

NOTES FOR PRESENTATION

COUNCIL OF AUSTRALASIAN TRIBUNALS (SOUTH AUSTRALIA BRANCH)

A CANADIAN PERSPECTIVE ON TRIBUNAL INDEPENDENCE

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Introduction

I would like to thank Professor Kathleen McEvoy for organizing this evening's presentation and all of you for attending. This is an informal session so I am quite happy to take questions and comments as I go along, though I hope we will also have time for more general discussion at the end of my presentation.

I thought it might be interesting to focus my remarks this evening on my impressions of Professor Pamela O'Connor's excellent report on *Tribunal Independence* that was prepared for COAT and published by the AIJA in 2013.¹ What I hope to do this evening is compare and contrast the approach taken in the Report with Canadian thinking on tribunal independence. I understand that COAT has invited Professor O'Connor to do some additional work on the report and I look forward with interest to reading it when it is published, but the focus of my remarks this evening will be on the 2013 version of the Report.

The COAT *Tribunal Independence* Report

I propose to structure my remarks by looking briefly at the conceptual foundations of the Report and then focusing on the Report's findings in the areas of administrative independence, institutional independence and adjudicative independence. Before I do so, however, I should start by acknowledging what I think is the very high overall quality of the Report. It is thoroughly researched, extremely thoughtful, and well organized. Naturally its focus is on Australian and New Zealand tribunals but it draws extensively on developments in Canada and the United Kingdom as well. In my view it is a very significant addition to the

¹ Available online at <http://www.coat.gov.au/images/downloads/tas/Tribunal%20Independence.pdf>. Hereafter "the Report".

literature on tribunal independence. I think COAT should be proud to have sponsored it and I look forward with interest to its further development.

The Report itself begins with an extended introduction to the concept of tribunal independence, which is then continued in the second chapter. This chapter explores the distinction between “de facto” and “de jure” independence as part of a discussion of how one might go about measuring independence. This introduction is important because it frames the discussion of the different aspects of independence that will be explored in more detail in subsequent chapters. The Report, in my view correctly, observes that tribunal independence is related to judicial independence, but suggests that it should be conceptualized in a somewhat different way that reflects the differences in the institutional arrangements between tribunals and courts.

The Report refers on a number of occasions to the guarantees of judicial independence in the Canadian constitution and uses Canadian jurisprudence to help inform its discussion of institutional independence, but it does not suggest that Australian or New Zealand tribunals should be assimilated within the judicial branch of government as the Legatt Report proposed in the UK.² You will be more familiar than I am with the impediments to that kind of assimilation within Australia’s constitutional arrangements, but I thought you might be interested to know that there has been a concerted, though ultimately unsuccessful, effort to bring at least some tribunals within the scope of the unwritten constitutional guarantee of judicial independence in Canada.³

I do not propose to go into great detail concerning the Canadian jurisprudence, though I am happy to do so in response to questions if that would be of interest to you.⁴ Suffice it to say, however, that the text of our Constitution gives explicit recognition to judicial independence in respect of our superior courts⁵ and in respect of courts that try persons charged with

² Sir Andrew Leggatt, *Tribunals for Users: One System, One Service – Report of the Review of Tribunals* (2001).

³ For an extended argument advancing the case for that some tribunals should fall under the protection of the unwritten constitutional principle for judicial independence, see Ron Ellis, *Unjust by Design, Canada’s Administrative Justice System* (UBC Press, 2013).

⁴ The key decisions are *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781 and *Saskatchewan Federation of Labour v. Saskatchewan*, 2013 SKCA 61, leave to appeal dismissed, December 19, 2013, 2013 CanLII 83789 (SCC).

⁵ *Constitution Act, 1867*, ss. 96-100.

offences,⁶ but it does not contain any explicit reference to a general principle of judicial independence that applies to all courts. More specifically, there is no explicit textual reference to the independence of provincial courts that exercise only civil jurisdiction.

The Supreme Court of Canada's 1997 decision in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*⁷ developed an "unwritten constitutional principle of judicial independence", a principle that is legally enforceable and that applies to all courts. It was not long before parties were raising the question of whether tribunals – or at least some sub-set of them – should be considered "courts" for purposes of the unwritten constitutional principle of judicial independence. This question is particularly important with respect to security of tenure, since most limitations on security of tenure for tribunal members are embedded in legislation and only constitutional arguments can protect members whose appointments have been terminated without cause in reliance on this type of statutory authority.

While there have been occasional suggestions in the case law that some tribunals could shelter under the umbrella of the constitution's protection of judicial independence,⁸ I think it is fair to say that the overall tendency of the jurisprudence is strongly against extension of the unwritten constitutional principle of judicial independence to any tribunals.⁹ The reasons for this, in my view, come down to two key points. One flows from our historical approach to the place of tribunals within our concept of separation of powers and the other relates to the limits on the appropriate role of courts in using the constitution to modify the institutional structure of government.

We have a relatively weak concept of the constitutional separation of powers and a correspondingly limited sense of the types of decisions that can be made only by courts. Within this concept, however, we have historically assigned tribunals to the executive rather than the judicial branch of government, even if the only powers the tribunal exercises are adjudicative. As long as the adjudication done by a tribunal or other executive entity is

⁶ *Canadian Charter of Rights and Freedoms*, s. 11(d).

⁷ [1997] 3 SCR 3 (hereafter "*PEI Provincial Court Judges Reference*").

⁸ See *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, 2006 BCSC 1372, appeal dismissed as moot, 2007 BCCA 507, leave to appeal dismissed April 28, 2008, 2008 CanLII 18936 (SCC).

⁹ See cases referred to in note 4.

subject to judicial review¹⁰ and the legislature does not attempt to take away the core jurisdiction of superior courts and assign it to a tribunal,¹¹ the fact that a tribunal carries out adjudicative functions, even ones that might otherwise have been exercised by a court, does not offend our limited conception of the separation of powers. While I think that compelling arguments can be made that the type of adjudication done by many tribunals is indistinguishable from adjudication done by courts, Canadian courts remain reluctant to change their view that for constitutional purposes tribunals are part of the executive branch of government rather than the judicial branch, and therefore are not entitled to the constitutional protection of judicial independence.

In addition, I think that Canadian courts are rightly concerned about the appropriateness of using an unwritten constitutional principle to alter the institutional structure of tribunals, especially around issues as fundamental as security of tenure. When the Supreme Court of Canada extended the constitutional protection of judicial independence to provincial courts exercising civil jurisdiction, it did so in the knowledge that the statutory arrangements governing the institutional structure of these courts – working lifetime tenure, a rigorous appointment process requiring consultation with the legal profession and the judiciary, a requirement that individuals have a number of years of experience as lawyers before being appointed – in significant measure mirrored the arrangements governing superior courts. Moreover these arrangements were fundamentally similar across the country. I would be the last person to suggest that giving aspects of those arrangements constitutional force in respect of all courts was of no practical significance, but I would argue that it was a relatively small and justifiable step.

Our institutional arrangements for tribunals vary widely from jurisdiction to jurisdiction. Most of the smaller provinces rely almost exclusively on tribunals staffed by part-time adjudicators who perform their duties largely as a form of community service. The larger provinces and the federal administration rely increasingly on full-time career adjudicators serving on renewable term appointments. The members of a small handful of tribunals, mainly in the province of Quebec, have working lifetime security of tenure. As a practical matter, significant change in these institutional arrangements needs the active support of governments and legislatures to put the necessary structures and resources in place for

¹⁰ See *Crevier v. Quebec (Attorney General)*, [1981] 2 SCR 220.

¹¹ See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725.

tribunals to operate successfully, and it is not obvious to me that the use of the unwritten constitutional principle of judicial independence to change some elements of those structures would be an effective way of obtaining that support.

It is worth noting that Canadian judges, among others, have expressed serious concerns about the ability of our current court system to provide timely and affordable access to civil justice to ordinary individuals.¹² To the extent that tribunals are seen as more affordable and user-friendly adjudicative bodies than courts, there is some concern that imposing that the institutional characteristics of courts on tribunals will exacerbate access to justice problems. I suspect that many Canadian judges are intuitively sympathetic to the view that it would be a good idea to enhance the independence of tribunals, especially in relation to security of tenure. Nevertheless, my sense is that very few Canadian judges believe it is appropriate for them to employ the unwritten constitutional principle of judicial independence to accomplish this goal. While a number of Canadian commentators have expressed disappointment with this state of affairs, I think most of us are reconciled to the view that we should look at building approaches to tribunal independence that will persuade governments and legislatures to address the challenges facing Canadian tribunals rather than trying to persuade courts to use the unwritten constitutional principle of judicial independence to bring tribunals into the judicial fold.

The COAT Report also avoids trying to merge tribunal independence with judicial independence and instead explores independence in terms of the institutional characteristics that contribute to tribunals being able to properly exercise their adjudicative functions. It divides these into three categories: (a) administrative independence, or the ability to control the personnel, finances and other resources needed to carry out adjudication effectively; (b) institutional independence, or the ability to ensure that decisions about appointment, continuation in office and remuneration do not become, and are not perceived to be, vehicles for executive interference with tribunal adjudication; and (c) adjudicative independence, or the conditions that enable individual tribunal members to perform their adjudicative responsibilities without fear of improper interference.

The Report takes the position that legal guarantees of independence contribute significantly to the achievement of actual independence, but it recognizes that different institutional

¹² See Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa, 2013), online at http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

arrangements can advance independence goals. As a result, it tends to identify a continuum of weaker to stronger approaches to independence rather than settling on a single set of acceptable arrangements. While there are differences in matters of detail, this approach to tribunal independence is familiar to Canadian commentators and it was gratifying to me to see that the Report drew on some of my own work in coming to this conclusion.¹³

The only broad area where I think the Report tends to depart markedly from Canadian thinking on tribunal independence is in the articulation of the relationship between independence and accountability. Many Canadian commentators tend to think it is important to emphasize that independence is not a mechanism for avoiding accountability on the part of tribunals or individual adjudicators, but a way of distinguishing appropriate from inappropriate ways of holding tribunals and adjudicators accountable. I recognize that the subject matter of the Report is independence rather than accountability and I can see why it is more important to focus on the institutional arrangements that are needed to secure tribunal independence than it is to draw attention to appropriate ways in which tribunals and their members can be held accountable. Nevertheless, it seems to me that the separation of these two concepts is unfortunate. First of all, I think the linkage between independence and accountability makes the case for independence more palatable to government. Just as importantly, however, it serves as a reminder to individual adjudicators that their right and obligation to exercise independent judgment in assessing the cases before them is complemented by their obligation to do so in a manner that is fair, expeditious and respectful of the limits on their authority.

Administrative Independence

Let me then turn to the area of administrative independence. Here it seems useful to note that the concept of administrative independence as part of Canada's constitutional guarantee of judicial independence is much more restricted than the concept of administrative independence that is described in the Report. At least to date, Canadian jurisprudence would suggest that all that is required to meet constitutional standards of administrative independence is that the judiciary has control over its docket (in other words that a member

¹³ See Philip Bryden, "How to Achieve Tribunal Independence: A Canadian Perspective" in Robin Creyke, ed. *Tribunals in the Common Law World* (Federation Press, 2008) 62.

of the judiciary rather than an executive official decides which judges hear which cases) and that judges are entitled to exercise control over the conduct of cases in their courtrooms.¹⁴

At the federal level we have established a Commissioner of Judicial Affairs who provides certain support services to the federally appointed judiciary at arm's length from the Minister of Justice. Nevertheless, the Commissioner's role is limited to administrative support in respect of judicial appointments, judicial education, international co-operation activities of judges, official languages support, internal communications and the work of the Canadian Judicial Council in addressing public complaints about federally appointed judges.¹⁵ These are all important functions, but it is important to recognize that the Commissioner does not deal with such things as court facilities, budgets for the various federal and provincial superior courts, or management of court staff. All of these fall within the responsibility of the relevant federal or provincial Minister of Justice.

My goal in mentioning this is not to suggest that this is an ideal system, but to observe that the constitutional protection of judicial independence in Canada does not provide a particularly useful model for robustly protecting the independent administration of tribunals. It is still the norm in Canada that the administrative support arrangements for tribunals are the responsibility of a portfolio Ministry whose mandate typically overlaps with the subject matter jurisdiction of the tribunal. There has been a tendency to develop memoranda of understanding that address such things as facilities, finance and budgets, human resources and support staff, information technology, communications and protocols for consultation around appointments. Sometimes statutes call for the creation of these agreements and in other cases they are developed as a matter of government policy. Such agreements are not in place everywhere and even where they are, compliance is often only as reliable as the relationship between the tribunal and the Ministry.

Bearing this in mind, it would appear that Canada does not have very much to offer to Australia and New Zealand if what you are looking for is models of highly independent tribunal administration. On the other hand, I think we may be able to offer some insight into the question of whether asking individual tribunals to take control over all aspects of their internal administration is a particularly efficient way of meeting those needs, or one that is

¹⁴ See *PEI Provincial Court Judges Reference*, *supra* note 7, at paras. 117 and 251-276; *Canada (Minister of Citizenship and Immigration v. Tobiass*, [1997] 3 SCR 391 at paras. 71-81.

¹⁵ See the website of the Office of the Commissioner for Federal Judicial Affairs Canada, online at <http://www.fja.gc.ca/home-accueil/index-eng.html>.

best calculated to help tribunals provide optimal service to those who appear before them. Let me offer two examples of how Canada has tried to organize administrative support for tribunals without resorting to either complete control by a portfolio Ministry or control by individual tribunals.

In 2014 our federal Parliament enacted the *Administrative Tribunals Support Service of Canada Act*,¹⁶ which creates an agency that has the responsibility of providing support services for 11 federal tribunals ranging from the Canada Industrial Relations Board and the Canadian Human Rights Tribunal to the Canadian International Trade Tribunal and the Transportation Appeal Tribunal of Canada. The support services provided include the typical “back office functions” (finance, human resources, facilities management, information technology and communications), plus registry services and research and legal advice to help the tribunals carry out their particular mandates.¹⁷ The 11 tribunals were not chosen because their mandates overlap but because they are small enough that sharing services would enable them to benefit from economies of scale, and having services provided by an organization that operates at arm’s length from their respective portfolio Ministries was thought to enhance the public perception of their independence. The jury is still out on how well this system will work in practice and I expect that there will be some tension as organizations that have used different systems in the past get used to the idea of using shared systems and facilities. In principle, however, the Service offers the potential to provide access to technology and expertise that might not otherwise be available to smaller tribunals that have to make adjudication available to citizens across a vast country and in two official languages.

It is interesting to note that the assessment of whether or not a particular tribunal would be included in the group of 11 was essentially pragmatic. For example, our largest federal tribunal, the Immigration and Refugee Board, is not included in the group. I suspect that this is because it is big enough that it has its own economies of scale and its needs for such things as translation services in many different languages and reports on conditions in refugee producing countries are sufficiently specialized that it makes sense to serve the Board’s administrative support needs by other means.

¹⁶ S.C. 2014, c. 20, s. 376.

¹⁷ See Administrative Tribunals Support Service of Canada website, online at <http://www.canada.ca/en/gov/dept/atssc/>.

Another approach that may be of interest is the tribunal clustering initiative in the province of Ontario. This approach, which was authorized by the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*,¹⁸ is seen as an alternative to consolidating a number of tribunals exercising specialized jurisdiction into one or more “super-tribunals”. The *Act* empowers the Lieutenant Governor in Council to designate two or more tribunals as a cluster where “the matters the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone.”¹⁹ Once a cluster has been designated, an Executive Chair is appointed to be responsible for the governance of all the tribunals in the cluster. To date three clusters have been created: (1) the Environmental and Land Tribunals Ontario (a cluster of 5 tribunals dealing with environmental assessment and land use planning issues); (2) the Social Justice Tribunals Ontario (a cluster of 7 tribunals dealing with issues ranging from social assistance to landlord and tenant disputes to human rights); and (3) the Safety, Licensing Appeals and Standards Tribunals Ontario (a cluster of 5 tribunals dealing with issues ranging from animal welfare and fire safety to parole and citizen complaints against the police). The Executive Chair still has to develop a memorandum of understanding with a responsible Ministry for the provision of the resources the cluster of tribunals needs to carry out its work, but the thinking is that Ministries are less likely to be influenced in their approach to tribunal resourcing by their happiness or unhappiness with particular tribunal decisions if they are dealing with a cluster of tribunals rather than a single tribunal. The cluster not only creates opportunities for efficiencies through the consolidation of “back office” operations (finance, human resources, information technology etc.) but it also makes it easier for tribunals to provide better service to parties through such things as co-location of facilities, consolidation of proceedings where more than one tribunal potentially has jurisdiction in respect of an issue, and harmonization of rules and procedures.

One might argue, of course, that the goals of clustering could be better achieved through the consolidation of specialist tribunals. Australia is a leader in tribunal consolidation and I understand that the new South Australia Civil and Administrative Tribunal is an example of this type of consolidation. I think it is interesting to consider whether tribunal consolidation or clustering or central provision of resources to specialized tribunals is the best way to ensuring that tribunals get the administrative support they need, but I am not sure that we

¹⁸ S.O. 2009, c. 33, sch. 5 (hereafter “*ATAGAA*”).

¹⁹ *Ibid.*, s. 15.

should necessarily see every tribunal having control over its own resources as the “gold standard” for administrative independence.

My point here is not to suggest that the Report is wrong to be concerned about the threat to independence that arises when a tribunal is dependent for the resources it needs to operate on a portfolio Ministry whose decisions it reviews. What I would say is that there is a balance to be achieved between administrative independence and the efficient and effective provision of the administrative support tribunals require to perform their adjudicative functions.

Institutional Independence: Appointments, Security of Tenure and Remuneration

Not surprisingly, appointment systems and security of tenure and remuneration play a central role in the Report. The Report notes that tribunal membership in Australia and New Zealand is in transition from a community service model to a career model, and this has implications both for the arrangements made for appointing members and for the structure of their appointments. The Report observes that there are various stages to the appointment process, and even if political actors are ultimately responsible for the decision to appoint a particular individual, different mechanisms can be put in place to ensure that candidates have a fair chance to be considered and that those who are ultimately chosen have appropriate qualifications. Likewise, the Report recognizes that considerations such as diversity may have an appropriate role in the selection of appointees from a pool of candidates who satisfy technical qualifications, though there is some question as to who is best suited to addressing those considerations.

The Report indicates that there is little support for working lifetime tenure for tribunal members in Australia and New Zealand and that the Canadian and Australian jurisprudence suggests that term appointments can satisfy constitutional requirements of judicial independence. There are, nevertheless, issues around reappointment where tribunal members are attempting to string together a number of term appointments in order to build a career. Even where there are merit-based systems for appointment, reappointment decisions are often opaque and members and tribunals are sometimes given insufficient notice with respect to reappointment. The Report also suggests that that in order to have reappointment systems that are merit-based, tribunals need to have performance standards, systems of performance evaluation, and opportunities for members to improve their skills through continuing education.

The Report devotes relatively little space to security of remuneration, and the main focus is on the different systems used to set remuneration and the question of whether there should be a statutory restriction on reduction of remuneration during the term of a member's appointment.

As I indicated above, I think it is fair to say that in Canada, progress from the community service model of tribunal membership to the career model is very uneven. Smaller jurisdictions such as the four Atlantic provinces tend to retain the community service model, with most tribunals heavily reliant on part-time adjudicators who are paid on a per diem basis. Quebec, on the other hand, has moved fairly far down the path towards career adjudication, and the members of its largest tribunal, the Administrative Tribunal of Quebec, enjoy working lifetime security of tenure²⁰ and for most practical purposes are treated as if they were provincial court judges who exercise specialized jurisdiction. As a general rule, the bigger the jurisdiction, the further it is along the path to the career model, but this can still vary from jurisdiction and sometimes from tribunal to tribunal within a jurisdiction.

One of the impediments to career adjudication is the presence of limits on the number of times a member can be reappointed. In some jurisdictions these limits flow from government policy and are subject to exceptions, but in my home province of Alberta, the *Alberta Public Agencies Governance Act*,²¹ which has been in force since April 2013, prevents anyone from serving as a member of a public agency that is empowered to perform an adjudicative function for more than twelve consecutive years.

The earlier practice of appointing tribunal members "at pleasure" has largely died out but in many jurisdictions it is possible for a tribunal member's term appointment to be terminated without cause upon the payment of compensation. The federal jurisdiction tends to be unusual in embedding in the enabling legislation for some tribunals a requirement that members may only be removed for cause during the term of their appointment and setting up a process for dealing with complaints about members and determining whether or not they should be removed for cause. Term appointments in most jurisdictions tend to be in the three to five year range, sometimes with shorter terms for initial appointments.

²⁰ Quebec *Administrative Justice Act*, C.Q.L.R. c. J-3, ss. 51-54.

²¹ S.A. 2009, c. A-31.5.

Most Canadian jurisdictions now employ what we would describe as a “merit-based” appointment process, or what the Report would call an “advisory panel model” of appointment. Some jurisdictions, such as Alberta, British Columbia and Ontario have statutory requirements that must be followed in the appointment process for tribunal members. In other jurisdictions, such as Nova Scotia, the process is mandated by government policy.

One thing that varies significantly from jurisdiction to jurisdiction is the role of the chair of the tribunal in making recommendations with respect to appointments. In Nova Scotia, the chair of the tribunal has no formal role in the process and advisory committees concerning appointments to adjudicative agencies are composed of two civil servants, two community representatives and one human resource professional.²² The *Alberta Public Agencies Governance Act* requires a transparent and merit-based appointment process but it does not explicitly require consultation with a tribunal’s chair. On the other hand, in practice many Alberta tribunals are responsible for assessing applications and making recommendations to the Minister who is responsible for appointments.²³ In British Columbia, the *Administrative Tribunals Act*²⁴ requires the use of both a merit-based appointment process and consultation with the tribunal’s chair before an appointment may be made, but there is no requirement that the chair approve the appointment. Finally, the Ontario *ATAGAA* mandates both the use of a competitive merit-based appointment process and a recommendation from the tribunal’s chair before an appointment can be made.²⁵

The major weakness in the Canadian system of tribunal appointments tends to be in the area of reappointments. Even jurisdictions such as British Columbia that have a strong statutory commitment to merit-based initial appointments typically do not extend that commitment to reappointments. Moreover, it is not uncommon for tribunal members and chairs to experience difficulty in obtaining timely information about whether or not members are going to be

²² See “Adjudicative Advisory Committees”, Nova Scotia Executive Council Agencies, Boards and Commissions website, online at http://www.novascotia.ca/exec_council/abc/adjudicative-advisory-committees.asp.

²³ See “Public Agencies Governance Framework”, Alberta Agency Governance Secretariat website, online at <http://alberta.ca/albertacode/images/ags-2008-02-Public-Agencies-Governance-Framework.pdf> at pp. 19-22.

²⁴ S.B.C. 2004, c. 45, s. 3(1).

²⁵ *Supra* note 18, s. 14 and in particular s. 14(4).

reappointed. This uncertainty causes hardship for many tribunal members since they do not know whether or not they need to look for alternative employment and their opportunities to search for some types of employment are likely to be constrained while they are still members of the tribunal. It can also cause problems for the tribunal, both because uncertainty about the status of members can make it difficult to schedule hearings in advance and because members who the tribunal would like to see continue may decide not to seek reappointment because they are not prepared to deal with an extended period of uncertainty.

Ontario is exceptional in its approach to reappointment because the Ontario *ATAGAA* ²⁶ requires the chair of the tribunal to recommend the reappointment of a member before reappointment can occur. The *ATAGAA* does not, however, require the appointing authority to reappoint a member whose reappointment has been recommended; it simply prevents the reappointment of a member who reappointment has not been recommended by the chair.

In Canada there is a significant contrast between the approach taken to establishing remuneration for tribunal members and the process used to determine the remuneration of judges. In most Canadian jurisdictions the remuneration of tribunal members tends to be fixed either by the Governor in Council or the Lieutenant Governor in Council or by the responsible Minister in accordance with Treasury Board guidelines. It is relatively unusual for tribunals to receive statutory protection from reductions in their remuneration, though this is done with respect to the Administrative Tribunal of Quebec. ²⁷ Tribunal members will typically be covered by any wage restraints or rollbacks imposed by government on the broader public service but I am not aware of an example of a government singling out the tribunal sector or a particular tribunal for differential treatment in relation to wage restraints or rollbacks.

By contrast, the *PEI Provincial Court Judges Reference* established an elaborate, constitutionally mandated, process for setting judicial compensation. This process was designed, insofar as possible, to depoliticize the establishment of judicial compensation. On a regular basis governments are required to set up an independent commission to make recommendations on levels of remuneration for judges, including levels and types of benefits. Associations of judges may make representations to the commission and respond to the

²⁶ *Ibid.* at s. 14(4).

²⁷ See Quebec *Administrative Justice Act*, *supra* note 20, s. 58.

government's submissions, but judges may not bargain with government over their compensation. The commission makes a recommendation to Parliament or the provincial legislature, as the case may be. Parliament or the legislature is not bound to accept the recommendation, but if it fails to do so it must provide reasons for its decision. The decision is subject to judicial review and may be overturned if it is not reasonable. There is no constitutional restriction on reducing the remuneration of judges, but any decision to do so must follow the independent commission recommendation process and must not single out judges individually or as a class.²⁸

I am fairly confident in saying that most people in the Canadian administrative justice sector would be thrilled if this type of regime applied to the establishment of their remuneration, but I am equally confident that nobody believes that any government would give this type of arrangement serious consideration. Moreover, I think the contrast between the relatively modest approach taken to the constitutional protection of the administrative independence of courts and the robust (some might say extravagant) protection afforded to security of judicial remuneration helps to explain why most Canadian commentators tend to be sceptical about the utility of attempting to use judicial independence as it is understood in our country as a model for tribunal independence.

Adjudicative Independence

I think it is fair to say that in Canada adjudicative independence has historically been addressed using the common law. Nevertheless, I agree with the Report's observation that there is an increasing tendency to look for ways to supplement the common law in order to enhance public confidence in the independence and impartiality of tribunal members as they exercise their decision-making functions. As a result, a number of the measures to enhance adjudicative independence identified in the Report have been adopted in Canada as well as in Australia and New Zealand.

I think this is the case for two main reasons. One is that our traditions of deliberative secrecy and testimonial immunity make it very difficult for parties to obtain the evidence on which to challenge a decision on the ground that there has been improper interference with the adjudicator's decision. While there are good reasons for these doctrines, and some basis for confidence in the willingness of adjudicators to bring to light improper efforts to interfere in

²⁸ *PEI Provincial Court Judges Reference*, *supra* note 7, at paras. 133-146.

their deliberations, I think it is fair to say that Canadian tribunals and policy-makers are increasingly persuaded that it is desirable to take positive steps to reinforce the legal commitment to independent and impartial adjudication.

The second is that key common law doctrines such as the “reasonable apprehension of bias” test, which in Canada addresses the impartiality of both tribunal members and judges, are often notoriously difficult to apply in marginal cases. With the support of the Canadian Association of Provincial Court Judges, my colleague Jula Hughes and I did a survey of 137 Canadian provincial and territorial judges concerning their experience with and attitudes toward recusal and disqualification. The answers the judges gave to whether or no they would recuse themselves in 32 relatively common but analytically marginal scenarios (situations involving social relationships with counsel, social relationships with parties and witnesses and previous encounters with parties in related or unrelated litigation) revealed significant differences of opinion.²⁹ The more precise articulation of standards in documents such as codes of conduct and conflict of interest guidelines can be useful to focus the attention of adjudicators on what types of conduct or potential conflicts of interest are and are not acceptable. In addition, they can help to offer guidance to parties on where the tribunal proposes to draw the line in marginal cases.

While I think there is common ground in Canada and Australia and New Zealand concerning the desirability of developing codes of conduct to help articulate the expectations we have of tribunal members in the performance of their duties, I feel that it would have been useful for the Report to focus a bit more attention on the balance between adjudicative independence and the responsibility of tribunal members to the parties and the tribunal for effective performance of their adjudicative duties. While this is obviously a sensitive topic, my sense is that Canadian thinking is evolving in the direction of a belief that tribunals need to take a much more pro-active approach to the development and enforcement of reasonable performance standards and to helping members improve their performance. In any organization bad systems of performance review, or good systems that are badly implemented, can be counterproductive. And it is only fair to observe that a significant element of the proper design and implementation of performance assessment in tribunals is ensuring that performance review does not interfere with the adjudicative independence of

²⁹ Philip Bryden and Jula Hughes, “The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification” (2011), 48 *Alberta Law Review* 569.

members. In 1995 the Society of Ontario Adjudicators and Regulators (“SOAR”) did a commendable job in producing a Manual on Performance Management in Ontario’s Administrative Justice Tribunals that is still available on SOAR’s website.³⁰ The Manual goes into some detail on the design and implementation of performance assessment systems and I would suggest that it could productively complement the Report’s otherwise useful observations on the content of codes of conduct and their relationship to adjudicative independence.

A second suggestion in the Report that raised some questions for me was the idea of tribunal members having an enhanced duty of disclosure of potential conflicts of interest, and the possibility that tribunal members should sit in some circumstances only with the agreement of all the parties. Canadian law with respect to impartiality does not impose an obligation on adjudicators to draw to the attention of the parties all circumstances that might be considered to have the potential to give rise to a reasonable apprehension of bias. My own view is that if an adjudicator has a serious concern about circumstances that might give rise to a reasonable apprehension of bias it is generally better, if possible, to seek advice from the Chair or an experienced member of the tribunal rather than raising it with the parties. Nevertheless, I acknowledge that there are some cases where disclosure can prove to be useful, if it is sufficiently complete, and Canadian courts recognize that a party’s right to bring forward a reasonable apprehension of bias argument on judicial review or appeal may be waived if timely and complete disclosure has been made and no objection is raised at the hearing.³¹ Legislation governing some American state courts goes further than Canadian law to address party concerns about a potential lack of judicial impartiality by giving parties a right to issue one preemptory challenge to the impartiality of a judge who has been assigned to hear a case, thereby resulting in the judge’s disqualification and the assignment of another judge to hear the case, and a number of American commentators have championed the expansion of this right.³²

³⁰ Online at <https://soar.on.ca/resources/soar-publications/17-resources/25-performance-management>

³¹ See, for example, *Fundy Linen Service Inc. v. Workplace Health, Safety and Compensation Commission*, 2009 NBCA 13; *Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board*, 2006 NBCA 61; *Fletcher v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 909.

³² See, for example, Raymond McKoski, “Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard” (2014), 56 *Arizona L Rev* 411; James Sample and Michael Young, “Invigorating Judicial Disqualification: Ten Potential Reforms” (2008), 92 *Judicature* 26; Charles Geyh, “Draft Report of the ABA Judicial Disqualification Project” (2008), online: <http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.

I tend to be sceptical about the value of expanding the opportunities parties have to challenge the impartiality of the adjudicators who have been assigned to hear their cases. My scepticism does not flow from any doubt about the importance of impartiality or the obligation of adjudicators to strive to be impartial and to behave in a manner that manifests their commitment to impartiality and thereby enhances the confidence of parties in the tribunal. Rather, my scepticism arises from a belief that making it too easy for parties to remove adjudicators on the basis of idiosyncratic concerns about impartiality undermines the public character of our system of judicial or tribunal adjudication. We do, of course, have systems of commercial and labour arbitration that give parties significant scope to choose their arbitrators and we are generally content to enforce the results of those arbitrations, but I think it is a mistake to treat systems of public adjudication as if they were ones in which the parties have a veto over who is empowered to adjudicate. First, making disqualification too easy can disrupt the assignment of work within a tribunal and cause inconvenience to other parties. Second, it can facilitate challenges that are made for tactical reasons by parties who have an incentive to prefer delay. Finally, it can be used in discriminatory ways that undermine efforts to enhance diversity in tribunal membership. There is, for example, some evidence to suggest that peremptory challenges to American judges are sometimes used for racially discriminatory reasons, typically to disqualify judges who are members of minority groups.³³ This is not to say that it is always easy to separate the challenges to impartiality that we ought to accept from the ones that we ought to reject, but I am not convinced that enhancing our sensitivity to the views of parties about what should and should not be accepted as a basis for a successful challenge to an adjudicator's impartiality is always a productive way to draw that distinction.

Finally, my sense is that Canadian law is a bit more ambivalent about the principle of efficacy than the Report suggests is appropriate, though the Report's comments in this area may be more aspirational than a reflection of the current state of the law on this issue in Australia and New Zealand. At various times Canadian legislation has made provision for appeals to Cabinet from decisions of regulatory tribunals, though these have been criticized

authcheckdam.pdf>; Debra Lyn Bassett, "Judicial Disqualification in the Federal Appellate Courts" (2002) 87 *Iowa L Rev* 1213.

³³ See Nancy J. King, "Batson for the Bench? Regulating Peremptory Challenge of Judges" (1998), 73 *Chicago-Kent L. Rev.* 509.

by commentators and in recent years have tended to fall into disfavour.³⁴ We also have examples of statutes that authorize ministers to issue policy guidelines. There is sometimes a question about whether what the legislation has authorized are true guidelines, which require the preservation of an element of residual discretion on the part of the adjudicator,³⁵ or a form of delegated legislation by the minister, in which case the “guideline” is treated as if it were a regulation that must be applied by the tribunal as long as it is couched in general terms and falls within the scope of the authority granted to the minister.³⁶

The key issue for us tends to be whether the scheme of executive review or rule or guideline making is transparent on the face of the legislation. In other words, we object to secret interference in tribunal decisions by executive actors but Canadian law does not object as a matter of general principle to legislation that reserves to executive actors the right to issue guidance in the form of rules or guidelines or to make ultimate decisions. An interesting recent example can be found in the 2012 amendments to the *National Energy Board Act*³⁷ that change the Board’s role in relation to the authorization of oil and gas pipeline proposals from making decisions to giving advice to the Minister. Some critics suggest that this undermines the role of the Board as an independent regulator. On the other hand, other commentators suggest that the new regime enables the Board to give expert advice on the costs, benefits and risks associated with pipeline construction and to give expert guidance on the technical aspects of routing and safety conditions, while placing ultimate authority and accountability for important questions of public policy in the hands of the Minister.³⁸

Conclusion

There are undoubtedly other aspects of the Report that we could productively discuss and I would be happy to explore areas that are of interest to you but that I have not touched on in my remarks. That said, I think it would be useful for me to draw my remarks to a close and to

³⁴ See Murray Rankin, “The Cabinet and the Agencies: Toward Accountability in British Columbia” (1985), 19 *University of British Columbia Law Review* 25.

³⁵ See *Canada (Attorney General) v. Mavi*, [2011] 2 SCR 504, 2011 SCC 30 at paras. 65-67; *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2.

³⁶ See *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 SCR 884 at paras. 33-38 and 44-50.

³⁷ R.S.C. 1985, c. N-7, as amended by the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c 19.

³⁸ See the discussion in Rowland Harrison, “Tribunal Independence: In Quest of a New Model” (2014) 2 *Energy Regulation Quarterly*, online at <http://www.energyregulationquarterly.ca/articles/tribunal-independence-in-quest-of-a-new-model#sthash.nKclcF3P.dpbs>.

open the floor to questions, comments and discussion. I would like to thank you for your attention, and to take this opportunity to congratulate COAT once again on undertaking this project and sponsoring the production of such a useful and stimulating report.