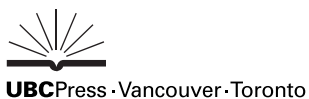


UNJUST BY DESIGN

Canada's Administrative Justice System

Ron Ellis



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Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

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Invitation to a Discussion

The author is hopeful that this book will provoke a serious debate within the legal profession, the administrative justice system, the executive and legislative branches of government, and perhaps within the public at large about the structures and quality of our administrative justice system – and also about the reforms proposed in this book. For the convenience of those who might wish to contribute to that debate, the author has organized an interactive website – administrativejusticereform.ca – and invites all interested parties to go there and talk to him and each other about these important issues. To facilitate free and frank discussions, the website will be structured to allow participants to elect to have their names held in confidence if they wish to do so.

Please note that the website is the author's undertaking and is separate from UBC Press's website.

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will find a full account of the McKenzie case in which I became involved as co-counsel, and of the influence that Mary and her case had on this book.

Two outstanding academics in the administrative law field read the book manuscript: David Mullan of Queen's University and Geneviève Cartier of the University of Sherbrooke. I thank them both for their important and constructive criticisms, comments, and questions. They would not want to be taken to have subscribed to all I have written, but the book is significantly better for their input.

I must also thank my family and friends who, aware of my interminable "book project," were always kind with their diplomatic inquiries and encouraging comment.

Finally, I need to acknowledge the kinship between the title of this book, *Unjust by Design*, and *Denial by Design*, the title of the 2001 report by Legal Aid Ontario's Income Security Advocacy Centre. That report is about the unfair bureaucratic obstacles facing applicants under the Ontario Disability Support Program, obstacles that were part of that program at that time. As the report indicates, it was researched and written, and presumably its title chosen, by John Fraser, Cynthia Wilkey, and JoAnne Frenschkowksi. The affinity between the two titles is based on more than just syntax. In the circumstances described in that report, the "denial" it references was "unjust." Thus, this book and that report are generically talking about the same thing: executive branch indifference to the principles of justice.

UNJUST BY DESIGN

Introduction

I begin with a story.

When I had been the chair of Ontario's Workers' Compensation Appeals Tribunal for a few years, a letter arrived on my desk from a mother living in a small Ontario town. The mother's young adult son had been seeking workers' compensation benefits for a major, disabling injury – benefits that would provide the income he could no longer earn for himself. Notwithstanding the seriousness of her son's injury, the Ontario Workers' Compensation Board had decided that the circumstances under which it had occurred did not bring the injury within the coverage of the *Workers' Compensation Act*; it had rejected his application. The Board's decision had been appealed to my Appeals Tribunal. A panel that I had assigned to hear the appeal had agreed with the Board. Her son's appeal had been rejected.

"Dear Mr. Ellis," the mother wrote, "I thought that as Chair of this so-called Tribunal you might want to see the enclosed." The "enclosed" was the last page of my Tribunal's decision in her son's appeal. The last line on that page read: "Appeal denied." Her son, the mother explained in her letter, had read the decision, gone out to the back shed, taken down the family shotgun, and killed himself. On the last page of the decision, below the words "Appeal denied," he had scrawled the words "Life denied." His mother had sent it to me in the blood-spattered condition in which she had found it.¹

The Administrative Justice System in Context

The “so-called Tribunal” the grieving mother held responsible for her son’s death is just one of hundreds of executive branch “administrative tribunals” to which Canadian legislatures have assigned the judicial branch function of making judicial decisions, decisions that are frequently of a life-altering nature. Currently, these tribunals are mainly referred to as “adjudicative tribunals” or “quasi-judicial tribunals,” but for reasons to be explained later I choose to call them “judicial tribunals.” Taken together, they add up to a surrogate system of justice – the Canadian administrative justice system – the system of justice that is the subject of this book.

This administrative justice system is the system to which Canadians are required to turn for the enforcement or vindication of their rights in a broad range of everyday matters. These matters currently include retirement pensions, disability pensions, veteran’s pensions, compensation for personal injuries arising from automobile accidents, compensation for workplace injuries, enforcement of human rights laws, involuntary incarceration of individuals in psychiatric institutions, enforced medical treatment and withdrawal of medical treatment, mental competence issues, parole eligibility, social welfare benefits, residential landlord and tenant issues, labour relations issues, employment standards, the conduct or competence of medical practitioners, the validity of doctors’ billings, access to assisted living accommodations, access to programs of special education, child and family services, compensation for victims of crime, immigration, asylum for refugees, employment insurance, cruelty to animals, compliance with building codes, and so on and so forth.

In any Canadian province, on any particular day, one will typically find over thirty executive branch judicial tribunals conducting hearings and exercising their specialized judicial functions. The total number of judicial decisions made by these tribunals across the country in the course of a year is unknown but is clearly very large indeed. In Ontario alone, for instance, one estimate puts the number of rights-related decisions by administrative tribunals at over a million each year.² In 2010, the Ontario Workplace Safety and Insurance Board dealt with a quarter of a million applications for the adjudication of new compensation claims, and the Landlord and Tenant Board dealt with 78,000 applications for the judicial determination of rights disputes between residential landlords and their tenants, a large proportion of which involved landlords applying for eviction orders.

Although the administrative justice system is the part of our justice system³ to which Canadians must now look for the recognition or vindication

of a majority of their everyday legal rights – the only justice system that most people are ever likely to encounter – it is, as a system, largely unknown. Lawyers, law professors, and judges know it, but even to them it presents an uncertain topography. It is an *ad hoc* system that has emerged over the past several decades as an unplanned consequence of the inexorable parade of new statutes creating important everyday rights and obligations in which the judicial function of adjudicating those rights and obligations has been routinely assigned not to the courts but to executive branch tribunals.

This uncertainty – even in the minds of academics, lawyers, and judges – about what the system consists of stems from the fact that Canada’s administrative law landscape is awash with bodies that are authorized by statute to exercise rights-determining functions, only some of which are judicial functions. Thus, the judicial tribunals that constitute the administrative justice system are to be found mixed in with an array of rights-determining bodies that may structurally resemble judicial tribunals, may exercise functions that are rather like those of judicial tribunals, and, most confusingly, are often called by the same names – tribunals, boards, commissions, committees, and so on. It is always a puzzle to distinguish one from the other and it has not helped that in the administrative law conversation in Canada – in our literature and jurisprudence – it has rarely been thought necessary to do so.

For purposes of this book, I divide the myriad of statutory, rights-determining bodies found in the modern Canadian polity into four groups: (1) executive branch administrative *justice* bodies, (2) executive branch regulatory bodies, (3) non-government regulatory bodies, and (4) non-government adjudicative bodies.

Administrative justice bodies are the executive branch, non-court judicial tribunals whose principal statutory assignment is the exercise of judicial functions. They are the core constituents of the administrative justice system and are the principal focus of this book. They are typically the judicial arms of the executive branch’s statutory rights enterprises. They have been known in the past as government “agencies,” but are now more commonly referred to as “tribunals.” As indicated above, in this book they will be called “judicial tribunals.” This group, of course, includes the adjudicator members of judicial tribunals. The prototypical examples of judicial tribunals are the workers’ compensation appeals tribunals.

Within this first group I also include the individuals appointed to government offices that exercise rights-determining functions that are in fact

properly judicial functions. Here I am thinking principally of public servants employed in a government department or ministry⁴ (including, perhaps in some instances, ministers themselves) to whose office a statutory provision may have assigned a rights-determining function that meets the definition of a judicial function. (As we will see, this definition includes, in part, the requirement that the rights-determining decision be a final decision – “final” in the sense that its conclusions concerning both facts and law cannot be appealed, as of right, to another judicial tribunal.)

In my view, the exercise of judicial functions of such final nature by public servants or cabinet ministers is neither compatible with the rule of law nor constitutionally permissible; where this has occurred, reforming the system will require these functions to be restructured. Fortunately, most of these in-house ministerial rights-determining functions are not judicial but only interim decision-making functions or administrative functions. The latter may often be of a “quasi-judicial” nature and so governed by the principles of procedural fairness (see below), but, as I will demonstrate in due course, a rights-determining function that is properly characterized as “quasi-judicial” is not a judicial function. (The differentiation of “quasi-judicial” administrative functions from “judicial” functions has in recent years been muted in the Supreme Court of Canada’s jurisprudence, but it is a difference that in my view is constitutionally essential. In later pages I will be addressing at length the definition of quasi-judicial administrative rights-determining functions, and the importance of maintaining the distinction between them and *judicial* rights-determining functions.⁵)

It is in the interest of completeness that I have noted the fact that in-house, ministerial rights-determining judicial functions are necessarily part of the administrative justice system, but in fact the exercise of such functions by public servants or ministers is rare.

The second of my four groups includes all government organizations that have been assigned regulatory functions. These functions are principally rights-determining functions of an administrative nature. Even when they are seen to be of a quasi-judicial nature, they remain fundamentally administrative in nature and are not part of the administrative justice system – not as that system is rationally conceived. These organizations are commonly referred to as “regulatory agencies” – a practice that I will follow – and prototypical examples are energy boards, securities commissions, the Canadian Radio-television and Telecommunications Commission (CRTC), and the like.

In this group of regulatory bodies, I also include the individuals appointed to government offices who have been assigned rights-determining

functions that are in fact properly regulatory functions. Here, as before, I have in mind public servants employed in a government ministry (including, in some instances, ministers themselves), to whose office a statutory provision may have assigned a rights-determining function of a regulatory nature. These functions may also often be of a quasi-judicial nature but they are not judicial functions and the individuals exercising them are not part of the administrative justice system.

Associated with this group of regulatory bodies is the important subcategory of functions often assigned to regulatory agencies that are in fact judicial functions, properly so called. In my view, these functions are, by definition, part of the administrative justice system and they present especially difficult issues that I will deal with later. I will refer to these functions as “adjunct” judicial functions.

My third group, the *non-government* rights-determining bodies, are bodies that are not executive branch organizations and whose statutory rights-determining functions are principally regulatory in nature. Examples are law society disciplinary tribunals, or bodies dealing with disciplinary issues or academic rights within the college and university communities. I will refer to the bodies in this group as non-government regulatory agencies. As with the executive branch regulatory agencies, one will find many of these agencies exercising adjunct judicial functions but I do not include these functions as part of the administrative justice system for the purposes of this book. To them, different arguments apply.

The fourth and final group, the *non-government* adjudicators, I also leave out of the frame as far as this book is concerned. Examples of these decision makers are grievance arbitrators appointed under collective bargaining agreements, and commercial arbitrators appointed pursuant to an arbitration act by the parties to a business dispute. In these cases, because the decision maker is chosen by agreement of the parties, the usual constitutional concerns about independence and impartiality of bodies exercising judicial functions are by and large answered.

This categorizing of bodies exercising statutory, rights-determining functions into four separate groups is, of course, anything but a scientific exercise. At the margins, it will often not be clear into which group a particular function or tribunal properly falls. Eventually, the lines of demarcation will have to be drawn through a case-by-case consideration of the fit of the applicable principles in the marginal cases; meanwhile, my analysis of those principles and their application will be focused on that core of tribunals that are beyond question judicial tribunals – executive branch

tribunals whose principal rights-determining function is obviously a judicial function.

To sum up, this book is about the executive branch's judicial tribunals and the administrative justice system of which they are the core components. This justice system looms over everyone's everyday life, waiting to be summoned to invasive action by the arrival of some exigent but everyday circumstance. Nevertheless, if one asks anyone who is not a lawyer about "judicial tribunals" and the "administrative justice system" one may expect only a blank stare. This is not surprising, since each judicial tribunal has a different appearance and a unique name, and none of them is actually called a "judicial tribunal." They are also easily confused with regulatory agencies; moreover, they are located in the executive branch of government, where no one should expect to find a judicial tribunal, much less a justice system.

The variability in the appearance and structure of judicial tribunals reflects the fact that there is no central design-coordination or any standard design principles or criteria, and the choice of names is purely arbitrary. Each tribunal is typically a one-off structure designed by the staff of the responsible portfolio ministry to reflect the particular political circumstances out of which the felt need for a judicial tribunal emerged in the first place. In these designs, the structural rule-of-law implications of the tribunal's role as an instrument of justice – as the surrogate for a court – have almost always been ignored.

That the design of each Canadian judicial tribunal is idiosyncratic and that their structures are, as we will see, typically unprincipled from a rule-of-law perspective is surprising enough, but even more remarkable is the fact that although their justice-system role is obvious as a matter of fact, as a matter of law their place in Canada's constitutional arrangements has yet to be determined.

Finally, since this book is most fundamentally about the rule of law in Canada, it is important to remind ourselves at the outset what the rule of law means. In its *Imperial Tobacco* decision⁶ in 2005, the Supreme Court defined the role of the rule of law in Canada's Constitution:

The rule of law is "a fundamental postulate of our constitutional structure" that lies "at the root of our system of government." It is expressly acknowledged by the preamble to the *Constitution Act, 1982*, and implicitly recognized in the preamble to the *Constitution Act, 1867* ...⁷

This Court has described the rule of law as embracing three principles. The first recognizes that "*the law is supreme over officials of the government*

as well as private individuals, and thereby *preclusive of the influence of arbitrary power*” ... The second “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” ... The third requires that “*the relationship between the state and the individual ... be regulated by law.*”⁸

My Own Experience of the Administrative Justice System

This book is in large measure a personal report from the trenches of the administrative justice system. It is, accordingly, important that I tell you something of my experience in those trenches – the experience that has provoked the writing of this book and that informs much of its content.

In the summer of 1997, my term as the chair of the Workers’ Compensation Appeals Tribunal to whom the grieving mother wrote her poignant letter came to an end. I resumed the labour arbitration practice that I had previously pursued on a part-time basis, and commenced, as well, something of a career as a critic of Canadian administrative justice.⁹ Six years later, I found myself enrolled in Osgoode Hall Law School’s graduate program studying for a doctorate. My subject: administrative justice.¹⁰

I entered the graduate program motivated by my long experience with the administrative justice system, of which the grieving mother’s blood-spattered missive was only the most wrenching part. I hoped that, in the academic environment of a PhD program, I might find my way to a coherent theory of administrative justice that would challenge the conventional wisdom that, in my view, supports an administrative justice system that, from a rule-of-law perspective, is truly beyond the pale.

Called to the Ontario bar in 1964, I had spent the first eleven years of my legal career with the Toronto law firm Osler Hoskin and Harcourt. I practised principally as a management labour lawyer, a practice that took me, as counsel, before the Ontario Labour Relations Board, very occasionally before the Ontario Workers’ Compensation Appeal Board (as it then was), and before various grievance arbitration boards. I was also an employer nominee on many of the latter boards. Then in 1975 I was appointed an associate professor of law at Osgoode Hall Law School. Of my seven years there, five were spent as the director and then co-director of Osgoode’s Parkdale Community Legal Services (Parkdale), a storefront poverty law clinic and clinical education program.

As the Parkdale clinic’s director, I was responsible for the appearances of the clinic’s law students on behalf of indigent clients before the numerous judicial tribunals that play such a critical role in the lives of the

disadvantaged. In Ontario at the time, these included the Social Assistance Review Board, the Refugee Advisory Board, the Immigration Appeal Board, the Pensions Appeal Board, Employment Standards Officers, Boards of Referees under the *Unemployment Insurance Act*, the Workers' Compensation Board and its Appeal Board, the Criminal Injuries Compensation Board, the various iterations of the residential tenant and landlord tribunal, the Ontario and National Parole Boards, the Ontario Legal Aid Plan, the Ontario Labour Relations Board and the Canada Labour Relations Board, various public housing officials, Children's Aid Societies, and so on. While teaching at the Law School, I also had the experience of *being* a tribunal, as a labour arbitrator from time to time and as the occasional chair of university adjudicative committees.

In 1981, I left the law school and joined the Law Society of Upper Canada as head of the Bar Admission Course and Director of Education, and in the spring of 1985, I was appointed the inaugural chair of Ontario's new Workers' Compensation Appeals Tribunal (which I will hereafter refer to as WCAT, although in 1997 it was renamed the "Workplace Safety and Insurance Appeals Tribunal") and embarked on my twelve-year career as an administrative justice insider.

WCAT was created as an independent, tripartite tribunal to hear appeals from the decisions of Ontario's Workers' Compensation Board (WCB – since 1997, the "Workplace Safety and Insurance Board").¹¹ WCAT opened its doors on 1 October 1985, and for eleven years and nine months – through a series of four three-year appointments – I was its chair and chief executive officer. At the request of the Mike Harris government, I left the position in June 1997, three months short of the expiration of my latest term.¹²

Before joining WCAT, my impression of the quality of Ontario's administrative justice system had been mixed. Both employers and unions and their counsel respected the Ontario Labour Relations Board for its independence, impartiality, fairness, and competence. But, on the other hand, the lawyers and students working in the Parkdale clinic encountered many marginally competent and biased tribunals, and they knew only too well what life-altering damage these were capable of inflicting. Indeed, from the Parkdale vantage point, it seemed that most judicial tribunals were like that. Capable and trusted tribunals like the Labour Relations Board and a handful of other "elite" tribunals appeared to be anomalous.

At WCAT, however, I saw from the inside what a properly structured judicial tribunal could do and be, and my experience there greatly deepened

my understanding of the administrative justice system generally. WCAT enjoyed a unique set of structural advantages – indeed, the proverbial “perfect storm” of structural advantages. And these advantages enabled it to become an exemplar of rule-of-law-compliant tribunal/government relationships, tribunal structural design, and administrative and operational practices.

I am confident that this claim is not contentious, and two particular “bookend” comments, one from 1990 and the other from 2008, are indicative. In 1989, the consulting firm of Coopers and Lybrand was commissioned by the Minister of Labour to review WCAT’s performance as part of the Minister’s “Green Paper” study of various aspects of the workers’ compensation system. Coopers’ 1990 report included this: “The Tribunal renders high-quality adjudicative decisions which are fair, balanced, consistent and fully-reasoned.”¹³ On 2 June 2008, the *Liversidge e-Letter* stated: “[T]he creation of the Appeals Tribunal in 1985, which for the ensuing 23 years delivered *the* archetypical standard of administrative justice in Ontario if not in Canada, was a leading edge and novel concept not that many years ago, that shook the Ontario workers’ compensation regime to its roots.”¹⁴

But, but – I can hear the question – what about the letter from the grieving mother to the “so-called Tribunal”? Good question. I did not, however, tell that story to point to a tribunal gone wrong. The son’s appeal had been given a fair hearing by a tribunal that was, as we shall see, as independent and impartial – as rule-of-law-compliant – as one could hope for, and, although no one can ever be satisfied that any adjudicative decision is right in any absolute sense, I was, and am, confident that this decision was, at least in law, correct. Certainly, it was a decision that would have withstood court scrutiny on judicial review. I told the story to make the point that what judicial tribunals do truly matters – as much as what courts do – and I wanted to make that point as clearly as possible at the outset.

I have cited WCAT’s exemplary status, and provided evidence in support of that status, to demonstrate that my experience of the administrative justice system during my twelve WCAT years was authentic and relevant. During those years, both as the management person responsible¹⁵ and as one of the tribunal’s adjudicators,¹⁶ I was immersed in the problems, challenges, and opportunities of a sizeable,¹⁷ capable, structurally principled, and eventually trusted administrative judicial tribunal.

My characterization of WCAT’s structural advantages as a perfect storm of advantages suggests something unique, but the advantages WCAT

enjoyed were unique, and unusual, only when compared with the structural, rule-of-law deficiencies with which most other administrative judicial tribunals were and are forced to cope.

One of WCAT's important advantages was having the Ontario Ministry of Labour as its "host ministry."¹⁸ Of all Ontario's host ministries, the Ministry of Labour's relationship with its tribunals appears to have been uniquely enlightened. Over its long history of dealing principally with the always prestigious but also politically sensitive Labour Relations Board, there had developed a culture of respectful attention. In such a culture, no person would be appointed as tribunal chair without the Deputy Minister being satisfied that the candidate was acceptable to both employers and unions; and no tribunal vice-chair¹⁹ would be appointed or, most importantly, reappointed without the tribunal chair's prior approval.

The ability to control appointments and reappointments is essential to a tribunal chair's management role and to a tribunal's institutional independence. Chairs known to have no say in their members' appointments, and expected to have little or no say in their reappointments, cannot win their members' allegiance or respect. Members who know they owe their appointment solely to their political connections bring to their work a sense of entitlement, and a sense of allegiance to those connections, that bodes ill for the culture of collegiality and allegiance to the tribunal and its goals and mission that an effective tribunal requires. Moreover, in a tribunal headed by such a chair, members faced with politically sensitive decisions will take no comfort from the chair's support and will know that if their decision makes the government or its friends unhappy, they will eventually have to face the government alone, typically when the expiration of their current appointment draws near. In view of these implications, one might have expected to find tribunal chairs typically empowered to control appointments and reappointments. But, no – the customary processes for appointment and reappointment of judicial tribunal adjudicators have historically excluded the chairs.²⁰ The chairs of tribunals hosted by the Ontario Labour Ministry were an exception. In that ministry, tribunal adjudicators always knew they owed their appointments to the tribunal chair and that if they performed to the chair's satisfaction – but only then – their reappointments were safe.

A second advantage of Ministry of Labour tribunals was that there was no limit on the number of reappointments. It was not unheard of for vice-chairs or members to retire twenty five years after their first appointment, having been appointed eight times to a series of three-year terms. This

absence of a cap on the number of years of service was exceptional. Traditionally, governments have capped the number of total years of tribunal service at six or ten. (Ontario has recently reaffirmed its commitment to a cap – now applicable to all tribunals, apparently including Ministry of Labour tribunals – of ten years, the same as the federal cap.)

WCAT was the beneficiary of all aspects of this special relationship between the Ministry of Labour and its tribunals.

WCAT was also uniquely placed to assert its independence. Created for the sole purpose of providing the independence notoriously missing from the workers' compensation system's traditional adjudicative structures, independence was acknowledged to be WCAT's *raison d'être*.

WCAT was created at the end of a turbulent political era in the workers' compensation system that culminated in Professor Paul Weiler's iconic review of a troubled system and his recognition of the pressing need for a final-level appeals tribunal independent of the WCB.²¹ WCAT became that tribunal – the independent, final adjudicator for which the injured worker organizations and unions had long fought and that Weiler had recommended. As a result, WCAT did not have to make the case for its independence nor, unlike most tribunals, did it have to deal with a government whose commitment to the tribunal's independence was merely rhetorical. For WCAT, independence was key; the government subscribed to it and the unions, injured workers' organizations, and legal clinics were all vigilant in ensuring that nothing was allowed to undermine it or give the appearance of doing so. WCAT became a truly independent judicial arm of the workers' compensation statutory rights enterprise, an enterprise that at the time employed some 3,000 people and processed approximately 450,000 new claims a year from workers employed by 155,000 Ontario employers.

One of the central needs of a statutory rights enterprise the size of the Ontario workers' compensation system, in which at the time nearly two thousand new claim files were opened every working day, is an efficient adjudicative strategy. Ascending levels of adjudication are required, with the first level focusing on screening out the obvious and routine. At this level, the goals have to be speed and low unit-expense – goals achievable only at the cost of quality and consistency. Large numbers of staff adjudicators managing large caseloads must be subject to rules and supervision that leave little room for discretion or independent judgment. Hearings as such are out of the question. At this level, efficiency is the priority, and to that priority the rule of law and the principles of natural justice must bend. In rule-of-law terms, however, this arrangement is acceptable provided the

expedient decision making is backed by subsequent levels of review opportunities that add up to a fair hearing.²²

The WCB's adjudication strategy involved four levels of decision making. All rejections of claims by claims adjudicators at the first level were automatically referred to a Claims Review Branch to be checked by senior claims adjudicators for errors before the decision was issued. After the decision was issued, either party – the worker or the employer – could appeal to an Appeal Adjudicator. The Appeal Adjudicators, who were also Board staff members, held *de novo* hearings²³ but were principally concerned with factual and medical issues. At this level, the “law” was not effectively an issue; everyone just “knew” the law. Typically, it was the worker who appealed, employers rarely participated, and lawyers tended not to be involved. The hearing process was rudimentary, and even complicated cases were typically dealt with in an hour or two.

Finally, the Appeal Adjudicator's decision could be appealed by either party to an internal Appeal Board composed of members of the WCB governing board designated as “Appeals Commissioners.” The Appeals Commissioners sat in panels of three. Here again the hearing was a *de novo* hearing, and at this level it was common for the parties to be represented by counsel, often lawyers. Participation by employers resisting the claim was also more common, and it was before this Appeal Board that I had appeared on rare occasions on behalf of employer clients when I was in private practice and before which my Parkdale clinic students appeared on occasion on behalf of injured worker clients. Even here, however, legal arguments got short shrift, with the WCB's corporate conventional wisdom as to what the *Workers' Compensation Act* said being largely treated as gospel. It was the Appeal Board that WCAT replaced in 1985.

The WCB's multi-level adjudicative process was not merely a public relations strategy. There is no doubt that the work of the adjudicators at each level was sincere and necessary.²⁴ Unfortunately, however, the Board's policy was to give only *pro forma* reasons for its decisions, so the merits of those decisions could never be objectively assessed. By the time Weiler began his review in 1979, the WCB was, in his words, “an embattled institution,” reeling from a continuous barrage of negative publicity and unrelenting attacks from injured workers' organizations.

Because the WCB's Appeal Board members, the Appeals Commissioners, were also members of the WCB's governing body – the WCB of Directors – they were inevitably perceived to be biased – one WCB person reviewing the work of another. Moreover, they operated under a conflict of interest.

The Board of Directors was responsible for both awarding benefits and setting employer assessment rates. The benefits decisions impacted on the assessment rates and, given the significance of the rate levels for the Ontario economy and for the competitiveness of Ontario employers, rate-raising decisions were fraught with political risk for the WCB, its chair, and its Board members, including the Appeals Commissioners.

It was WCAT's independence – both the reality and the perception – that at the final appeal stage eliminated both the perception of bias and the conflict of interest, and so independence was WCAT's main thing. But unstinting government commitment to its independence was only one of the sources of WCAT's culture of independence. There was also the unique circumstance that the debilitating conflicts of interest between tribunals and host ministries that typically characterize a judicial tribunal's operational environment were in WCAT's case all largely attenuated.

In the first place, the Labour Ministry's responsibility for workers' compensation policy was at one remove from that of the WCB itself. It was not the Ministry but the Board that planned the operational policy, drafted the rules and regulations, and made the original benefit decisions. WCAT decisions therefore did not address policy or operational decisions made by the Labour Ministry or its staff, so, unlike most tribunals, WCAT did not have to challenge its host ministry directly. When a WCAT decision appeared to question the judgment, or sometimes perhaps even the competence, of the initial decision makers, or impacted negatively on policy, it was the WCB and its staff that were affronted, not the Ministry.

Furthermore, although WCAT's annual budget was subject to the Minister of Labour's approval, the statute directed that the money come from the WCB's Accident Fund, which was derived from employer assessments and administered by the Board. The added costs arising from the Appeal Tribunal's decisions in individual cases were, of course, also paid from the Accident Fund. Thus, neither WCAT's administration nor its adjudicative decisions impacted on its host ministry's own budget. As things now stand in Canada, very few judicial tribunals are in that enviable position.

And, finally, with the Minister and Ministry, and government, known to respect the chair's recommendations on reappointment decisions, no threat to the tribunal's independence arose from that direction either.

In such circumstances, the tribunal's embrace of a robust independence came naturally and found support on all sides.

Finally, WCAT enjoyed the great advantage of having all of its administrative resources in-house. These included the registrar function, legal

services, the financial and accounting function, the payroll and benefits departments, the personnel function, the library and publications departments, and the information technology (IT) and statistics departments. All were covered by WCAT's own budget and all were ultimately administered and supervised by the chair. Except for the chair, no WCAT person had any reporting relationship with the Ministry or with any of its officials. Moreover, WCAT staff members were not members of the public service and owed no allegiance, and had no rights or special opportunities of entry, to the public service.²⁵ Hiring, firing, and promotion decisions for staff were for the chair alone (although in due course, the firing power was fettered by a WCAT collective bargaining agreement).²⁶ Most importantly, the tribunal developed and defended its own annual budgets.

None of this was usual. There are only a handful of judicial tribunals that are stand-alone in all these respects.²⁷ In my experience, however, a judicial institution cannot be independent without being in all respects its own person – a fully realized adult person. In my view, WCAT's vibrant *esprit de corps* and culture of insouciant independence could not possibly have emerged had it not been such a person.

With all these advantages, and aided in the early days of the tribunal by the unstinting support of Dr. Robert Elgie, the Minister of Labour at the time, and by his Deputy Minister, Tim Armstrong, I was, as chair, able to recruit and keep a full complement of highly qualified and exceptionally talented tribunal members and staff, all selected by me in collaboration with my colleagues. When my own appointment was terminated in 1997, most of those members and staff were still there and still performing at a level of excellence; some are still with the tribunal as I write. It is axiomatic that to have a good tribunal you must recruit and retain good people, and we were allowed to do that.

This set of unique advantages continued for ten years. Then, in June 1995, the Progressive Conservative Party formed the government, and at once WCAT took its turn as an embattled institution. The new government's "Common Sense" election platform had included a commitment to reduce workers' compensation assessments and bring the system's unfunded liability under control. WCAT's elimination was widely anticipated.

As noted, I left the tribunal in June 1997, so for almost two years I headed a judicial tribunal operating within the gunsights of a hostile government. That experience proved, however, to be nearly as instructive about the mores of an administrative justice system as the preceding ten years of leading a uniquely advantaged tribunal.

The new government initiated a full review of the compensation system, with one of the foremost questions being whether WCAT's existence could still be justified. After an initial fact-gathering process, the responsible Minister published a discussion paper that again left the question of WCAT's continued existence explicitly open. In the end, the concept of an external, independent appeals tribunal survived. Its name was changed to the Workplace Safety and Insurance Appeals Tribunal (WSIAT), its jurisdiction was reduced to ensure that it would be, by law, bound by WCB policies that were themselves lawful, and its tripartite nature was diluted, but it survived in essential respects and continues to operate to this day. At various stages during the Minister's year-long review process, however, I found it necessary to make both private and public submissions correcting what I saw to be errors in the Minister's statements about the tribunal and its performance.²⁸ I did this with as much courtesy and circumspection as I could muster. Nonetheless, I experienced during this period what most judicial tribunal chairs and members experience routinely: the necessity of frequently disagreeing publicly with the Minister or Ministry on whom their tribunal depends for its life and the chair and members for their reappointments, obviously not a prescription for independent decision making.

During the month preceding my departure from WCAT, a number of my recommendations for the reappointment of WCAT members whose terms were expiring were rejected and three new members were appointed without consultation with either me or my replacement as chair,²⁹ the first such appointments in the tribunal's history.

The arbitrary denial of reappointment of meritorious members of judicial tribunals and the exclusion of chairs from the appointment and reappointment process, both of which were characteristic of the administrative justice system under the Harris regime, are inherently incompatible with the concept of an independent and impartial administrative justice system. About three months after leaving the tribunal, in a farewell address to the Workers' Compensation Section of the Ontario Branch of the Canadian Bar Association, I made my concerns in that respect public, and in the process rather launched my "career" as a critic of Canada's administrative justice system.³⁰

Another aspect of my professional experience that has helped shape the lens through which I view that system is my involvement in the collegial organizations of tribunal chairs and members. These organizations began to evolve in the latter half of the 1980s and were devoted to the presentation of continuing legal education programs for administrative tribunal

members and chairs and to the exploration of generic administrative justice issues.

The first such organization was, I believe, La Conférence des Juges Administratifs du Québec (CJAQ), first organized in 1985. The first and only national organization is the Council of Canadian Administrative Tribunals (CCAT), formally organized in 1986. I was a member of CCAT's first board of directors and served in that capacity until 1994. In 1986, I also became involved with an informal "circle" of Ontario tribunal chairs that met regularly to discuss common problems and issues, and in 1988 organized the first annual Conference of Ontario Boards and Agencies.³¹ This informal organization morphed into the Society of Ontario Adjudicators and Regulators (SOAR), and I served as its inaugural president from 1992 to 1996. The CCAT and SOAR initiatives were followed in British Columbia by the organization of the BC Council of Administrative Tribunals (BCCAT), and in Manitoba there is now the Manitoba Council of Administrative Tribunals (MCAT).

I was frequently a member of training and conference planning committees for both CCAT and SOAR, co-chair of CCAT's annual national conference in 1990, and a regular presenter of papers at training programs and conferences, many of which were subsequently published. My involvement with these conferences continues to this day. One advantage of this type of involvement has been the opportunity to share confidences with colleagues in tribunals in other provinces and territories and in the federal jurisdiction, about the problems and issues we were all encountering in the administration and operation of our tribunals.

In 2005, I was asked to serve as a member of the Advisory Panel of the Immigration and Refugee Board of Canada (IRB). This was the Advisory Panel that was the central component of the IRB's merit-based appointment process that had been introduced circa 2004 by the IRB chair at the time, Jean-Guy Fleury.³² This appointments process will be described at some length in Chapter 1.

Finally, there is my personal experience as counsel in the *McKenzie* case, which arose serendipitously in the midst of my graduate program at Osgoode Hall. The decision of the BC Supreme Court in *McKenzie* will figure prominently in the legal analysis to follow, but my experience with the case so enriched my understanding of the administrative justice system and its issues, and so quickened my concern about these issues, that it also belongs in this account of my formative administrative justice experiences.

In the winter of 2004-05, a senior and respected Residential Tenancy Arbitrator, Mary McKenzie, was adjudicating residential landlord and tenant disputes in British Columbia. She was a lawyer, a graduate of Osgoode Hall Law School in Toronto, with a master's degree in Public Administration from Queen's University. She had been appointed as a part-time Residential Tenancy Arbitrator in 1994, one of thirty selected out of three hundred applicants in what was at the time a unique, merit-based selection process. On 1 January 2004, she had been appointed to a new five-year term.

By 2002, McKenzie's residential tenancy arbitration work, while still notionally part-time, had become her sole source of income. She was by then the mother and sole support of two children, and circumstances had so conspired that she found herself living in Nanaimo on Vancouver Island and commuting to Burnaby in the Lower Mainland for arbitration hearings three days a week. Then, in March 2003, she was able to trade one day of her Lower Mainland hearings with another arbitrator for one day of his Nanaimo hearings, and so began to hold landlord and tenant hearings one day each week in her home city, Nanaimo.

This schedule continued for about twenty-one months, until December 2004, when, without warning, McKenzie was removed from all Nanaimo hearings and her Nanaimo hearings were assigned to other arbitrators. This decision, which effectively reduced her income by one-third, was particularly disturbing because the problem was obviously not a lack of cases in Nanaimo. She also knew that the quality of her work was not an issue because management had regularly complimented her work and encouraged her to seek additional hearing dates. Moreover, while suddenly barred from hearings in Nanaimo, she continued to be assigned to her two days of hearings in Burnaby.

Over the next five weeks, McKenzie's attempts to reach the Director of the program (who was based in Victoria) were unsuccessful, and her letter demanding an explanation went unanswered. Finally, she was summoned to a meeting with the Director at the Nanaimo office on 18 February. At that meeting, the Director handed McKenzie a letter advising her that her five-year, fixed-term appointment as a Residential Tenancy Arbitrator, due to expire on 31 December 2008, would be terminated effective 31 March 2005, the date on which her current fee arrangements would expire. The Director explicitly refused any reason or justification for this extraordinary decision, stating only that the government was acting under a new statutory provision that authorized it to terminate any tribunal member's fixed-term

appointment at any time, without cause or reasons, upon payment of one year's compensation. The provision in question was s. 14.9(3) of the *Public Sector Employers Act*.³³ This section had been enacted in May 2003 and McKenzie was the first tribunal member whose appointment was terminated pursuant to its provisions.

Mary McKenzie had an unblemished service record of over ten years. She had no indication of management displeasure with her or her performance. In fact, at the 18 February meeting, the Director agreed to assign her additional hearings in Burnaby during the six weeks leading up to the termination date. After her termination, the previous Director, who had supervised her work for ten years, provided her with a glowing written reference; paradoxically, the new Director also provided a positive reference letter.³⁴

The singling out of a tribunal adjudicator for termination in this fashion was unprecedented in British Columbia. For Mary McKenzie, it meant the destruction of her career as an adjudicator in her home province and a catastrophic disruption of her finances and personal life. She believed strongly that "they couldn't do this" and that in her own interests, and in the interests of the integrity of the administrative justice system in British Columbia, she "could not allow them to do this." She retained counsel and, in due course, after a period of futile discussion between her counsel and government counsel, she instructed her counsel to file a petition in the BC Supreme Court for judicial review of the government's decision.

An especially significant fact about these proceedings is that at no time – not during the pre-litigation discussion nor at any time during the course of the ensuing litigation – did the government attempt any explanation whatsoever for its original decision to bar McKenzie from presiding over residential landlord and tenant hearings in Nanaimo. The government did not suggest that the number of Nanaimo hearings had declined, nor did it express any concerns with the quality of her work. The Director who had written the termination letter was never called upon to explain why she had made such a recommendation, nor was she asked to confirm that the recommendation had in fact originated with her. The government filed no evidence of any kind. What, then, was the government's problem with McKenzie's holding hearings in Nanaimo? The government would not say; it has never said.

Of course, McKenzie and her legal team speculated at length about the government's motives for barring her from holding Nanaimo hearings. The obvious inference was that someone in Nanaimo with influential ties to the government had not liked her decisions. The team thought long and hard

about how that probable motive might be made to figure in the litigation, but they ultimately decided against the attempt. There was no reasonable likelihood of proving what had really happened and, in any event, the importance of the case actually lay in its challenge to the constitutionality of the government's alleged power to terminate members of independent judicial tribunals without cause in the middle of their terms. From that perspective, the government's motives in this particular case were only of incidental interest.

McKenzie's Petition for Judicial Review was filed in the Supreme Court of British Columbia on 31 May 2005. Shortly thereafter, the BC Council of Administrative Tribunals (BCCAT) applied for intervenor status. The following paragraph from the affidavit of the BCCAT president filed in support of that application captures the public-interest nature of the issues raised by McKenzie's application for judicial review.

BCCAT is of the view that the answers to each of the public law questions raised by the Petitioner, who has raised them as the first person respecting whom action has been taken under s. 14.9(3) ... will have implications for many administrative law adjudicative schemes. BCCAT thus does not view this Petition as being properly characterized as a dispute between private parties. Rather, BCCAT sees this as being a test case the outcome of which will transcend the particular dispute between the Petitioner and Respondents. BCCAT is of the view that the Petition raises public law issues whose outcome will have very significant implications for BC's administrative justice system.

Mary McKenzie's judicial review petition was successful. Mr. Justice McEwan of the BC Supreme Court held that the government's interpretation of s. 14.9(3) was incorrect. Most importantly for the thesis of this book, however, he also held that, if the interpretation had been correct, the section as it applied to Residential Tenancy Arbitrators would then have been incompatible with the constitutional principle of judicial independence, and therefore constitutionally invalid.³⁵ The order terminating McKenzie's appointment was quashed and her appointment thereby reinstated.

The government appealed. After a two-day hearing, the BC Court of Appeal reserved its decision and then surprised both parties by refusing to deal with either the interpretation or constitutional issues on their merits. The Court dismissed the government's appeal solely on the grounds that at the time of the hearing of the appeal the issues had become moot.³⁶ In

addition, the Court, also on its own motion, went out of its way to cast doubt on the precedential value of Justice McEwan's decision. It took the position, without benefit of argument from either party, that the issues had also been moot (for different reasons) at the time of the lower court hearing.³⁷ It did not, however, comment on the substantive merits of Justice McEwan's decision.

McKenzie, whose role in the litigation had become by the time of the appeal only that of a public-interest litigant,³⁸ believed that the public interest required that at least the constitutional issue be resolved at the highest appeal level, and she therefore applied to the Supreme Court of Canada for leave to appeal the BC Court of Appeal's refusal to decide the substantive issues and its disparagement of the precedential value of Justice McEwan's judgment. Her application was dismissed in April 2008, and the *McKenzie* case came to an end. Justice McEwan's judgment remained intact on its merits, but its precedential value had been left in doubt.

So, where did I come into this? Within the tribunal community, the mid-term termination of Mary McKenzie's appointment without cause quickly became a national *cause célèbre*. I first heard of it in May 2005 in discussions with CCAT colleagues. It was perverse to be excited by the news, but it sounded to me exactly like the case the administrative justice system needed.

The case the system needed was a case that would present squarely the issue of constitutional protection for the independence of administrative judicial tribunals. I had come to despair of any realistic possibility of asserting justice-system principles in an executive branch-controlled justice system unless it could be established that the constitutional requirement of judicial independence applied to tribunals exercising judicial functions. On that issue, the Supreme Court of Canada had been giving confusing signals, at one time appearing to say it did not (*Ocean Port*,³⁹ 2001), and at another time suggesting that it might (*Bell Canada*,⁴⁰ 2003) or that it probably did (*Ell*,⁴¹ also 2003).

In *Ocean Port*, the Court had seemed to say – indeed, had been understood by many to have said – that the implicit constitutional requirement of judicial independence first identified by the Supreme Court in 1997 in its *PEI Reference* decision⁴² as applicable to “all courts” would not apply to administrative tribunals of any kind, not even to judicial tribunals. I had doubted, however, that, in the end, this view of the matter would hold. Speaking at a community legal services clinic training day in Toronto in April 2003, I had struck this hopeful note:

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[T]en or fifteen years from now *Ocean Port's* place in the administrative justice system will be seen to have been principally important for the impetus it gave to a fundamental rethinking of our theory of administrative justice and to a more careful consideration of the nature of our [judicial] tribunals. In some future case, the Court will be faced with [a judicial tribunal] ... whose decision-makers, by reason of statutory provisions ... clearly do not qualify as impartial or independent. In that future case, the Court will ... be inevitably moved to reassert the role of the courts as the ultimate guardians of the rule of law in our administrative justice systems.⁴³

From what I had learned from my CCAT colleagues, the *McKenzie* case appeared likely to be that future case.

McKenzie's counsel was Paul Pearlman, QC, of Victoria, British Columbia.⁴⁴ I e-mailed Mr. Pearlman, commenting on the constitutional importance of the case if the facts I had heard were true, and offering a memorandum of law that I had written on another occasion about the potential for asserting the constitutional principle of judicial independence in support of administrative justice system tribunals and their members. Mr. Pearlman forwarded my message to Mary McKenzie and I heard back from her the same day. I then learned that she was the same Mary McKenzie who had been a student of mine many years earlier, in the Parkdale clinic program; and when my interest in establishing the constitutional invalidity of the statutory provision under which her appointment had been terminated turned out to match her passionate belief that the termination of her appointment had placed the independence of the entire BC administrative justice system in question, my role as co-counsel in the *McKenzie* case began.

For the next three years, through researching and drafting the petition and appeal materials and preparing the Application for Leave to the Supreme Court of Canada, and while spearheading the funding campaign that would enable the proceedings to continue, Mary McKenzie and I spent countless hours working together.

From a doctrinal and theory of law perspective, my research and analysis on the issues presented by *McKenzie* were central to my graduate studies agenda. Just as important, however, was the extent to which my extended working relationship with Mary McKenzie enabled me to truly grasp the personal impact that a government's abuse of its powers has on the individual abused and to better appreciate the vulnerability felt by tribunal members faced with governments that brandish powers of arbitrary dismissal.

A mid-term dismissal of a tribunal adjudicator without cause is not a private event.⁴⁵ While the government is not alleging cause, the unusual nature of its action will inevitably suggest to the uninformed observer that the government must in fact have some serious reasons, and when the government declines to talk about those reasons, the observer is very apt to conclude that the government's reasons must be serious indeed. Few would suspect that the government is not talking about it because its own motives cannot stand the light of day.

Because the government has implicitly libelled them and refused any explanation, terminated members suffer severe damage to their professional reputations. Since the government also controls all future adjudicative appointments, the adjudicative career of terminated tribunal members in their home jurisdiction is effectively ended, and in applications for adjudicative appointments outside their home jurisdiction or for employment in other legal fields, they face the problem of having no explanation for their peremptory, and public, mid-term dismissal from a long-standing adjudicative position.

Mary McKenzie, through no fault of her own, was suddenly deprived of her income, her reputation, and, effectively, her career. The courage that it took, first to reject settlement offers fashioned as though her case was just another wrongful dismissal of a government employee, and then to persist in her fight for the independence principle all the way to the end of an unsuccessful application for leave to appeal to the Supreme Court of Canada, was remarkable.

In his opening statement in the hearing of McKenzie's petition (before Justice McEwan), Victoria lawyer Frank Falzon appearing for the Intervenor BCCAT, grabbed the attention of the Court – and, I might add, of his fellow counsel – by audaciously comparing Mary McKenzie's defence of the independence of administrative justice tribunals to Lord Coke's famous seventeenth-century defence of the independence of the common law courts against the depredations of King James I. The comparison appeared to provoke a tolerant smile from the presiding judge but, when looked at fairly in its modern context, was not far off the mark. Moreover, the comparison was tactically sound. With that bold metaphor, Mr. Falzon at one stroke laid bare for the Court the undoubtedly historic nature of the case and the daring and vulnerability of the protagonist.

In May 2007, speaking to the CCAT International Conference on Administrative Justice in Vancouver while we awaited the Court of Appeal's decision, I paid tribute to Mary McKenzie: "It is the system's rare good

fortune that the burden of championing the constitutional independence of adjudicative tribunals happened to fall on a person with the courage and principled commitment of a Mary McKenzie.”

At the annual CCAT conference in Halifax in June 2009, after the disappointing Court of Appeal decision and the dismissal of McKenzie’s application for leave to appeal to the Supreme Court of Canada, the proposition that there was indeed no constitutional protection for the independence of adjudicative tribunals and that, yes, this was a good thing became the subject of a formal plenary-session debate. I was a member of the debate panel, arguing, of course, for the no side.⁴⁶ At the end of the debate, questions from the floor were invited. Heather MacNaughton, who was then the chair of the BC Human Rights Tribunal, asked the panel members supporting the “no constitutional protection” proposition: “Are you not aware of the chilling effect on the decision-making of tribunal members in B.C. and across the country of adjudicators having watched the treatment accorded to Mary McKenzie and what she was put through in her attempt to protect the independence of tribunal members? If there is no constitutional protection, what do you propose be done about that?” The pro side of the debate panel had nothing to suggest.⁴⁷

What Experience Teaches

My experience with the administrative justice system recounted in this Introduction has led me to firm convictions on three fundamental points.

1. *What judicial tribunals do really matters – often desperately.* It was to drive this point home that I told the story about the blood-spattered misseive from the grieving mother. What judicial tribunal members do is too important for them to be pursuing their own political or ideological goals, or dabbling in public service, or wending their way to a comfortable retirement; just like judges, they are engaged in serious business where the consequence of getting things wrong may be the infliction on the parties who appear before them, and on their families, of injustices and hardships of the gravest kind.

2. *Canadian administrative judicial tribunals and their members are not independent, do not meet the rule-of-law criteria for impartiality, and cannot be counted on for competence.*⁴⁸ The evidence for this will be found throughout this book.

3. *Hardly anyone cares – on the evidence, certainly not the politicians or the bureaucrats.* In the spring of 2003, Auditor General of Canada Sheila Fraser blew the whistle on the federal Liberals’ sponsorship scandal. At or

about the same time, Peter Showler blew the whistle on patronage abuse at the Immigration and Refugee Board. Showler knew whereof he spoke. He was the outgoing chair of the IRB and had been a member of that Board for nine years. Here are some of the remarkable things he said to a reporter:

Political patronage is a devastating blight on the Immigration and Refugee Board ... [It] undermines the Board's work, the morale of its staff and the implementation of Canada's immigration and refugee policy ... Political influence ... is pervasive and pernicious ... [The Board's] real problem is ... mediocrity and incompetence among some of its members [caused by political patronage] ... The Board is hobbled by patronage ... [P]olitical in-fighting within the [federal] Liberal Party and caucus over who should get the patronage plums has often resulted in lengthy delays in filling vacancies, despite unprecedented pressure on the Board to perform ... Members who get mediocre or even bad [performance] ratings can find themselves appointed to a second term because of political connections, while members who have excelled are sometimes denied a second term ... The Board's internal process for evaluating the work of its members can also become tainted by political influence, with managers coming under political pressure to give positive evaluations to members who have more powerful political friends than they do.⁴⁹

Federal government officials and politicians know that the competent implementation of Canada's troubled immigration and refugee policy depends on the quality of the people appointed to the IRB. They also know that these appointees are entrusted with adjudication of the immigrant or refugee status of individuals – frightened individuals, often in desperate straits, whose future and the future of their families, and sometimes their very lives, depend on a fair, competent, and timely adjudication of their rights.

In light of these facts, it seems to me that it should be plain for all to see that the patronage abuse of IRB appointments described by Showler is on moral and ethical grounds far more shameful than the mere misappropriation of public funds. Yet, unlike Sheila Fraser's revelations, Peter Showler's equally public and authoritative exposé appears to have startled no one; it certainly sparked no outrage, led to no inquiry, threatened no one's job, and brought down no government.

Nor, of course, was Showler the first to highlight the problem of patronage in appointments to administrative judicial tribunals; indeed, there had

been a long history of known patronage abuse at the IRB itself. I cite this one instance as a particularly compelling demonstration of a general problem: except for its victims, no one seems to be concerned about our shameful administrative justice system.

That no one is concerned may be found writ large in the historical fact that, seemingly without political embarrassment and with no public criticism, Ontario governments were able to refuse any compensation increases to Ontario's administrative judicial tribunal members for over twenty years – a drought that did not come to an end until the spring of 2007. The salary of my successor as chair of WCAT was exactly the same in 2007 as mine had been when I left in 1997, and the same as I was earning in 1989.⁵⁰ There is no reason to think that, outside of Quebec (and the federal jurisdiction, where salaries for tribunal members were kept in line with the public service), the experience of members of judicial tribunals in other provinces or territories was very different.

In the category of evidence that no one cares, I must also respectfully place the decisions of the BC Court of Appeal and the Supreme Court of Canada in *McKenzie*. It is always problematic for lawyers to criticize court decisions in cases in which they have participated as counsel. Their motives will be suspect and their analysis viewed with the skepticism that extreme partisanship attracts and often deserves. It is not an activity in which any lawyer normally engages, but I believe the risk is necessary in this special case.

The Court of Appeal panel that heard the government's appeal in *McKenzie* had to know that the power claimed by the BC government – the power to terminate judicial tribunal members at any time without cause – was antithetical to either the appearance or the reality of their independence. The Supreme Court of Canada had said so, repeatedly.⁵¹ But it was the Court of Appeal – not either of the parties – that raised the mootness issue. Both the government and *McKenzie* had urged the Court to decide the constitutional issue notwithstanding any concerns about mootness. It was also the Court that, again of its own volition, went out of its way to disparage the authority of the lower court's decision.

The law is perfectly clear that a court has jurisdiction to decide a moot issue, given exigent circumstances. The principles governing the exercise of that jurisdiction are known as the *Borowski* principles.⁵² Both parties had argued that the constitutional and interpretation issues decided by the lower court were *not* moot in the appeal. But even if the issues *were* moot, the circumstances in which they were presented for decision to the Court of

Appeal were precisely the circumstances that the *Borowski* principles identify as authorizing a court to exercise its discretion in favour of deciding an issue, despite its mootness.⁵³ If the circumstances of this case did not justify the exercise of that discretion, it is difficult to imagine what circumstances would. And, as mentioned, *both* parties had argued that, moot or not, it was of critical importance that the issues be dealt with.

And yet the Court of Appeal, fully cognizant of the *Borowski* principles, thought it right to effectively condone the continuation of the government's power to dismiss judicial tribunal members at any time without cause until some other victim of such arbitrary power should find the financial where-withal and emotional fortitude to challenge the government again, in some future litigation. On this point, the Court said:

Further, it cannot be said that the issues are evasive of review. Section 14.9(3) ... applies to approximately 37 administrative tribunals. It defies common sense to suggest that another tribunal member, similarly aggrieved, will not challenge the legislation.

In my opinion, it would be wise to await that challenge and decide the merits of an appeal from that challenge on the specific facts and circumstances of such a case and in their specific legislative context ... To do otherwise would, in my view, have the potential to create mischief.⁵⁴

By this decision, the independence of virtually all BC tribunals was effectively destroyed for an indeterminate period of time, a period that has not expired even as I write. The BC Court of Appeal was content to initiate such a result, and the Supreme Court of Canada apparently saw nothing in that contentment that was of sufficient public importance to warrant its granting leave to appeal.

All of this, then, is what has moved me to write this book and also, of course, is what has shaped the lens through which I view the need for transformative reform.

What This Book Is Not About

As indicated above, this book is *not* about the exercise of regulatory functions by regulatory agencies such as the energy boards. For reasons that I will explain shortly, it is also not about Quebec. Neither is it about the failures or neglect of any particular government or political party. I am talking here about a justice-system, rule-of-law train wreck whose provenance is

decades old – a train wreck for which all political parties; all Canadian governments, past and present, and their administrators; and, to some extent, the courts must take responsibility.

Why is my criticism of the administrative justice system not, for the most part, pertinent to Quebec's share of that system? Quebec's radical and progressive reform of its system of administrative law in 1996 dramatically changed the architecture of that system.⁵⁵ In terms of administrative law, Quebec is now a different case from the rest of the country. It is also the only province with a written constitutional requirement that administrative tribunals in general be independent and impartial.⁵⁶ I shall refer to Quebec in comparative terms from time to time, but by and large my analysis of the problems with the administrative justice system in the English-speaking jurisdictions of Canada does not apply to Quebec's current system. My concerns relate to the rest of Canada, where the Quebec reforms have had no discernible impact.⁵⁷ Note, however, that my exclusion of Quebec from this critique should not be taken to mean that I have concluded that there are no administrative justice problems left in that province. My point is that it is a different case. Whether it is in all respects a better case I leave for others to determine.

What This Book Is About

Given that administrative judicial tribunals are the only embodiment of our justice system that most Canadians will ever personally face, and that the decisions of those tribunals are often life-altering for the parties involved, casual admirers of Canadian justice would presumably expect to find in these tribunals what they expect to find in Canadian courts: a strong tradition of independence, impartiality, and competence. Instead, however, we have an executive branch system of judicial tribunals where the reality is typically an intransigent culture of government dominance and control, a system that ignores the rule of law and the Constitution, and a system that is, at a minimum, careless of competence. The executive branch proclaims its administrative judicial tribunals to be independent in their decision making, but requires that they operate in the ordinary course under the influence of pervasive conflicts of interest that are irredeemably toxic to any reasonable perception of independence or impartiality, conflicts that would not be tolerated in any other setting.

This book is about a national scandal, about Canada's long tolerance of a system of justice – the system of administrative justice – in which the rule

of law's justice system requirements of structural independence and impartiality are simply absent.

The judicial functions that comprise this system are all deployed, controlled, and administered by the executive branch of government. From the beginning, the executive branch has understood that permitting these judicial functions to be protected by the structures required of a rule-of-law-compliant justice system – structures designed to ensure the independence and impartiality of the bodies exercising the judicial functions – would be inimical to its interests, and has simply chosen not to permit it. Thus, everywhere in Canada (with the exception of Quebec) we have a state-sponsored justice system to which the majority of our rights disputes have been assigned for final adjudication but where the rule of law has been willfully disrespected and actively resisted – by the government. As I say, a scandal.

For reasons I will address shortly, the structural flaws in Canada's administrative justice system generally lie below the surface, rarely causing public controversy of a general nature. Nevertheless, from time to time the evidence of the defective structures comes to the fore.

Of course, official assertions of the independence of tribunals are ubiquitous, but never more than empty rhetoric. In Chapter 1, I will present evidence of ruinously inadequate budgets; of patronage and partisan political preoccupations undermining appointments and reappointments; of competitive, merit-based selection processes for judicial tribunal members being the rare exception rather than the rule; of appointments that are invariably for short, fixed periods, typically of three or five years, with the reappointment power routinely exercised arbitrarily, and with expected reappointments of experienced, meritorious members and chairs often refused following decisions that were unpalatable to the government or its allies or merely to make way for the appointment of a government's importunate friends; of incoming governments refusing to reappoint judicial tribunal members on ideological grounds, not caring that the refusals are jeopardizing the tribunal's ability to meet its statutory responsibilities; of the tolerance of mid-term dismissals of members without cause or reasons; of judicial tribunal chairs and members being discharged allegedly for cause without an opportunity to be heard; of the administrative justice system routinely expelling its most qualified members at the end of an arbitrarily imposed maximum of six or ten or twelve years of service; and of egregious, structurally embedded conflicts of interest between judicial tribunals and their host ministries continuing to be the common reality.

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