One System, One Service”. See < www.tribunalsreview.org.uklleggatthtm/leg-00.htm>.

5 There is, fortunately, an English language version of Bill 130.

6 For an earlier, detailed discussion of the merits of one particular “provincial tribunal” proposal, see the author's 1997 paper, Restructuring the Administrative Justice System: The Provincial Tribunal, 10 C.J.A.L.P. 175.

7 The reference to “rights tribunals” anticipates a distinction made later in the paper between “rights tribunals”, “regulatory tribunals” and “government agencies”.

8 Les tribunaux administratifs au Québec: rapport du Groupe de travail sur les tribunaux administratifs, Québec, sous la direction de M. René Dussault, 1971, 300 p.

9 Canadian Council of Administrative Tribunals (CCAT); Society of Ontario Adjudicators and Regulators (SOAR); and British Columbia Council of Administrative Tribunals (BCCAT).

10 For an account of this history see a paper given by M. Jean-Francois Gosselin on the occasion of the Canadian Institute for the Administration of Justice's 1987 National Conference on “Justice: Independence and Responsibility”. At the time, Mr. Gosselin was Vice-President of the Council of Canadian Administrative Tribunals (CCAT) and a Commissioner appointed to the Review Board of Land Taxation in Québec.

11 For a complete listing of these studies up to 1992, see Priest, Structure and Accountability of Administrative Agencies, Law Society of Upper Canada, Special Lectures, 1992, Administrative Law, p. 10, at 14 to 38.

12 The text of the speech was distributed at that conference, and the comments referred to here start at page 2 of that text. The author has been unable to ascertain whether the speech was ever published.

13 Ratushny, “What Are Administrative Tribunals? The Pursuit of Uniformity in Diversity”, Canadian Public Administration/ Adminstrative Publique du Canada, volume 30, No. 1 (SPRING/PRINTEMPS 1987), pp. 1-13, at 11.

14 Legislative Assembly of Ontario, Hansard for October 11, 1995, at 216.

15 Amongst other sources, see column by James Rusk in the Globe and Mail on October 12, 1995.

16 Appointment Agreement for Regulatory & Adjudicative Agencies, November 2000.

17 “Idiosyncratic removals” is a phrase that entered the Canadian administrative justice lexicon when Ontario Chief Justice McMurtry, in his address to the Ontario Conference of Ontario Boards and Agencies in November 1997, spoke of adjudicators' freedom from fear of “idiosyncratic removal” as one of the vital conditions for ensuring the public's perception of adjudicators as independent. It is also in this address that the Chief Justice acknowledged that the justice system must now be understood as comprising two distinct components — the judicial justice system and the administrative justice system”. See copies of the text of that address, at p. 7 and 1 respectively. The author has been unable to find where this address may have been published.

18 March 31, 1998, at pp. A-798 et seq.

19 The Ontario government's current “core competencies” for new appointees to rights tribunals are as follows: “analytical thinking; conceptual thinking; concern for image impact; flexibility; information seeking; organizational awareness; organizational commitment; self-confidence; self-control; self-development; and steady focus”.

Contrast these with the following qualifications for new appointees recommended in the 1995 SOAR Report on the performance management of adjudicators:

... a good understanding of the mandate of the tribunal and other relevant legislation; experience with public hearings; experience in a field related to the subject matter of the tribunal's hearings or in law; a good understanding of procedure, including the Statutory Powers Procedure Act if applicable to the tribunal's hearings, and the common law concepts of natural justice/fairness; an awareness of, and sensitivity to, the various interests and issues represented at the tribunal's hearings; an aptitude for adjudication, including fairness, good listening skills, open-mindedness, sound judgement, tact, and an ability to interpret legislation; an ability to organize and analyze evidence (written and oral); good writing skills — the ability to write a clear, well-reasoned decision that takes into account the evidence, the submissions, the law and policy; ....

The SOAR report: Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice System, is published in 9 C.J.A.L.P. at 179. The government core competencies are to be found in the Ontario government document, Competency Framework for Regulatory & Adjudicative Agencies, November 2000, distributed by the government at the November 2000 Conference of Ontario Boards and Agencies.

20 See, for example, the Macaulay Report — Directions — Review of Ontario's Regulatory Agencies, 1989.

21 See, for example, the Appointment Agreement for Regulatory & Adjudicative Agencies, November 2000, referred to in note 16, supra.

22 Fuller, The Forms and Limits of Adjudication (1978), 92 Harvard Law Review 350. [Note: this article was published posthumously and is comprised of work that took a number of published and unpublished forms during the 1950s, the final version of which was written by Professor Fuller for classroom use in 1961.]

23 Ibid., at 394.

24 Ibid., at 364.

25 Ibid., at 398.

26 Ibid., at 399.

27 Ibid., at 400.

28 Canadian Radio-television and Telecommunications Commission.

29 Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch), 2001 SCC 52, 93 B.C.L.R. (3d) 1, 274 N.R. 116, [2001] 10 W.W.R. 1, 204 D.L.R. (4th) 33, (sub nom. Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)) 155 B.C.A.C. 193, 254 W.A.C. 193, 2001 CarswellBC 1877, 2001 CarswellBC 1878, [2001] S.C.J. No. 17 (S.C.C.).

30 Ibid., at para. 24.

31 Ibid.

32 C.U.P.E. v. Ontario (Minister of Labour), (sub nom. Canadian Union of Public Employees v. Ontario (Minister of Labour)), 51 O.R. (3d) 417, 5 C.C.E.L. (3d) 8, 194 D.L.R. (4th) 265, 26 Admin. L.R. (3d) 55, 138 O.A.C. 256, 2000 CarswellOnt 4245, [2000] O.J. No. 4361 (Ont. C.A.), leave to appeal allowed 2001 CarswellOnt 3071, 2001 CarswellOnt 3072 (S.C.C.).

33 The author first heard the label used, somewhat tongue-in-cheek, by a union labour lawyer in a meeting of the Administrative Law Section of the Ontario Bar Association in October 2001.

34 See the reference in the article Res ipsa loqitor by Dan Harris published in Vol. 3, No. 2 June 2001, of the Canadian Bar Association — Ontario, Labour Relations Section Newsletter.

35 Ocean Port, supra note 29, at para. 21.

36 Ibid.

37 For a detailed description of the selection and appointment criteria and process, see the 1989 Program Handbook for Administrative Law Judges, published by the United States Office of Personnel Management.

38 Young, Judicial independence in Administrative Adjudication: Past, Present and Future, published in the 1999 Summer issue of the American Bar Association's Judges Journal (Vol. 38, No. 3, at 16). The author, Ann Marshall Young, is a senior U.S. federal Administrative Law Judge.

39 For a full account of this struggle, see, in addition to Judge Young's article, an article by G.B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from the New Deal Politics, 90 Nw. U. L. Rev. 1557 (1996).

40 See note 11 supra.

41 Roman, Structure and Accountability of Administrative Agencies, Law Society of Upper Canada, Special Lectures, 1992, Administrative Law at 63. The Priest article is perhaps better known as the “tribunal from hell” piece, which, in his commentary, Roman said was not from hell but from Ontario.

42 Canadian Bar Association, Report on the Independence of Federal Administrative Tribunals and Agencies, September 1990.

43 The Ratushny Report, at 6.

44 Government Task Force on Agencies, Boards and Commissions, Report on Restructuring & Adjudicative Agencies [the Wood Report], February 1997. The Task force was chaired by Conservative MPP, Bob Wood.

45 Everyday Justice, Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies, April 1998. The Commission was chaired by Conservative MPP, Garry Guzzo.

46 Law Reform Commission of Nova Scotia, Reform of the Administrative Justice System in Nova Scotia, Final Report, January, 1997.

47 For an account of the promise of the Guzzo Report, see Ellis, Everyday Justice in Ontario: The Guzzo Report — an Assessment, Reid's Administrative Law, volume 7, No. 3, January 1999 at 49. (Cite: 7 R.A.L. 49.)

48 For example, with respect to the appointments process, Guzzo recommended, amongst other things, that the following principles should apply: appointees must be qualified and competent; the process for appointments and re-appointments must be open and transparent; there should be a “screening committee” to evaluate applicants against selection criteria; and agency chairs should be consulted on both appointments and re-appointments. In the implementation process, each of these principles had been abandoned. It is true that appointment qualifications have been established — the so-called core competencies referred to in footnote 19, supra. However, the limited nature of the latter may be seen from the government's own documents. The Ontario Government's Learning Strategy for Appointees to Regulatory & Adjudicative Agencies, November 2000, observes in the last paragraph on page 1 that “[a]ppointees come into the agency sector from many walks of life, and are commonly unfamiliar with government, the role of administrative justice agencies, the agency decision-making process, and particularly with the expectations associated with the role of an appointee”. [Emphasis added.].

49 See page 64 of the cite at note 41, supra.

50 See note 11 supra.

51 See note 41 supra at 64.

52 Ibid., at 63.

53 “... It takes herculean feistiness for tribunal adjudicators to develop decisions of a potentially controversial kind ... when they know that at the end of the political telescope through which they are observed is a person with the power to renew or not renew a three- or five-year appointment.” — Rosalie Silberman Abella, Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization — address delivered to the 4th Annual CCAT Conference, May 29-June 1, 1988, when Justice Abella was Chair of the Ontario Labour Relations Board. The paper is published in 2 C.J.A.L.P. 1, and the passage quoted may be found at page 10. Abella is now Madam Justice Abella of the Ontario Court of Appeal.

54 Minister's speech to OBA meeting on February 27, 2001.

55 See the Appointment Agreement for Regulatory & Adjudicative Agencies, November 2000, referred to in note 16, supra.

56 For one attempt at closely considering the implications of such a policy see the author's 1996 article, Administrative Justice System Reform: The Term of Appointment Issue, 10 C.J.A.L.P. 1.

57 See page 202 of the citation at note 6 supra.

15 CJALP 15