

VALIDATING ADMINISTRATIVE TRIBUNALS

David Matas*

Introduction

Canada's administrative justice system is in a state of crisis. The courts have struck down one administrative tribunal after another as being unconstitutional. In recent years, the courts have said that powers exercised by the Quebec Transport Commission¹, the Quebec Professions Tribunal², the proposed Ontario Residential Tenancy Commission³, the Nova Scotia Residential Tenancies Board⁴, a proposed landlord and tenant tribunal in Alberta⁵, the Clean Environment Commission in Manitoba⁶, and a municipal tax assessment tribunal in New Brunswick⁷ were all unconstitutional and therefore invalid.

Although there is good legal reason for these decisions, there is little policy sense in them. Administrative tribunals exist to protect the citizen from the administration; declaring them invalid benefits no one, except the litigants who are contesting the tribunal decisions adverse to them. The great losers in these decisions are not the losing litigants, but citizens, who lose recourses against arbitrary administration⁸.

The Supreme Court of Canada offers no policy justification for this situation. The Court is faced with the law as it finds it. It must apply the law, no matter what the policy consequences. Mr. Justice Dickson, now Chief Justice of the Supreme Court of Canada, in a 1981 case, said:

I am neither unaware of, nor unsympathetic to the arguments advanced in support of a view that s. 96 (of the Constitution) should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. Yet, however worthy the policy objections, it must be recognized that we, as a Court, are not given the freedom to choose . . .⁹

Section 96 of the *Constitution*, referred to by Mr. Justice Dickson, gives Ottawa the seemingly clear, simple, and innocuous power to appoint high court judges.¹⁰ On its face, Section 96 has nothing to do with administrative law, or judicial review. Yet, through judicial interpretation of Section 96 since its enactment in 1867, the power to appoint high court judges has become murky, complex and significant. It has prevented the establishment of administrative tribunals. It has entrenched judicial review.

* David Matas is a lawyer in private practice in Winnipeg. He was a member of the C.B.A. Section 96 Committee.

1. *A.G. of Quebec v. Farrah*, [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161.

2. *Crevier v. A.G. of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

3. *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554.

4. *Burke v. Arab* (1981), 130 D.L.R. (3d) 38 (N.S.C.A.).

5. *Re Constitutional Questions Act*, [1978] 6 W.W.R. 152 (Alta. C.A.).

6. *Texaco v. Clean Environment Commission* (1977), 79 D.L.R. (3d) 18, [1977] 6 W.W.R. 70 (Man. Q.B.).

7. *Minister of Municipal Affairs v. L'Eveque Catholique* (1972), 24 D.L.R. (3d) 534 (N.B.C.A.).

8. See Patrice Garant, "La loi 61 et l'inconstitutionnalité des tribunaux administratifs d'appel" (1982), 42 R. du B. 615 at 629.

9. *Supra* n. 3, S.C.R. at 747.

10. *Constitution Act, 1867*, s. 96.

Rationale

Paul Weiler has said that the historic rationale for the power was no more than that Ottawa should have the right to dispense the political patronage of judicial appointments in return for picking up the bill for judicial salaries.¹¹ Section 100 of the *Constitution* requires Parliament to pay the salaries of high court judges.¹²

However, the courts have given the federal appointment power a rationale far beyond that. For instance, Mr. Justice Estey in a Supreme Court of Canada case decided in 1982, said that the federal appointment power was "designed to ensure a quality of independence and impartiality in the courtroom where the more serious claims and issues in the community arise".¹³ Lord Atkin, in the Judicial Committee of the Privy Council in 1938, even went so far as to say that the federal power to appoint high court judges was one of the principal pillars in the temple of justice", "not to be undermined".¹⁴

This often repeated rationale is highly unflattering to provincial court judges who are, after all, independent, too. For Sir Lyman Duff C.J., in 1938, it was an "extraordinary supposition" that the provinces were wanting either in will or in capacity to protect themselves against judicial misconduct. To him, any such suggestion was baseless in fact and fallacious as a foundation of a theory controlling the construction of the *Constitution*.¹⁵

A more plausible and less demeaning rationale is that given by Mr. Justice Dickson in a 1981 case. In his view the federal judicial appointment power was "conceived as a strong constitutional base for national unity, through a unitary judicial system".¹⁶ The power of Ottawa to appoint judges was part of a compromise that gave to the provinces power over the administration of justice.¹⁷ To Mr. Justice Dickson, it was one of the important compromises between the Fathers of Confederation.

The Committee on the *Constitution* of the Canadian Bar Association, in "Towards a New Canada", had a similar perspective. In the United States, there is a dual system of courts. When one of the litigants is an out-of-state resident, the federal system of courts has jurisdiction over the litigation. When the litigants are all in-state residents, the state courts are used. To avoid the inconvenience and expense of a dual court system, the Fathers of Confederation devised a system of higher courts, provincially administered, but with federally appointed judges.¹⁸

11. "Judges and Administrators: An Issue in Constitutional Policy" in *Proceedings of the Administrative Law Conference held at the University of B.C., Faculty of Law on Oct. 18-19, 1979* (P. Gall ed. 1981) 379 at 381.

12. *Constitution Act, 1867*, s. 100.

13. *Re Family Relations Act of B.C.* (1982), 40 N.R. 206 at 210, (sub nom. *Reference Re Section 6 of the Family Relations Act, 1978*) 131 D.L.R. (3d) 257 at 281 (S.C.C.).

14. *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at 426 (P.C.).

15. *In Re Adoption Act*, [1938] S.C.R. 398 at 416, [1938] 3 D.L.R. 497 at 510.

16. *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 728, 123 D.L.R. (3d) 554 at 567.

17. *Constitution Act, 1867*, s. 92 (14).

18. Committee on the Constitution, Canadian Bar Association, *Towards a New Canada* (1978) 51.

The Law

Whatever the rationale for the power, the courts have guarded it vigorously. Where a province has created a tribunal, and given it the power of a higher court, the courts have not hesitated to say the tribunal is unconstitutional and its decisions invalid. Because only Ottawa can appoint a high court judge, any provincial attempt to create a tribunal with high court attributes is a violation of Ottawa's appointment power.

The courts have developed a three step test to determine whether a power given to a provincial tribunal violates the federal appointment power. The first step is to ask if the power given to the provincial tribunal is a power which was exercised by the high courts at the time of Confederation. If so, the second step is to ask if the power given is a power to determine judicial questions, i.e., the competing rights of individuals and groups, or to determine policy questions, i.e., what is good for the community as a whole. If the power is a power to determine judicial questions, the third step is to determine if the power is the sole or central function of the tribunal, or if the power is merely ancillary to broader administrative or policy functions. It is only if all three tests are met, i.e., when the power is of the sort 1867 high courts had, is judicial, and is the central function of the tribunal, that the power is unconstitutional.¹⁹

Problems

Some of the problems with the law are obvious just from stating what the law is. What possible justification can there be for allocating court jurisdiction today simply on the basis of what it was in 1867? Why should we be involved in the exercise of determining what happened in 1867 in order for us to know what we may do now? Court jurisdiction should be determined on a rational functional basis. We may be influenced by history; we should not be tied down by it.

Nothing frustrates a litigant more than to be told that he was right, but that he went to the wrong court. Yet that is what litigants have been told time and time again, because of the federal appointment power. A litigant may have won his case before a provincial tribunal, but because the tribunal had powers that belonged, in 1867, to the high courts, the decision had to be set aside on review or appeal.

It should be pointed out that the division of powers between federally appointed courts and provincially appointed courts is entirely different than the division of powers between Parliament and the Legislatures. It would be a relatively simple matter if federally appointed courts had jurisdiction over matters within the legislative competence of Parliament, and provincially appointed courts had jurisdiction over matters within the legislative competence of the provinces. However, federally appointed courts have jurisdiction over matters many of which are within provincial legislative competence.

19. *Supra* n. 16, S.C.R. at 734-736.

If some of the difficulties with the federal appointment power are obvious at first glance, other difficulties that have developed are almost beyond imagining. One is the impossibility of creating provincial administrative appeal tribunals.

In the case of *A.G. Quebec v. Farrah*²⁰, the Quebec Transport Commission gave Farrah a transport licence. Others applied to the Quebec Transport Tribunal for permission to appeal the decision of the Commission. Farrah asked the courts to order the Tribunal not to hear the appeal. The order was granted, and upheld by the Supreme Court of Canada. The Tribunal, because it had the power to decide questions of law on appeal, was functioning like a high court. A provincially appointed tribunal, which the Transport Tribunal was, could not have such a power.

Patrice Garant has said of *Farrah* that it sounded the death knell for administrative appeal tribunals.²¹ The Minister of Justice for Quebec said of *Farrah* that it shows how inadequate the constitution is, because it makes it more and more difficult for the provinces to establish administrative tribunals.²²

Another fantastic consequence of the federal appointment power is the entrenchment of judicial review. In the case of *Crevier v. A.G. Quebec*,²³ Harmel Aubry and Robert Cofsky were suspended from their profession of optometry for three months because they practiced optometry in the office of a prescription optician. They appealed to the Professions Tribunal, a provincially appointed tribunal, and won. Crevier, who had originally laid the charge against Aubry and Cofsky, went to court to ask that the decision of the tribunal be quashed. The Supreme Court of Canada, on appeal, affirmed the quashing of the decision. Because the governing statute of the Professions Tribunal contained a privative clause ousting review of jurisdiction by the courts, the Tribunal had the powers of a high court. Its decision, because it was made by provincial appointees, was invalid.

In other words, privative clauses are unconstitutional. According to the Chief Justice, "where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative function, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional."²⁴

There are, no doubt, many who would not object to the entrenchment of judicial review in the *Constitution*. The Canadian Bar Association Committee on the *Constitution* recommended that judicial review be constitutionally guaranteed.²⁵ However, judicial review should be entrenched as a conscious policy decision after full debate over its advantages and disadvantages. It should not, to use the words of Paul Weiler, be "teased

20. *Supra* n. 1.

21. *Supra* n. 8, at 630.

22. *Que. Débats de l'Ass. nat.*, 3^{me} sess. 31^e Lég. p. 1244 (3 Mai, 1978).

23. *Supra* n. 2.

24. *Supra* n. 2, S.C.R. at 234, D.L.R. (3d) at 12.

25. *Supra* n. 18, at 51.

out of the oblique and anachronistic wording" of the present *Constitution*.²⁶ As he has said, judicial review is too important a matter to be left to the judges.²⁷

The judicial review that is entrenched should state the grounds of review that are entrenched. They too should not be left to be "teased out". There is strong argument for including in the grounds for entrenched judicial review denial of natural justice, and denial of administrative fairness, as well as want or excess of jurisdiction. To date, the only ground of judicial review the courts have said is entrenched is want or excess of jurisdiction.

The federal appointment power has become a noose around the necks of governments. With each decision, the noose gets tighter and tighter. With each decision, we learn there is less and less Parliament or the legislatures can do without violating the federal appointment power.

Until recently, it was assumed that the federal appointment power limited the power of the provincial legislatures, but did not limit the power of the federal Parliament. There were academic articles, lower court decisions, and even Supreme Court of Canada dicta to that effect.²⁸ The academic comment criticized the double standard.²⁹ These assumptions were overturned by the *McEvoy* decision.³⁰

In *McEvoy v. A.G.N.B.*, the Government of New Brunswick, on a reference, asked the New Brunswick Court of Appeal whether a provincially appointed unified criminal court would be constitutional, if Parliament agreed.³¹ The Court of Appeal said yes. The federal appointment power provided no fetter to Parliament. If Parliament wanted to give provincially appointed judges powers that formerly had been exercised by high court judges, it could.

McEvoy, an intervenor, appealed to the Supreme Court of Canada. The Supreme Court of Canada reversed the New Brunswick Court of Appeal and answered "no" to the questions asked. Parliament could not give away Ottawa's power to appoint judges. The Court said: "Parliament can no more give away federal constitutional powers than a province can usurp them."³²

The implications of the judgment go far beyond denying the power of Parliament to abandon its appointment power. The Court said that the independence of the high courts has been raised to the level of "a fundamental principle of our federal system". Under the *Constitution*, the high courts are independent of "both levels of government". The *Constitution* "guarantees the independence" of the high courts from Parliament, as well as from the provincial legislatures.

26. *Supra* n. 11, at 382.

27. *Ibid.*, at 391.

28. See Robin Elliot, "Is s. 96 Binding on Parliament?" (1982), 16 U.B.C.L.R. 313 at 314, 315 fn. 4 and 5.

29. See Dussault et Patenaude, "Le contrôle judiciaire de l'administration" (1983), 43 R. du B. 163 at 180.

30. *McEvoy v. A.G. of N.B.* (1983), 46 N.B.R. (2d) 219, 48 N.R. 228 (S.C.C.).

31. (Sub nom. *Reference Re Establishment of a Unified Criminal Court of New Brunswick*) (1981), 127 D.L.R. (3d) 214 (N.B.C.A.).

32. *Supra* n. 30, N.B.R. (2d) at 229, N.R. at 238.

The implication is that Parliament cannot create administrative appeal tribunals, any more than the provincial legislatures can. The implication is that judicial review is entrenched for the federal administration as much as it is entrenched for provincial administrations. The implication is that Parliament cannot take powers from the high court to give to its own tribunals, any more than it can give them to provincial tribunals.

In sum, the courts have viewed the federal power to appoint high court judges, not so much as a power given to Ottawa, but as a power given to the high courts. The power may be in Ottawa to appoint, but what Ottawa is doing when it appoints someone, is conferring on that someone the right to exercise the powers given to the high courts. Neither Parliament nor the provinces can take these powers away. The federal appointment power is, in reality, a duty imposed on the provinces and on Ottawa not to take powers away from the high courts and give them to other officials. Any attempt to do so will be struck down as unconstitutional.

Principles For Reform

These, to date, have been the consequences of the federal appointment power. It is little wonder they have led to proposals for reform. The principles to be applied for reform are, I suggest, these:

1. The jurisdiction of the high courts should be set out. We should not have to go through a historical search to discover what the jurisdiction of the superior courts was in 1867. There must be a better basis for jurisdiction than that;

2. There must be express allowance for administrative appeals tribunals. The high courts must not be given so extensive a jurisdiction that every attempt to establish an administrative appeals tribunal is viewed as a threat to these courts;

3. Judicial review should be entrenched explicitly. It should not be left to be teased out from oblique wording. The grounds of review should be stated. The grounds should include want or excess of jurisdiction, denial of fairness, and denial of natural justice;

4. There should be a balance between jurisdictions. The *Constitution* should not allow Parliament to create administrative appeals tribunals, and at the same time prevent the provincial legislatures from creating administrative appeals tribunals. The *Constitution* should not entrench judicial review for provincial administrative decisions, and at the same time leave federal administrative decisions free from constitutionally entrenched judicial review;

5. The unitary court system in Canada should be retained. Any reform must not be so broad as to allow provincially appointed tribunals to assume all or most of the jurisdiction of the high courts;

6. The independence of the courts should be entrenched explicitly. We should not have to rely on something as oblique as the federal power to appoint judges to guarantee the independence of the courts.

The Government Proposal

The Government of Canada has come out with a discussion paper on this whole issue. The paper is entitled "Provincial Administrative Tribunals and the Constitution". The reform the discussion paper proposes is that the present federal appointment power be retained. In addition, a new section should be added. This new section has these features:

1. The Legislature of each province is to be given the power to confer, on any tribunal, jurisdiction in respect of any matter within provincial legislative authority;
2. The Tribunal granted any such power must not be a court;
3. The decision of any such tribunal would be subject to judicial review for want or excess of jurisdiction.

The proposed section is:

96B. (1) Notwithstanding section 96, the Legislature of each Province may confer on any tribunal, board, commission or authority, other than a court, established pursuant to the laws of the Province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the Province.

(2) Any decision of a tribunal, board, commission or authority on which any jurisdiction of a superior court is conferred under subsection (1) is subject to review by a superior court of the Province for want or excess of jurisdiction.

Defects

The federal proposal suffers, I suggest, from a number of defects:

1. It maintains the problem of trying to figure out what the jurisdiction of the high courts was in 1867. The old federal appointment power remains in the law unrepealed. Where the new proposed section will not apply, the existing provision will;

2. The grounds of judicial review proposed are too limited. We do not want administrative tribunals free from all judicial review so that they can, for example, assert for themselves a jurisdiction which does not belong to them. We do not, on the other hand, want such extensive judicial review that administrative tribunals become just a preliminary step in a court proceeding. Courts of review should not be able to re-try cases. If they could, administrative tribunals, rather than offering speed and low cost, would just add to the expense and delay of litigation.

The *Constitution* should entrench judicial review for adjudicative tribunals, those tribunals being validated by any constitutional amendment. That review should cover excess or want of jurisdiction, including failure to comply with natural justice. The review should not cover error of fact.

The discussion paper states that, on the basis of the case law as it presently stands, failure to observe a principle of natural justice goes to the jurisdiction of the tribunal.³³ If the intention is to include denial of natural justice, why not say so?

33. Government of Canada, "Provincial Administrative Tribunals and the Constitution", Discussion Paper at p. 13.

3. The proposal suffers from lack of balance. It proposes to entrench judicial review for provincial tribunals, but not for federal tribunals;

4. Because the tribunals that can receive jurisdiction over matters within the legislative authority of the provinces cannot be courts, the proposal, on one reading, is meaningless. It must be remembered that there was a three-step test to determine whether the federal appointment power was violated. The steps were: 1. Was the power to be conferred a power held by a high court in 1867? 2. Was the power judicial? 3. Was the power the sole or central power of the tribunal? It is only a central judicial power exercised in 1867 by the high courts that, when conferred on a provincial tribunal, violates the *Constitution*. It makes little sense to talk of a tribunal as exercising a judicial function, a high court function, as its sole or central function, and yet say it is not a court. Every tribunal that exercises a judicial high court function as its sole or central function is a court. The proposed reform could apply to nothing.

On another reading, the notion of a "tribunal other than a court" could have a meaning. It could mean a tribunal that was not previously a court. That is, a tribunal that is not a court independently of the functions conferred on it by virtue of this legislation passed under authority of the amendment. Even assuming that the notion of a "tribunal other than a court" has content, its content is problematic.

The Government of Canada did not, either in its suggested draft reform, or in the accompanying discussion paper, state the distinction between courts, on the one hand, and tribunals whose sole or central function was judicial, on the other hand. What is the distinction?

What distinguishes the two, I believe, is formality of proceedings. Both a court and an administrative tribunal whose sole or central function is judicial decide on rights between adverse parties. A court, however, is formal. Court proceedings normally involve pleadings, interrogatories and examinations for discovery. The High Court is, generally, specialized by profession and generalized by subject matter. Its members are all lawyers of at least ten years standing. The High Court has, at common law, plenary jurisdiction over all matters. There are strict rules of evidence that must be followed. The proceedings are adversarial. The Court is limited to considering the matters that the parties bring before it.

Administrative tribunals are, on the other hand, informal. Their membership is not limited to lawyers. The members are specialized by subject matter. They draw on their subject matter expertise when deciding the matters before them. There are normally no pleadings, no interrogatories, nor examinations for discovery. The tribunals are usually not bound by the strict rules of evidence. They can hear any evidence the members of the tribunal find credible and trustworthy. The proceedings need not be adversarial. The tribunal may have the power to conduct its own investigation into the matters before it. It is not necessarily limited to considering the matters that the parties bring before it.

The High Court is a highly developed system for arriving at the truth, worked out over centuries. Its formality is not mere formalism. It is a

protection for the parties, to give them the best opportunity possible for arriving at justice.

The elaborate system of justice that the High Court represents is simply not suitable for many litigants. Many litigants would rather sacrifice accuracy for speed or cost. Many litigants would rather have their case decided by someone who is expert in the subject matter of their dispute, and not by someone who is expert in the law. Administrative tribunals offer to litigants quicker decisions at lower cost, by experts in the field. They may, as well, produce inaccurate results, including error of law. Courts offer a greater likelihood of accurate results, especially accuracy in the statement and application of the law, but often with delay and high cost.

Whether a particular set of litigants should go to the High Court or to an administrative tribunal is a policy matter. For some types of disputes, one side can use the delay and expense of the courts system to its own advantage. In order to have a workable disputes resolution mechanism, reliance on administrative tribunals is necessary. Labour management disputes are now, in Canada, considered to be best resolved by administrative tribunals. So are residential landlord tenant disputes.

Lawyers and judges may have a bias in favor of courts and against administrative tribunals. Our training and experience, after all, lead us to appreciate the court process. However, we should not become so enamoured of the court process that we render determination by administrative tribunals impossible. There is no justification for making administrative tribunals unconstitutional.

5. The government discussion paper ignores the *McEvoy* decision. It does not discuss federal administrative tribunals, only provincial administrative tribunals. If *McEvoy* does, indeed, throw into doubt the constitutional validity of federal administrative tribunals, the paper suffers from a gaping omission. With the proposed reform implemented, provincial administrative tribunals would be potentially valid, but federal administrative tribunals would not. Even if federal administrative tribunals survive the *McEvoy* decision, and remain constitutionally valid, why not say so explicitly in the *Constitution*?

6. If, in some respects the proposed reform is too narrow, in another respect it is too broad. The intention of the proposed reform is to validate the decisions of tribunals that hear appeals from provincial administrative decisions. Yet its wording goes far beyond that. It allows provincially appointed tribunals to deal with any matter within provincial legislative authority. In other words, these tribunals could deal with actions in contract, actions in tort, actions in real property. If that happened, we would lapse into the dual system of courts that the *Constitution*, in 1867, was designed to avoid.

If Canada were a unitary state, we would never have seen a constitutional prohibition against adjudicative tribunals. The prohibition, as developed by court interpretation, is not there to protect against the existence of adjudicative tribunals. It is there to protect against the provincial usurpation of the federal High Court appointment power.

There are provincial governments, and not only the Government of Quebec, who will, as a matter of principle, exercise to the fullest every jurisdiction given to them. If a provincial appointment power is given, it will be used. If provinces are given the power to transfer all High Court functions to provincially-appointed administrative tribunals, then some provinces will transfer all High Court functions to provincially-appointed administrative tribunals.

Canada now has a unitary system of High Courts, federally appointed and provincially administered. We could create a dual system of High Courts, with a federally-appointed, federally administered court to decide all matters within Parliament's jurisdiction and provincially appointed, provincially administered courts to decide all matters within provincial jurisdiction. The United States has a federal/state dual court system. There is no inherent evil in such a system.

All that can be said here is that if we want to switch to a dual court system, it should be done intentionally. It should not be done inadvertently as a side effect of an attempt to validate provincial adjudicative tribunals. It should be possible to maintain our unitary court system and still allow for provincial adjudicative tribunals.

Any constitutional amendment must allow for the creation of adjudicative tribunals. It must, at the same time, restrain the jurisdictional ambitions of the provinces. We want to give provinces the power to create these tribunals. We want, at the same time, to prevent them from using this power in such a way as to destroy the present court system. While adjudicative tribunals have their place, so do the courts. If in allowing the creation of adjudicative tribunals we create a system that leads to the destruction of the courts, we will have done more harm to justice in Canada than if we maintained the present system.

The proposed Government of Canada amendment imposes no provincial restraint. By saying that tribunals may deal with any matter within the jurisdiction of the provinces, and no more, the suggested amendment leaves the door open for the wholesale transfer of High Court jurisdiction to provincially-appointed administrative tribunals;

7. The proposed reform does not directly address the independence of the courts.

There is now no general requirement in the *Constitution* that courts be independent from government. There is, in the *Charter of Rights and Freedoms*, a requirement that the criminal courts be independent. The Charter gives every person charged with an offence the right to be presumed innocent until proven guilty by an independent and impartial tribunal.

For Superior Courts, the constitutional protection of the tenure of judges is, in effect, a protection of their independence. According to the *Constitution*, judges of the Superior Court hold office during good behaviour. They are removable only by the Governor-General on the address of the Senate and the House of Commons. They cease to hold office on reaching age 75.

There is no constitutional protection of independence nor protection of tenure for members of administrative tribunals. They can be appointed at the pleasure of the government of the day. They can be removed by political whim, without Parliamentary or legislative action. Often, when governments change, the personnel of administrative tribunals change, from affiliates of the defeated party to affiliates of the winning party.

There is a general principle of natural justice that a tribunal must not be biased in arriving at its decision. That principle, which the courts will enforce, is not, in itself, enough to protect the independence of administrative tribunals. That principle prevents the operation of bias in an individual case. It does not prevent the systemic sympathy to government that would flow from a dependence by the tribunal on the government of the day.

There is no need to guarantee the independence of tribunals whose function is non-judicial. Tribunals whose function is to advise on or apply government policy, if independent from government, would just frustrate the workings of government. However, those tribunals whose sole or central function is judicial must, in order to be fair to the litigants, be independent from government. The *Constitution* must guarantee that independence.

The CBA Proposal

The Canadian Bar Association appointed a committee to examine the government proposal and make recommendations. That Committee made a number of recommendations to remove what it saw to be the defects in the proposal. One recommendation was that a "tribunal, board commission or authority other than a court" be defined. The Committee called this entity an adjudicative tribunal. It defined an adjudicative tribunal as a tribunal whose sole or central function is judicial, and which is an element in a scheme for the administration or application of a regulatory statute in a specialized field.

First, the tribunal has to be an element in a scheme for the administration or application of a statute. A statute that does nothing more than establish a tribunal and give it High Court powers would be invalid. There would have to be a statutory scheme for the tribunal to apply.

The statute would have to be regulatory in nature. It could not be just a statement of rights and liabilities. It must establish a system of administrative discretion.

The statute would have to be in a specialized field. It could not be an omnibus statute covering several disparate fields.

The Committee recommended the validation of federal, as well as provincial, tribunals. It suggested a separate clause validating any federally-appointed adjudicative tribunal, which had jurisdiction conferred on it in respect of any matter within the legislative authority of Parliament.

The Committee recommended a guarantee of independence for all courts and adjudicative tribunals. In the view of the Committee, the *Constitution* should have a clause stating that every court and every adjudicative tribunal should be independent and impartial.

This proposal has the advantage, besides guaranteeing the independence of administrative tribunals whose sole or central function is judicial, of guaranteeing the independence, for the first time, of all our civil courts, superior and inferior, federal and provincial.

Finally, the Committee recommended a more general guarantee of judicial review. Instead of limiting judicial review to want or excess of jurisdiction, the Committee proposed a broad statement of the principle of judicial review: that adjudicative tribunals are to be subject to the supervision and control of Superior courts.

At the Mid-Winter meeting of the Canadian Bar Association Council in Whitehorse, in February, 1984, where the Committee report was presented, the Council passed a resolution referring the report to the Minister of Justice and the provincial Attorneys General. As well, the resolution recommended that "the suggested amendment to s. 96 of the *Constitution Act* be deferred until a thorough study has been made of the need to reform all the adjudicative provisions on the *Constitution Act*, including jurisdiction of the courts, tenure and appointment of judges, the independence of the judiciary, and the constitution of the Supreme Court of Canada."

Ontario Response

This resolution brought an angry response from Roy McMurtry, the Attorney-General of Ontario. He wrote to the C.B.A., in a letter of April 2, 1984, that it was "totally unacceptable" that the section 96 problem be linked to reform proposals for all of the judicature provisions of the *Constitution Act*. He said that that was "a recipe for total paralysis".

Mr. McMurtry went on to criticize the federal Minister of Justice for his proposal. He claimed that federal provincial discussions had led to a best efforts draft to amend section 96 to remedy the two major difficulties experienced in the administration of justice in the provinces: family law and administrative law. The federal discussion paper, which dealt solely with administrative law, was, in the eyes of Mr. McMurtry, only "an isolated segment" of the solution. This isolation led, he believed, to the "cautious defensive" response of the C.B.A. . Mr. McMurtry concluded that an effort to amend section 96 should not be piecemeal, nor purport to solve all problems related to the judicature provisions of the *Constitution*.

I disagree with Mr McMurtry. If we are to validate administrative tribunals, we have to look at all the judicature provisions of the *Constitution* and not just section 96. What is more, it is not necessary to deal with family law courts at the same time as administrative tribunals.

The point that has to be made about the judicature sections of the *Constitution*, sections 96 to 100, is that these sections are an integrated whole. Sections 97 and 98 say that federally appointed judges of the courts of the provinces must be chosen from the bars of the provinces. Section 99 says that high court judges shall hold office during good behaviour until age 75. Section 100 says that the salaries of federally appointed judges of the courts of the provinces shall be fixed by Parliament.

Although the problem Canada faces about the validity of administrative tribunals is often referred to as a section 96 problem, in reality it is a sections 96 to 100 problem. W.R. Lederman has written:

[S]urprise is expressed that a mere appointing power (in s. 96) can mean so much. I do not think the implied guarantee of jurisdiction rests on so slender a foundation. It arises from the cumulative effect of all the judicature sections . . . the only peculiar thing that s. 96 does is to provide a single negative test of whether the provincial tribunal whose jurisdiction is being challenged is a superior court.³⁴

Even if section 96 were not there (i.e., even if the provinces were given the power to appoint superior court judges), but sections 97 to 100 remained, the problem would remain. The same approach that the courts have used to strike down administrative tribunals on the basis of section 96 would be used to strike down those tribunals, this time on the basis of sections 97 to 100.³⁵ All that would have happened is that we would have changed our section 96 problem to a section 99 or a section 100 problem.

So, the C.B.A. proposal is not too broad. Nor is the Government of Canada proposal, because it does not deal with family courts, too narrow.

There is, to be sure, a family courts problem. However, the problem was not caused by section 96 of the *Constitution*. The family courts problem is not one of too little, but of too much. We are not faced, in family law, as we are in administrative law, with one tribunal after another being held invalid. Rather, we are faced with family court fragmentation. One set of courts, federally appointed, deals with some family problems. Another set of courts, provincially appointed, deals with some of the same and with other family court problems. What is needed is a unified family court to deal with all family law matters.

The fragmentation of the family court system was caused by the constitutional division of powers over family law matters. The *Constitution* gives exclusive jurisdiction to Parliament over marriage and divorce.³⁶ The *Constitution* gives exclusive jurisdiction to the provincial legislatures over property and civil rights.³⁷ That category includes custody, access, maintenance, and alimony. When these matters are ancillary to divorce, Parliament may also legislate, and its legislation is paramount.

The power to legislate carries with it a power to confer jurisdiction upon a court to adjudicate disputes. Section 96 imposes limits on the exercise of this power; it does not transfer this power from one jurisdiction to another. Parliament has conferred powers to deal with family law matters within its legislative jurisdiction upon federally appointed courts. Insofar as section 96 allows them to do it, the provincial legislatures have conferred power to deal with family law matters within their jurisdiction upon provincially appointed courts.

34. W.R. Lederman, "The Independence of the Judiciary" (1956), 34 C.B.R. 1139 at 1172.

35. See also Robin Elliott, "Is Section 96 Binding on Parliament" (1982), 16 U.B.C.L.R. 313 at 322; (1984), 18 U.B.C.L.R. 127 at 132.

36. *Constitution Act, 1867*, s. 91(26).

37. *Constitution Act, 1867*, s. 92(13).

Amending or removing section 96 will not solve this problem. Even without section 96, if the provinces insisted on allocating family law matters within their jurisdiction to provincially appointed courts, and Parliament insisted on allocating family law matters within its jurisdiction to federally appointed courts, fragmentation would remain.

What is more, the problem can be solved with section 96 remaining in the *Constitution*. There have been all sorts of unified family courts proposed, and some actually implemented, without constitutional amendment. What is needed is merely federal-provincial co-operation on the appointment of the judges to the unified family court.

Admittedly, section 96 complicates the solution. Legislators must ensure that section 96 is respected. However, there is a solution all the same, without constitutional amendment.

That cannot be said of the administrative law problem. We must choose between a constitutional amendment and invalidity of administrative tribunals. It makes eminent sense to proceed with a solution to that problem separate from the family courts problem.

Conclusion

If the debate over the federal power to appoint judges were simply a debate over which government should be able to dispense judicial patronage, the debate would be a matter of indifference to most of us. However, the debate is of a good deal more significance than that. What is at issue is judicial review, the existence of administrative appeal tribunals, and the survival of a unitary court system. It is, I suggest, a debate we should all follow closely.