THE INDEPENDENCE OF ADMINISTRATIVE TRIBUNALS: CHECKING OUT THE ELEPHANT

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Recently the courts have begun to define in greater detail the applicability and content of the notion of independence of the judiciary, in part as a result of the Charter guarantee of "... a fair and public hearing by an independent and impartial tribunal"[1] and other legal rights guaranteed by the Charter, including those implied by section 7. The independence of the judiciary as a concept in English law in part arose as a reaction to the growth of a competing system of administrative law.[2] At the basis of the independence of the judiciary is the role of the judiciary as one of the three key elements in the effective balancing of governmental power in a democratic society.[3] This short paper considers the somewhat extensive analysis and commentary on the independence of tribunals and agencies found in numerous studies, reports and articles in the context of recent judicial decisions which relate the independence of tribunals and that of the judiciary. On the basis of this analysis it appears that the current cautious functionalism and pragmatism of the courts respecting the independence of administrative tribunals appear to be justified and may point the way toward the most promising avenue for resolution of the difficult issues arising concerning the independence of administrative tribunals.

Following the chain of decisions commencing with the *N.B. Liquor* decision and most recently culminating in such decisions of the Supreme Court of Canada as those in *Paccar*, *P.S.A.C.* (#2), *Pezim*, and *C.B.C.* v. *Canada (Labour Relations Board)*[4], it has become evident that where considerations of function and

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[1]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11(d) [hereinafter "the *Charter*"].

[2]The starting point most often cited is the *Act of Settlement*, 12 & 13 William III, c.2. (1791). See Holdsworth, *Sources and Literature of English Law* (Oxford: Clarendon Press, 1925) at 66.

[3]The others being the Legislature and the Executive, or sometimes "administrative", power. There are numerous discussions to be found of the need to balance the Legislative, Executive and Judicial powers, but few consider the role of administrative agencies in this context. The most useful approach is almost certainly to leave undisturbed the symmetry of Montisquieu's trilogy and to define the status of administrative bodies in the context of their already somewhat fixed points of reference. A discussion which touches the more general issue of how administrative agencies fit in the balance of powers may be found at *Parliament Administrative Agencies*, Law Reform Commission of Canada, 1982, Minister of Supply and Services, at 19-20.

[4]*C.U.P.E.* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227; 97 D.L.R. (3d) 417; *C.A.I.M.A.W., Local 14* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; 62 D.L.R. (4th) 437; *Canada (A.G.)* v. *Public Service Alliance of Canada (P.S.A.C. #2)*, [1993] 1 S.C.R. 941; 11 Admin. L.R. (2d) 59; *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canadian Broadcasting Corporation* v. *Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. See also W. MacLauchlan, "Reconciling

pragmatism are combined with an apt privative clause and a legislative intent that the administrative agency be the final decision maker, courts will defer to the decisions of administrative tribunals, even those with which they may disagree. The courts prefer to search for the intent of the legislature in order to identify the function to be performed by administrative tribunals and agencies and to pragmatically defer to the tribunal, allowing the tribunal to decide issues within its area of expertise in accordance with legislature intent. The intent of the legislature, in consideration of the specific situation being considered, and taking account of broader legal standards, is the most appropriate indicator of the measure of independence thought to be accorded a tribunal as well as of the degree to which a tribunal should be accorded deference.

With the maturing of the notion of deference it is becoming both more important and somewhat easier to consider the issue of tribunal independence. Deference requires that courts be pragmatic and carefully consider the function being performed by the tribunal before substituting their view for that of the tribunal. Tribunal decisions are, it now appears, to be treated as final, aside from questions of jurisdiction, natural justice, fairness, the applicability of the Charter or an incorrect interpretation by the tribunal of a law outside the core of its jurisdiction. Subject to these exceptions, tribunal decisions may be reviewable only upon patent unreasonableness.[5] Concern must then arise whether the institutional and other safeguards of the independence of such decision makers, whose decisions may not be reviewable, are fully adequate. If administrative tribunals to an increasing extent are to function as a single opportunity for parties to have their issues of concern considered, then this must occur in an appropriate institutional context where the tribunal's independence will sometimes be of critical importance. At the same time, it should be remembered that the independence of the tribunal decision maker, unlike that of the courts, does not serve a fundamental constitutional purpose. The administrative decision maker, as a general rule, need only be sufficiently independent to serve its statutory functions and purposes. A tribunal must act fully in accord with the statutory purpose for which it was established. This can mean different standards for different tribunals. Court-like independence based upon constitutional considerations is something different from the requirement that decisions be taken "at arm's length". The function of the tribunal will be critical, and it is clear that the integrity of adjudicative functions, in particular, will require particular attention, but the notion

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Curial Deference With A Functional Approach In Substantive And Procedural Judicial Review", (1993), 6 Cdn. J. of Admin. Law & Pract. 1.

[5]The choice of "may" is not accidental. Given the necessary fluidity inherent in the notion of jurisdiction and the continuing development and to an extent the blending of the notions of natural justice and fairness, for instance, it is not always easy to draw necessary distinctions and to assert with certainty what is or is not reviewable.

of independence should reflect a tribunal's real functions and activities and should not become overburdened by a facile analogy with the independence of the courts.

An examination of recent considerations of what an appropriate institutional context for administrative decision makers should entail discloses numerous suggestions that the institutional context of administrative tribunals does not meet appropriate standards.[6] At the same time, as mentioned above, issues of tribunal independence are of late more frequently surfacing in the courts. The general and theoretical studies of the issue tend to identify a need, or at least to suggest merit, in substantial reform directed at guaranteeing, improving or maintaining tribunal independence. At the same time, as the jurisprudence respecting the independence of tribunals develops in the courts it appears that the courts are cautiously and pragmatically applying judicial standards to the tribunal context.[7]

It is now evident that the general standards outlined by *Valenté* and subsequent decisions are providing a general framework for the assessment of the independence provided by the institutional setting within which decisions are being made by tribunals.[8] However, the courts appear to diverge from the approach of

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[6]The most recent, specific, thorough and direct consideration of the issue of tribunal independence is that of the *Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada* of September 1990 [hereinafter "the *C.B.A. Report*"]. The *C.B.A. Report*, which contains 75 separate recommendations, summarizes them as follows at p. 158-9:

> Essentially, our recommendations are to establish:
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> - A comprehensive and systematic system of appointments to independent decision-making bodies which will prefer qualifications and experience over political patronage.
> - Legislative guarantees of independence for tribunal and agency members in relation to such matters as tenure, remuneration and immunity.
> - Accountability of members for incompetence, lack of diligence or misconduct through discipline or removal.
> - Accountability of tribunals for the expeditious and efficient conduct of its business in serving the public.
> - Protection of economic-regulatory agencies from direct government interference in their independent functions.

[7]See: *Valenté* v. *The Queen* [1985] 2 S.C.R. 673 [hereinafter *Valenté*]; *MacKeigan* v. *Hickman* [1989] 2 S.C.R. 796; *R.* v. *Lippé* [1991] 2 S.C.R. 114; *Pearlman* v. *Manitoba Law Society*, [1991] 2 S.C.R. 869; *R.* v. *Généreux*, (1992) 1 S.C.R. 259; *Ruffo* v. *Québec (Conseil de la magistrature)* [1995] S.C.J. No. 100. See also discussion, P. Hogg, *Constitutional Law of Canada* (3rd ed.), (1992) at 169-173.

[8]See *Matsqui Indian Band and Matsqui Indian Band Council (Appellants)* v. *Canadian Pacific Limited and United Communications Inc. (Respondents) and Indian Taxation Advisory Board (Intervener)* (1995), 177 N.R. 325 (S.C.C.) [hereinafter *Matsqui*] has certainly directed attention squarely on this issue. In that decision Lamer, J. speaking for himself and Cory, J. observed, (at p. 374 N.R., para. 75):

> I begin my analysis of the institutional independence issue by observing that the ruling of this court in *Valenté*, *supra*, provides guidance in assessing the independence of an administrative tribunal. There, LeDain, J. considered whether provincial court judges were independent. He

the analytical reports, and while they use standards of judicial independence as a reference are hesitant to see judicial standards of institutional independence mechanically transferred from the courts to tribunals. There is, thus, a recognition that this approach does not solve all the problems. The use of judicial standards as a reference is unobjectionable, but the variety of the functions of administrative tribunals suggests a need for caution.[9] Administrative tribunals and agencies can fall on the judicial side of the division of powers and their adjudicative functions can be closely analogous to those of the courts. However, tribunals can be hybrids and their adjudicative functions can be moderated by or combined in likely and unlikely ways with administrative and even legislative functions. It is the disregard of the notion of separation of powers that makes the analysis of issues of independence relating to administrative tribunals so difficult and generalizations about them so difficult.[10] The definition of what is an appropriate relationship and what is the appropriate level of independence for a legislatively created hybrid may be an altogether different issue from the task of defining and maintaining the role of the judiciary.

The balancing of powers inherent in the notion of the separation of powers is a key concept when issues of judicial independence arise.[11] Judicial independence

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pointed to three factors which must be satisfied in order for independence to be established: security of tenure, security of remuneration and administrative control.

Although only Cory, J. fully supported the reasons of Lamer, J. on this point, the reasons of Sopinka, J. with whom L. Heureux-Dubé, Gonthier and Iacobucci, J.J. concurred appear generally to be in agreement with this observation.

[9]Hence the title reference to the elusive elephant. As we grope toward an understanding of the role, function and pragmatic use of administrative tribunals we are like the blind men who conclude in turn that an elephant *is very like a rope, a wall, etc.* While there are constitutional overtones, which shall be discussed below, the exercise of classifying the elephant is at base one of statutory interpretation. Because of the use of the term "court of competent jurisdiction" in s. 24 of the *Charter* it is becoming obvious that for *Charter* purposes some tribunals can approach the status of the courts. Some tribunals do, see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 967; other tribunals do not, see *Mooring v. Canada (National Parole Board)* [1996] 1 S.C.R. 75. In this context it is now easy to conceive that tribunals are on a continuum and will range from those clearly authorized to apply the *Charter*, to those clearly not so authorized. Some will fall nearer to the line. The situation is similar with respect to deference issues, see *supra* note 4.

[10]The position is generally taken that, "There is no general 'separation of powers' in the *Constitution Act, 1867*", Hogg, *supra* note 7 at 184. However, if the *Constitution Act, 1867* is examined it becomes apparent that the *concept* of separation of powers to a very significant extent led to the manner in which the Act of 1867 was structured. One need only regard the parts into which it is divided. The first seven of these are, I. Preliminary, II. Union, III. Executive Power, IV. Legislative Power, V. Provincial Constitutions, VI. Distribution of Legislative powers, VII. Judicature.

[11]See Reference *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; 123 D.L.R. (3d) 554; 37 N.R. 158: *Crevier* v. *A.-G. of Québec*, [1981] 2 S.C.R. 220; 127 D.L.R. (3d) 1; 38 N.R. 541; Reference *Re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. 13 at para. 56.

is the foundation of the rule of law itself.[12] Caution, however, should be exercised in equating the independence of administrative tribunals with that of the judiciary. It is important to recall that no provincially appointed administrative tribunal may exercise judicial functions that broadly conform to those of the superior courts except to a circumscribed extent and even then tribunals are subject to the supervising jurisdiction of the superior courts.[13] The theoretical difference between federal and provincial tribunals should not be lost sight of in transferring federal standards of independence to the provincial sphere.

Nevertheless the large number of reports and studies which to a significant degree touch upon and analyze the independence of tribunals,[14] particularly with respect to the adjudicative functions of tribunals, often take judicial standards of independence, with all that this implies in respect of appointment, tenure, remuneration and institutional autonomy as a point of reference. Few of these reports have been implemented because their conceptual and theoretical analysis is based upon a somewhat strained analogy between administrative tribunals and the courts.[15] The pragmatic and functional approach toward which the courts themselves are evolving in other situations where the status and situation of administrative tribunals is at issue is greatly to be preferred.

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[12]*MacMillan Bloedel Ltd.* v. *Simpson* [1995] S.C.J. 101; [1996] 2 W.W.R. 1 per Lamer, J. at para. 37-38; Reference *Re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252 per Lamer J. at 264.

[13]*Supra* note 10. It is also of importance to note that unless federally established administrative tribunals meet judicial standards of independence they too may be functionally circumscribed in the same way. *Couture (Alex) Inc. et autres* v. *Canada (A.G.)*, (1991), 41 Q.-A.-C. 1; 83 D.L.R. (4th) 577 (C.A.), leave to appeal refused, (1992), 91 D.L.R. (4th) vii.

[14]The numerous reports, studies and such are catalogued and analyzed by M. Priest, "Structure and Accountability of Administrative Agencies" (1992), L.S.U.C. Special Lectures (Administrative Law) 11. Her summary of recommendations aimed at administrative tribunals discloses many aimed at Appointments and Tenure, Training, the establishment of Tribunal Councils, controls or reviews by Cabinet and Policy Directives, etc.

[15]A. Roman, commenting on M. Priest's analysis, indicates in "Structure and Accountability of Administrative Agencies" (1992), L.S.U.C. Special Lectures (Administrative Law) 63 at 64:

> After recovering from the surprise of the sheer number and volume of studies, I began to reflect on what all these studies had accomplished. Plus ça change, plus c'est la même chose. It is astonishing how little improvement we have actually seen despite all these studies... There must be a reason why the structure and accountability of administrative tribunals has changed so little in decades.

See also G. M. Thompson, "Agencies, Board and Commissions: Accountability and Independence" (1992), L.S.U.C. Special Lectures (Administrative Law) 93 at 93:

> Let me begin by stating that I support much that is written in Margot Priest's paper. At a minimum it demonstrates that there should be no more studies dealing with the structure and accountability of administrative tribunals until there has been at least a modest increase in the implementation of past studies.

It may be useful at this point to consider the question of the extent to which an administrative tribunal should be independent from the legislature. Tribunals and agencies are generally thought of as the creatures and creations of the legislature and may be altered by and required to report to them, subject to reasonable manner and form requirements, generally designed to keep legislators at arms length.[16] Perhaps the only point to make here is that there is an extensive body of writing on the issue much of which deplores any non arm's length relationship and that a range of legislative and administrative mechanisms aimed at preserving the independence or autonomy of the relationship between the legislature and tribunals have been suggested.[17]

With respect to the executive, the relationship of administrative agencies has never been a particularly comfortable one, and the issue of actual or possible interference with adjudicative functions has been of particular sensitivity. It is suggested that the analogy with the courts is particularly useful in considering the relation of tribunals to the executive and is of most value in considering and assessing executive intrusion into the performance of the adjudicative function. At the same time it must be recognized that in this as in most areas of legal concern the range of action lies in a continuum ranging from indirect influence to direct interference [18] and there is a recognition that there is a broad range of tribunal functions as well.[19]

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[16]On this issue two papers of the Law Reform Commission of Canada have been particularly thoughtful. The first is the 1979 Study Paper "Political Control of Independent Administrative Agencies", Law Reform Commission of Canada, Minister of Supply and Services Canada. The second was the 1982 Paper, "Parliament and Administrative Agencies", 1982 Law Reform Commission of Canada, Minister of Supply and Services Canada. M. Priest's article, *supra*, note 14 contains the exhaustive list.

[17]Of course a direct interference by an individual legislator with a tribunal's adjudicative function is generally considered a breach of the arm's length rule sufficient to merit the legislator's resignation.

[18]See the *C.B.A. Report*, *supra* note 6, and the reports cited therein as well as the Priest article, *supra* note 14, most of which address at least one aspect of the tribunal independence issue. The categorization of tribunals has been particularly problematic and the *C.B.A. Report* proposes a two category breakdown. The Law Report Commission of Canada, Working Paper 25, *Independent Administrative Agencies*, Ottawa, 1980, (L.R.C., W.P. 25); Law Report Commission of Canada, *Report on Independent Administrative Agencies*, Report 26 Ottawa, 1985 (L.R.C., Rpt. 26); *Directions; Review of Ontario's Regulatory Agencies*, Toronto, Queen's Printer, 1989 (MacCauley Report); Rapport du groupe de travail sur les tribunaux administratifs, *Les tribunaux administratifs*: l'heure est aux décisions, Québec: Government of Québec, 1987, (Ouellette Report) all concern themselves with the issue to a greater or lesser extent and the functions of the tribunal always appear to be key.

[19]In the 1982 Law Reform Commission Study Paper, "Parliament and Administrative Agencies" there is a listing of agency functions and roles including Assistant, Substantive Expert, Procedural Expert, Manager, Adviser and Investigator, Adjudicator, Arbitrator, Determination Maker, Rule Maker, Policy Maker, Intermediary and Insulator. This probably represents a good beginning.

Administrative tribunals continue to present an attractive alternative to the courts because of considerations of speed, flexibility and cost. Governments continue to create them and to assign to them a dispute resolution role in the justice system. Tribunals can allow new and flexible approaches, new remedies and new perspectives on old problems. In a world of increasing specialization, they promote enhanced expertise and focus. As the creativity of legislators continues to expand their use and their role, cautious attention must continue to be directed to issues of tribunal independence and a pragmatic approach which takes account of the specific functions being performed and avoids entrenched positions based on concepts seems most appropriate. Even the executive may have an appropriate relationship with tribunals in respect of certain tribunal functions and with appropriate safeguards.

A pragmatic approach is particularly important in consideration of the caseload pressures on the court system and continued fiscal pressures on governments. There is a danger that a utopian view of administrative tribunals would see the judicial model of independence used as template for the stamping out of tribunal structures modelled upon those of the courts, with judicial standards of pay, tenure, independence of administrative control, training, discipline and appointments as well as with supporting structures modelled upon those of the judiciary. The *C.B.A. Report*, for instance, suggests the establishment of a Commissioner for Federal Independent Tribunals and Agencies as well as a Council of Tribunal and Agency Heads, modelled, it is presumed, upon the Commissioner for Federal Judicial Affairs and Canadian Judicial Council.[20] Few commentators considering such recommendations conceptually would disagree with them. And yet, very little actually gets done. It is useful to consider the reasons why.

Most of the various reports consider issues of tribunal independence from a generalized, and theoretical perspective. From such a perspective, conclusions that administrative tribunals lack independence can and often are relatively easily drawn. This is particularly so because of the tendency to view judicial standards as the point of reference, whether these be the judicial standards of pay and related benefits, of tenure, of administrative structures or of discipline and appointment. The members of tribunals themselves most often enthusiastically support the judicial analogy with its promise of enhanced prestige and improved working conditions. Legislators and bureaucrats, on the other hand, with an eye on the costs and inconvenience of the judicialized model are more sceptical.

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[20] *Supra* note 6, recommendations 8-13 at 51-52. This is not an isolated recommendation (it, or similar recommendations are common to many of the reports) and is based upon a real need for some authority with a mandate to oversee the systematic and disciplined organization and structuring of tribunals as well as toward the functions of the organized discipline and training of tribunal members and the monitoring of their activities. What is of concern is that the mechanism to be installed reflect what tribunals do and not what the courts do.

The issue of judicial salaries and benefits, provides a useful example. The standards of pay and benefits of the federally appointed judiciary and the administrative mechanisms which play a role in the administration and support of judicial remuneration are not at present sustainable if they are to be applied to all administrative decision makers. While federal levels of pay and benefits and a Triennial Commission to periodically review and recommend appropriate changes of the salaries and benefits of those appointed to administrative bodies[21] would in probability be welcomed by the vast majority of both federal and provincial administrative decision makers, it is not likely that such a ideal will be reached in the short term. The achievement of such a high standard would be incompatible with the level of resources of most of the governments concerned. At the same time, circumstances are conceivable where levels of remuneration might be so inadequate or subject to manipulation by a party of interest that the independence of the tribunal might be called into question by them. It is useful for the purpose of illustration to consider how such a manipulation might be called into question and challenged.

Despite the repeated recommendations for their creation, as yet no independent statutory bodies have been created in Canada with responsibility for the oversight of the process and independence of administrative tribunals and agencies. The Law Reform Commission of Canada itself has been abolished and despite hope offered at the political level for its reinstitution remains inactive to date. In the absence of legislative measures, at present the best protection seems to lie in a resort to judicial processes. The question that must be addressed is whether these processes provide adequately for the independence of administrative tribunals and their processes?

As a starting point, although our domestic legal processes may not be said to be grounded directly upon International Covenants, it is comforting that the importance of the guarantee of a competent independent and impartial tribunal established by law has now become an internationally recognized component in the legal system of democratic societies.[22] Domestically, in Canada, our first reflex is to seek support from the *Charter* particularly from the requirement that life, liberty and security of the person, as guaranteed by s. 7, shall only be abridged in

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[21]As is the case in respect of the federally appointed judiciary. See, for example, *Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits*, (Minister of Supply and Services Canada, 1993), submitted to the Minister of Justice of Canada 31 March 1993.

[22]The International Covenant on Civil and Political Rights for example leaves little doubt. Article 14 indicates:

> 14-1 All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law....

accordance with the standards of fundamental justice, and the provisions of section 11(d) guaranteeing the right in the circumstances set out therein to a fair and public hearing by an independent and impartial tribunal. While future cases may expand the principles of fundamental justice to incorporate in civil matters the sort of guarantees set out in international covenants, the development of case authority to date has tended to contract rather than to expand the use of the *Charter* as an instrument underpinning the legal guarantees of the independence of administrative tribunals.[23] In this respect it should not be forgotten that the *Canadian Bill of Rights* does provide a somewhat broader basis than does the *Charter* for the assertion of the rights of an individual or of a corporate entity wishing to assert that rights to an independent and impartial tribunal are in some way being compromised.[24]

Despite the fact that s. 7 of the *Charter* may not be available in all cases, the *Ruffo* decision in the Supreme Court of Canada[25] makes it clear that the principles of fundamental justice protected by s. 7 of the *Charter* guarantee the right to have one's rights determined by an independent and impartial tribunal wherever these rights do in fact involve issues of life, liberty or security of the person. Not only do the guaranteed rights include the right to a decision maker which is both independent and impartial, but the decision in *Ruffo* makes it clear as well that the test to be applied with respect to both impartiality and independence will be not only subjective independence but objective independence as well.

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[23]Such cases as *R.* v. *Wigglesworth* [1987] 2 S.C.R. 541 which indicated that disciplinary and regulatory proceedings may be outside the scope of section 11(d), and *Irwin Toy* v. *Quebec* [1989] 1 S.C.R. 927 and *British Columbia (Securities Commission)* v. *Branch* which made it clear that the provisions of s. 7 of the *Charter* do not apply to corporations have tended to contract the applicability of the *Charter* to administrative proceedings.

[24]*Canadian Bill of Rights*, Stats. Can. 1960, c.44, section 2(e):

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to...
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> (e) 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;...

The importance of this additional protection is that although life, liberty, or security of the person are less likely to be directly involved in proceedings before administrative tribunals, and property rights may be protected by section 2(e), additionally while the protection of Section 7 of the *Charter* may be denied to a corporation that of Section 2(e) may be available.

[25]*Supra* note 7.

In *Ruffo*, Gonthier, J., speaking for himself, LaForest, l'Heureux-Dubé, Cory, MacLachlin and Iacobucci, outlined the modern test for tribunal independence where section 7 of the *Charter* is applicable:

> The objective status of the tribunal can be as relevant for the 'impartiality' requirement as it is for 'independence'. Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on the institutional level, the requirement of impartiality is not met. As this Court stated *Valenté, supra*, the appearance of impartiality is important for public confidence in the system ... [26]

Gonthier, J., indicated that the test to be applied is that established in *Committee for Justice and Liberty v. National Energy Board* where de Grandpré indicated:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude ....[27]

In *Ruffo* the Supreme Court of Canada relied on the *Charter*. However, because of the limitation that s. 7 of the *Charter* only applies with respect to issues where life, liberty or security of the person are at issue, and the additional limitation that the *Charter* is not always available to corporations asserting their rights, the *Charter* may not always apply to situations where concerns about the independence or impartiality of a tribunal arise.

It is suggested that because of the decision of the Supreme Court of Canada in *Matsqui Indian Band et al.* v. *Canadian Pacific Limited*[28] even in such circumstances situations may not materially change. This is because of the applicability of the rules of natural justice including the right to an unbiased tribunal. While the *Charter* may not apply to many tribunals the rules of natural justice almost certainly will, if adjudicative functions are exercised. While *Matsqui* does not represent an unequivocal and unanimous decision of the Supreme Court of Canada, it does make it clear that included among the principles of natural justice to be applied to the situation of tribunals is the notion of bias and that this notion, even in the tribunal context, includes guarantees of tribunal independence

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[26] *Ibid.* at para. 44.

[27] [1978] 1 S.C.R. 369 at 394.

[28] *Supra* note 8.

and impartiality along the lines set out in the *Valenté* case where the tribunal is functioning in an adjudicative fashion in determining the rights of parties.

The words of Mr. Justice Lamer gave particular heart.

> I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valenté* are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted...[29]

Lamer, J., gives further assistance in determining how the principles of *Valenté* should be applied in the tribunal context further on. He indicates:

> Therefore, while administrative tribunals are subject to the *Valenté* principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.
> In some cases a high level of independence will be required. For example, where the decisions of a tribunal affect the security of the person of a party (such as the immigration adjudicators in *Mohammed, supra*), a more strict application of the Valenté principles may be warranted. In this case we are dealing with an administrative tribunal adjudicating disputes relating to the assessment of property taxes. In my view, this is a case where a more flexible approach is clearly warranted.
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> I would therefore apply this approach to the question of whether the members of the appellants appeal tribunals are sufficiently independent. The Valenté principles must be considered in the light of the nature of the appeal tribunals themselves, the interests at stake, and other indices of independence, in order to determine whether a reasonable and right minded person, viewing the whole procedure set out in the assessment by-laws, would have a reasonable apprehension of bias on the basis that the members of the appeal tribunals are not independent.[30]

The Supreme Court, as was noted above, was not unanimous in the reasons for its decision in the *Matsqui* case. Because the matters at issue came before the Supreme Court of Canada on appeal from a judicial review application in the Federal Court Trial Division, the substantial minority decision written by Sopinka,

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[29] *Ibid.* at para. 80.

[30] *Ibid.* at para. 83.

J. did not find it necessary to set aside the decision of the Appeal Tribunal on the basis of bias or lack of independence in the Tribunal.

The decision of Sopinka J. did, however, indicate substantial support for the statement of principle of the Chief Justice. Mr. Justice Sopinka indicated:

> I agree with the Chief Justice that the *Valenté, supra*, principles are to be applied in the context of the test that applies in determining impartiality, that is, whether a reasonable and right minded person would have a reasonable apprehension of bias. I also agree that the hypothetical reasonable, right minded person must view the matter on the basis of being provided with the relevant information.[31]

Mr. Justice Sopinka went on to say:

> The difference between us in this regard, while the Chief Justice would limit the information to the procedure set out in the by-laws, I would defer application of the test so that the reasonable person will have the benefit of knowing how the tribunal operates in actual practice. That the principle of natural justice are flexible and must be viewed in their contextual setting has become almost a trite observation...[32]

Finally, Mr. Justice Sopinka quoted de Grandpré, J.'s decision in *Committee for Justice and Liberty v. National Energy Board*:

> The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, Administrative Law and Practice, 1971, at page 220:
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> > "[T]ribunals" is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.[33]

It is submitted that the decisions of Lamer and Sopinka in the *Matsqui* case say a great deal of what needs to be said about the independence of administrative tribunals. The independence issue, like those of judicial review and the capacity of tribunals to apply the *Charter*, must be approached pragmatically and with a view to their functions. The first difficulty encountered in attempting to outline general principles applicable to administrative tribunals is that they simply are not all the same. As much as we try to strive to develop ironclad categories for our

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[31] *Ibid.* at para. 145.

[32] *Ibid.* at para. 146.

[33] *Supra*, note 27 at 395. The same observation and the same difficulty arises over and over again. Not all tribunals are the same. A useful discussion of the difficulty in establishing a conceptual framework to deal with tribunals is set in the *C.B.A. Report, supra* note 6 at 38-40.

administrative agencies and tribunals, the tribunals themselves – adaptable as they are to differing particular and peculiar circumstance – have the capacity to evade and defy categorisation. In the context of judicial review and that of the application of the *Charter of Rights* we have learned that tribunals do different things, that they range on a continuum and that the content to be given to their insulation from judicial review or the content to be given to their capacity to apply the *Charter* may differ substantially. The particular context of the tribunal, its specific circumstances and other specific indicia including how it actually functions must all be taken into consideration. It is suggested that the *Matsqui* case represents the beginning of the application of this recognition to the issue of tribunal independence.

There may simply be no escape from this result and the purity of the conceptual framework it seems must always yield to the reality and peculiarity of circumstance. When confronted by the reality of the differences in tribunals the law cannot take refuge in the generality of principle but must find its reference in the reasonable right thinking person. We know if the elephant is independent when we actually see it move. This is why attempts at reform have been so infrequently fruitful, because in the realm of tribunals and agencies the vessel of theory all too often finds itself grounded on the shoals of practicality and functionality. There are however some useful markers to guide the reasonable person amongst the shoals.

The foremost of these is that as the function of the tribunal approaches the court-like, protections of independence approaching the judicial become more and more appropriate. While this is somewhat less relevant for provincial tribunals, which cannot be directly given the powers of courts even if they may in context exercise judicial powers and functions, it is clear that the function of deciding upon the rights of parties and individual cases carries with it a heightened requirement for independence and impartiality. The sign-post of the *Valenté* decision and the judicial standards inherent in it are an important and almost directly applicable standard in respect of such tribunals.

The functional situation of a tribunal and practical considerations may apply to moderate the stringency of the judicial standard in many circumstances. However, the emerging jurisprudence, certainly that which applies the notion of bias and the other rules of natural justice, appears to identify parameters within which the independence of the tribunal if truly and substantially at hazard, may be addressed through the current and existing legal mechanisms. This applies whether or not the *Charter* directly applies because natural justice is a common law notion. A balancing of function and pragmatism together with a consideration of the interests at stake is obviously a part of the broader process. As the standards trend down toward the merely financial and proprietorial the standard to be applied may be correspondingly lessened. The interests of life, liberty and

security of the person will be entitled to the heightened protection of the *Charter* standards. Within the protection of the general common law and *Charter* standards the law, as it has done with respect to issues of deference and the ability to apply the *Charter*, once again seems to be working its way toward a pragmatic and flexible resolution of this issue.

Because tribunal independence is not a fundamental constitutional value, policy makers should be allowed to continue to use the flexibility of tribunals in a pragmatic fashion. A particular danger may be that the issue of tribunal independence or impartiality can sometimes become a screen for other issues of more practical concern to policy makers, to members of tribunals and those whose interests are at stake in tribunal proceedings.[34]

The careful considerations of the issue in the many Studies and Reports should not be ignored. There are many very important points made in these. Of particular importance is the observation made in the *Canadian Bar Association Report* that the most important guarantee of tribunal independence is the quality of tribunal decisions and the standards established to maintain the institutional and functional independence of the tribunals themselves. Independence is a two-sided coin and independence is likely to be greater where the capacity to be independent exists in the body which seeks it.

The refusal, through inaction, inattention, or indifference to implement the many proposals for reform should lend a cautionary note. It appears that no hard and fast categorisation of tribunals is likely to emerge to resolve all difficulties. Given the *Valenté* criteria, it is apparent that greater financial security, improved security of tenure and careful attention to institutional independence, or at least institutional autonomy, are more likely to produce an institutional and administrative structure which does not run afoul of reasonable standards of institutional independence. At the same time, the constitutional origins of these standards and the high values that they consequently represent need not always be transferred or implied into the tribunal context. The distinction between an agency or tribunal at arm's length and the independence of the judiciary should be kept to mind.

The task of probing and testing the elephant should continue. The task of further defining and delimiting the level of independence that is appropriate for

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[34]In this respect it is useful to recall studies and considerations that reinforce the functional utility and importance of the standardization and unification of court systems and the tension between generalization and specialization. Tribunal members, one sometimes suspects, may be prepared to argue independence when at heart their concern may be judicial level salaries. The report prepared by Professor Carl Baar in 1991 for the Canadian Judicial Council, *One Trial Court: Possibilities and Limitations*, provides a useful introduction to the broader administrative considerations that argue against a uniform non-differentiated decision making structure.

tribunals at all levels must progress and the evolving judicial standards appear to present an appropriate instrument for measurement. However, in view of the proliferation of considerations of the relevant questions and issues and the lack of response, careful reflection should precede actual reform. In the final analysis, a consideration of the situation of each tribunal should pay attention to its actual requirement for independent decision making and this should match the purposes and functions of its statutory context. Tribunals should not be viewed as courts, but the legal community should be alert to ensure that they do have such independence as appropriately suits the pursuit of their varied purposes.