
How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence

Gerald Heckman and Lorne Sossin*

International human rights law recognizes the right to have one's rights and obligations adjudicated by an independent tribunal—one free from internal collusion and external manipulation. Under Canadian law, by contrast, the right to tribunal independence is watered down. Interference by the executive in administrative decision making is tolerated because the constitutionally entrenched protection of judicial independence is understood not to extend to the sphere of administrative tribunals, ordinarily viewed as instruments of governmental policy. The deference of Canadian courts to tribunals without constitutional protection for independence means that many tribunal decisions remain insulated from review by independent courts. Furthermore, even where a certain degree of protection exists, the overwhelming emphasis in Canadian administrative law on guarantees of security of tenure and financial remuneration of tribunal members leaves tribunals vulnerable to external manipulation through political influence over tribunal appointments and policy directions.

In this article, the authors ask whether the Canadian norm of tribunal independence measures up to international human rights standards. The authors document and compare the content of this norm in conventional international law and Canadian law. They conclude that the protections for tribunal independence found in Canadian law likely fall short of the standards embodied in international human rights instruments and suggest ways in which Canadian law might draw inspiration from international sources.

Le droit international des droits humains reconnaît le droit de faire juger de ses droits et obligations par un tribunal indépendant — un tribunal libre de toute collusion interne et manipulation externe. En droit canadien, le droit à l'indépendance des tribunaux est quelque peu édulcoré en comparaison. Certaines intrusions par le pouvoir exécutif dans les décisions administratives sont tolérées parce que la protection constitutionnelle de l'indépendance judiciaire est vue comme ne s'étendant pas à la sphère des tribunaux administratifs, ordinairement perçus comme des instruments servant les politiques gouvernementales. La déférence dont font preuve les cours canadiennes envers des tribunaux dont l'indépendance n'est pas protégée constitutionnellement a pour effet de soustraire nombre de décisions de ces tribunaux à toute révision par des cours indépendantes. De plus, même lorsqu'une certaine protection existe, l'emphasis écrasante que met le droit administratif canadien sur les garanties relatives à la durée des mandats et à la rémunération financière des membres des tribunaux rendant ceux-ci vulnérables à des manipulations externes, à travers l'influence politique, sur les nominations et l'orientation des politiques.

Dans cet article, les auteurs se demandent si les normes canadiennes relatives à l'indépendance des tribunaux sont à la hauteur de celles prescrites par le droit international. Les auteurs documentent et comparent le contenu de ces normes en droit international conventionnel et en droit canadien, pour en venir à la conclusion que les protections offertes en matière d'indépendance des tribunaux en droit canadien ne rencontrent pas les standards contenus dans les instruments internationaux relatifs aux droits humains et suggèrent de quelles manières le droit canadien pourrait s'inspirer de sources internationales.

* Gerald Heckman, Ph.D. candidate, Osgoode Hall Law School, York University. Lorne Sossin, Associate Professor and Associate Dean, Faculty of Law, University of Toronto. The authors wish to thank Leslie Zamojc for her excellent research assistance and Laverne Jacobs for sharing some of her ongoing research into questions of administrative independence. We are grateful for the constructive and challenging questions posed by colleagues who reviewed an earlier draft of this paper, including Harry Arthurs, Colleen Flood, France Houle, Grant Huscroft, David Mullan, and Michael Taggart. Gerald Heckman gratefully acknowledges the support of a doctoral fellowship from the Social Sciences and Humanities Research Council of Canada.

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Introduction

A cornerstone of international human rights law is the principle that everyone is entitled to have their rights and obligations adjudicated by an independent tribunal—one free from internal collusion and external manipulation. An analysis of Canadian administrative law reveals a slightly less firm procedural foundation: under Canadian standards, one can claim at most that *some* people have *some* right to have *some* of their cases heard and adjudicated by a tribunal that is *quasi*-independent. This slippage occurs because most Canadians have their disputes heard and adjudicated by administrative tribunals, boards, commissions, and other executive decision makers who are, to varying degrees, subject to influence and interference by the government of the day. This interference is tolerated because the constitutionally entrenched protection of judicial independence is held not to extend to the sphere of administrative tribunals. In Canadian constitutional law, the distinction between tribunals and courts is key—it holds even where there is virtually no functional distinction between the adjudication conducted in tribunals and courts, and even where the interests, rights, and obligations at stake in tribunal proceedings may be far more significant than what is at stake in judicial proceedings. This is not to say that those in Canada who have their rights adjudicated by administrative tribunals have no constitutional entitlement to procedural protection: some matters (e.g., refugee determinations) engage life, liberty, and security of the person concerns and consequently give rise to *Charter*¹ procedural protections, but the vast majority do not. While there are some non-*Charter* statutory protections that might afford procedural protections for people coming before administrative decision makers—the *Canadian Bill of Rights*² and Quebec *Charter of Human Rights and Freedoms*³ are the two salient examples—most jurisdictions in Canada have not enacted this sort of legislation. As a result, Canadian administrative law protections resemble a patchwork quilt with different degrees of protection applicable in different jurisdictions depending on differing contexts. Even so, the right of affected parties to an independent hearing can in most cases be vitiated by a simple act of the legislature. This uncertainty flows from one of the presuppositions of the Canadian constitutional system, which is that administrative tribunals form part of the executive rather than the judicial branch of government,⁴ and are therefore subject to parliamentary supremacy. James Sprague captured the conventional Canadian position well when he observed: “[A]dministrative agencies are not junior, imitation or quasi-courts. They

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

² *Canadian Bill of Rights*, S.C. 1960, c. 44.

³ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [*Quebec Charter*].

⁴ See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 [*Ocean Port* cited to S.C.R.].

are instrumentalities of government policy which are, nonetheless, required to act fairly.”⁵

The question we wish to pose in this paper is whether this state of affairs in Canadian administrative law measures up to procedural norms in international human rights instruments. Through an analysis of these instruments and the present state of Canadian judicial review, we conclude that it likely does not. While the doctrine of institutional independence has been affirmed on numerous occasions in the last decade or so by the Supreme Court of Canada, increasingly these affirmations have come with qualifications. Most importantly, the common law protection of institutional independence can be trumped by clear statutory language to the contrary. Where contrary language is present, its effect is to insulate adjudication from review even where there is an apprehension of vulnerability to influence or manipulation. Because Canadian courts often defer to expert decision makers even where their independence may be curtailed by statute, many Canadians will have their rights and interests adjudicated without the guarantee that the adjudicating body is independent and impartial. Additionally, even where procedural protections are in force, the analysis tends to focus on judiciary-oriented concerns of financial independence and security of tenure rather than more executive-oriented concerns about political interference from supervising ministries and the partisan political staff of the government of the day.

As David Dyzenhaus, Murray Hunt, and Michael Taggart have argued, the principle of legality forms an important bond between the development of Canadian administrative law and international norms.⁶ Should anyone care, however, how Canadian administrative law measures up to those international norms? We argue that our claim regarding the dissonance between international norms and Canadian administrative law is important for at least three reasons. First, insofar as the federal executive, by ratifying international human rights conventions, has made an international commitment on behalf of the Canadian state that decision making in Canada would respect the procedural standards expressed in these conventions, concern is appropriate where Canada is failing to honour its commitment. This is not to suggest that the executive can bind all governments in Canada through its pen but rather that, if the government of Canada has undertaken such a commitment, it should be seen as a legal obligation, albeit often an unenforceable one, from which positive obligations may flow. This reasoning is less compelling in the case of provincial governments, which usually will have had no say in the commitments the Canadian executive has decided to undertake.

⁵ James L. H. Sprague, “*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*: Case Comment” (2000) 12 Can. J. Admin. L. & Prac. 349 at 356.

⁶ David Dyzenhaus, Michael Hunt & Murray Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) 1 Oxford University Commonwealth Law Journal 5.

Second, international human rights norms, because they are forged from a broad consensus among disparate nations (including, of course, Canada in some instances), provide an important measuring rod with which to assess the scope and content of procedural safeguards in Canadian administrative law. Under this comparative law approach, we rely on international law for its ability to provoke “critical self-reflection”: “Comparing the international and domestic approaches to a legal problem may lead to the recognition of differences and alternatives within domestic law, thereby promoting engagement with diverse internal perspectives on the problem.”⁷

Third and finally, we believe that gaps between public law standards need to be justified—in other words, if the content of institutional independence under section 7 of the *Charter* differs from the content of institutional independence under subsection 2(e) of the *Canadian Bill of Rights* or section 23 of the *Quebec Charter of Human Rights and Freedoms* or the common law, this begs fundamental questions.⁸ While the gaps between domestic procedural protections may give rise to similar questions, in this paper we focus on the gap between domestic procedural protections taken as a whole on the one hand, and international human rights law procedural protections on the other. If institutional independence under Canadian administrative law appears to be a less rigorous standard than in international human rights law, in our view it is vital to ask why.⁹ This is especially the case considering that the various sources of procedural rights recognized in Canadian administrative law interpenetrate with international law on many levels. Common law principles of procedural fairness and of tribunal independence form part of the state practice underlying the creation of customary international law. Given the central role of common law nations in drafting the principal regional and international human rights instruments, the same common law principles likely inspired the formulation of the conventional international norms of procedural fairness and independence. Conversely, conventional international norms, now shaped through their interpretation by international bodies, may influence the meaning of Canadian common law principles through application of the presumption that Canadian law should, where possible, be interpreted in conformity with Canada’s treaty obligations. And, as the Supreme Court observed in *Suresh v.*

⁷ Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U.J. Int’l L. & Pol. 501 at 531.

⁸ Compare the discussion of the *Charter* in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 212-16, S.C.J. No. 11 [*Singh* cited to S.C.R.] with the discussion of the *Canadian Bill of Rights* in *Singh* at 229-35; the discussion of the *Canadian Bill of Rights* in *MacBain v. Canada (Canadian Human Rights Commission)*, [1985] 1 F.C. 856, 22 D.L.R. (4th) 119; the discussion of the *Quebec Charter* in *2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool)*, [1996] 3 S.C.R. 919, 140 D.L.R. (4th) 577 [*Régie* cited to S.C.R.]; and the discussion of the *Charter* in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1 [*Suresh* cited to S.C.R.]. The standards of fairness applied in each of these different settings do not appear to differ in substance.

⁹ See David Dyzenhaus, “*Baker*: The Unity of Public Law?” in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 1.

Canada (Minister of Citizenship and Immigration),¹⁰ both the common law procedural fairness rules¹¹ and international human rights norms¹² form part of the principles of fundamental justice for the purposes of the *Charter*.

Other Westminster systems are facing a similar dilemma with respect to harmonizing or reconciling domestic guarantees and international commitments. In the UK, the courts have adapted their judicial review doctrines to incorporate the principle of proportionality from German administrative law (“has the authority gone beyond what is needed to achieve the desired object?”) instead of the doctrine of *Wednesbury* reasonableness (“could a reasonable minister acting reasonably in the legislative context have done what the minister did?”) as the basis of evaluating the legitimacy of state policy and action.¹³ In addition, international treaties have had a significant impact on state-based law and judicial reasoning.¹⁴ This impact may include an increased expectation that judges and lawyers develop the explicit rationality of their thought in dialogue with a broader global universe of norms, principles, and methods of reasoning.

If Canadian courts and the federal and provincial governments adopted the goal of making Canadian administrative law compatible with the procedural requirements of international human rights instruments, as in our view they should, the content of Canadian administrative law might substantially alter. This suggestion should not be confused with the argument that international human rights norms should be given “binding” effect in Canadian courts. The Supreme Court has reiterated on a number of occasions that international treaties and conventions are not part of Canadian law unless they have been implemented by statute.¹⁵ The Court has also accepted,

¹⁰ *Suresh*, *supra* note 8.

¹¹ *Ibid.* at para. 113.

¹² *Ibid.* at para. 46.

¹³ See Lord Slynn of Hadley, “The European Union and English Law” in Cheryl Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia* (Sydney: Federation Press, 1996) at 176.

¹⁴ See M. Moran, “Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method” in Dyzenhaus, *The Unity of Public Law*, *supra* note 9 at 389, and J. Brunnée & S. Toope, “A Hesitant Embrace: *Baker* and the Application of International Law” in Dyzenhaus, *The Unity of Public Law*, *supra* note 9 at 357 [Brunnée & Toope, “*Baker* and International Law”]. See also Gareth Evans, “The Impact of Internationalisation on Australian Law: A Commentary” and Lord Cooke of Thorndon, “The Dream of an International Common Law” in Saunders, *supra* note 13.

¹⁵ See e.g. *Francis v. The Queen*, [1956] S.C.R. 618 at 621, 3 D.L.R. (2d) 641 [*Francis* cited to S.C.R.]; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 172-73, 81 D.L.R. (3d) 609 [*Capital Cities* cited to S.C.R.]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 67-70, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.]. Jutta Brunnée and Stephen J. Toope argue that this is an unduly narrow view of the requirement that international treaty provisions must be “transformed” before they become determinative in the interpretation of domestic legislation (Jutta Brunnée & Stephen J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) *Can. Y.B. Int'l Law* 3 at 26-27 [Brunnée & Toope, “Hesitant Embrace”]). They suggest that where Canada ratifies a

however, that statutes are enacted and read in a legal context that includes the values and principles contained in customary and conventional international law and should be interpreted to reflect these values and principles.¹⁶ Similarly, the Court has found that customary and conventional international law may inform *Charter* interpretation and, in particular, may constitute evidence of the principles of fundamental justice.¹⁷

The difference between the “binding/nonbinding” and “persuasive or evidential value” approaches to the role of international legal norms in domestic law was dramatically illustrated in the case of *Ahani v. Canada (Attorney General)*.¹⁸ Facing imminent removal to Iran based on his alleged terrorist activities and intentions and having exhausted all other remedies under Canadian law, Ahani filed a petition with the United Nations Human Rights Committee under the *Optional Protocol to the International Covenant on Civil and Political Rights*,¹⁹ alleging that his deportation would breach his rights under the covenant. His application for an injunction to delay his deportation until his petition could be heard was denied by the Ontario Court of Appeal, which held that Ahani could not rely on the covenant or the *Optional Protocol* as neither was legislatively incorporated into Canadian law and therefore binding on Canadian courts. While looking at a different constellation of issues, our analysis is aimed at broadening the discussion about the role of international law norms in Canadian administrative law beyond the one-dimensional binding/nonbinding discourse.²⁰

Part I of this article examines the scope and content of the norm of tribunal independence in conventional international law, in particular under article 14 of the *International Covenant on Civil and Political Rights*²¹ and article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.²² While the requirements and sources of tribunal independence under these instruments

treaty based on the prior conformity of Canadian law with the treaty provisions, Canada’s commitments should be considered to have been implemented (*ibid.* at 28).

¹⁶ See *Baker*, *ibid.* at para. 70.

¹⁷ See *Suresh*, *supra* note 8 at para. 60.

¹⁸ (2002), 58 O.R. (3d) 107 (C.A.).

¹⁹ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 [*Optional Protocol*].

²⁰ For analysis on how a broader approach to the role of international law norms could have informed *Ahani*, see Gerald P. Heckman, “International Human Rights Law Norms and Discretionary Powers: Recent Developments” (2002) 16 Can. J. Admin. L. & Prac. 31 at 59-63. See also A. Macklin, “The State of Law’s Borders and the Law of States’ Borders” in Dyzenhaus, *The Unity of Public Law*, *supra* note 9 at 194-95, and Brunnée & Toope, “*Baker* and International Law”, *supra* note 14 at 364-66. For analysis of the decision of the Human Rights Committee on the merits of Ahani’s petition, see Gerald P. Heckman, “International Law and Procedural Safeguards in Deportation Proceedings: Developments in International Law” (2005) VII:3 Regulatory Boards and Administrative Law Litigation 418 [Heckman, “Deportation Proceedings”].

²¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 [*ICCPR* or *Covenant*].

²² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, art. 6 [*ECHR* or *European Convention*].

remain contested, we believe Canadian administrative law would be enriched by greater engagement with these norms and their interpretation by international treaty bodies. Part II describes the evolution in Canadian law of the principle of institutional independence of tribunals, with an emphasis on the recent jurisprudential tendency to limit both the principle's scope and content. Part III compares the level of institutional independence guaranteed by Canadian administrative law to individuals subject to tribunal decision making to that recognized in international human rights law. The discussion focuses on the implications for administrative independence of the highly deferential posture assumed by Canadian courts in their review of administrative decision makers, especially in settings (such as appointment decisions) where the vulnerability to political interference may be greatest.

I. The Guarantee of Independence in Conventional International Law

It is well established that international human rights law entitles each individual to a fair and public hearing by an independent and impartial tribunal in the determination of his or her rights and obligations. This right is expressly guaranteed in several international declarations and conventions, including the *Universal Declaration of Human Rights*,²³ the *International Covenant on Civil and Political Rights*,²⁴ the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁵ and the *American Convention on Human Rights*.²⁶ It has been observed, based on a wide-ranging review of state constitutions, legislation and supporting state practice regarding judicial independence, that "the general practice of providing independent and impartial justice is accepted by states as a matter of law" and is thus a customary norm of international law.²⁷ An exhaustive review of the sources of the international law norm of tribunal independence falls outside the scope of this paper. This part will instead focus on how the scope and content of this norm has been defined under article 14(1) of the *ICCPR* and article 6(1) of the *ECHR*.

The *ICCPR* is a "key international document" for Canada.²⁸ Ratified by Canada and in force since 1976, the *Covenant's* provisions are binding on Canada under international law, which means that at the very least, Canadian courts should, where

²³ *Universal Declaration of Human Rights*, GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 10 [*UDHR* or *Declaration*].

²⁴ *Supra* note 21.

²⁵ *Supra* note 22.

²⁶ *American Convention on Human Rights*, 22 November 1969, 65 A.J.I.L. 679, art. 8.

²⁷ Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities, *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report by the Special Rapporteur Param Cumaraswamy*, UN CCPROR, UN Doc. E/CN.4/1995/39 (1995) at para. 35.

²⁸ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 19.

possible, interpret Canadian law in a manner that comports with Canada's obligations under the *Covenant*.²⁹ Moreover, Canada has claimed in its regular reports to the UN Human Rights Committee to have implemented the terms of the *Covenant* by, among other measures, enacting the *Charter of Rights and Freedoms*.³⁰ The Human Rights Committee ("Committee"), established under the *Covenant*, monitors the implementation of the *Covenant* by reviewing the periodic reports of states parties, and issues commentaries on the meaning and scope of the *Covenant*'s provisions. By ratifying the *Optional Protocol*, Canada has recognized the jurisdiction of the Committee to receive and consider communications from individuals alleging a breach by Canada of their rights under the *Covenant*. This part will pay close attention to the Committee's pronouncements on the scope and content of the norm of tribunal independence expressed in article 14.

To date, article 14 of the *ICCPR* has not been successfully invoked to challenge Canada's system of administrative justice. In contrast, administrative decision making in many European states, notably the United Kingdom, has been scrutinized for compliance with article 6 of the *ECHR*. The two provisions are broadly analogous, and although we will argue that the scope of article 14 of the *ICCPR* is broader than that now recognized for article 6, the jurisprudence of the European Court of Human Rights regarding the content of the norm of tribunal independence expressed in article 6 offers valuable insight into the nature and extent of Canada's obligations in international law.

A. *The International Covenant on Civil and Political Rights*

Article 14(1) of the *ICCPR* provides that:

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

1. Scope of the Right to an Independent Tribunal

The right of persons to "a fair and public hearing by a competent, independent and impartial tribunal established by law" in article 14(1) applies only to the

²⁹ See Brunnée & Toope, "Hesitant Embrace", *supra* note 15 at 51. Toope and Brunnée note, however, that courts have been inclined to treat ratified but unimplemented treaties merely as relevant and persuasive sources that may inform the interpretation of Canadian law.

³⁰ See Anne F. Bayefsky, *International Human Rights Law—Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 63. Toope and Brunnée observe that the Canadian government "has claimed implementation primarily through the Charter and related constitutional jurisprudence, complemented by various amendments to existing statutes" (Brunnée & Toope, "Hesitant Embrace", *supra* note 15 at 24). See also Human Rights Committee, *Consideration of Reports Submitted by States under Article 40 of the Covenant: Fourth Periodic Report of States Parties Due in 1995: Canada*, UN CCPROR, 1995, UN Doc. CCPR/C/103/Add.5.

determination of a criminal charge and to the determination of a person's rights and obligations in a suit at law. Based only on this wording, it is unclear whether article 14(1) applies to proceedings of an administrative nature. However, the *travaux préparatoires* to the *Covenant* and the Committee's views and comments indicate that some administrative proceedings must indeed comply with the requirements of fairness, independence and impartiality.

a. *The Travaux Préparatoires*

The *travaux préparatoires* to the *Covenant* reveal a debate among drafting committee delegates about the proper scope of article 14(1) in relation to noncriminal matters. The debate centred around whether to limit the right to a fair hearing before an independent and impartial tribunal to proceedings that determined "civil" or "private" rights and obligations or to extend it to proceedings between individuals and the state, including administrative matters.³¹ The committee accepted a compromise solution, proposed by Eleanor Roosevelt, the US representative, to remove the adjective "civil" but qualify the term "rights and obligations" with the phrase "in a suit at law", a formulation intended to emphasize that "appealing to a tribunal was an act of a judicial nature."³² The drafters of the *UDHR* had also removed the qualifier "en matière civile" from the French version of article 10 of the *UDHR*, emphasizing their intent "to avoid any restriction which would exclude—a *priori*—rights other than private ones."³³

Two conclusions may be drawn regarding the final wording of article 14(1) in light of the *travaux préparatoires*. First, the drafters did not intend article 14(1) to limit the fair hearing guarantee to civil matters between private individuals. The consensus appeared to be that article 14(1) extends to disputes between individuals and the state. As van Dijk states:

[O]ne cannot draw any other conclusion than that it was not the intention of the drafters to restrict the scope of Article 14 of the *Covenant*, apart from determinations of a criminal-law character, to determinations of rights and obligations of a private-law character. ... On the contrary, ... proposals whose

³¹ For a more detailed treatment of the *travaux préparatoires*, see David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (The Hague: Kluwer Law International, 2001) at 46, 48 & 51. See also Peter van Dijk, "The Interpretation of Civil Rights and Obligations by the European Court of Human Rights—One More Step to Take" in F. Matscher & H. Petzold, eds., *Protecting Human Rights: The European Dimension—Studies in Honour of Gérard Wiarda*, 2d ed. (Berlin: Carl Heymanns Verlag KG, 1990) 131 [van Dijk, "One More Step"]. See also Heckman, "Deportation Proceedings", *supra* note 20.

³² Weissbrodt, *ibid.* at 51. Roosevelt had expressed concern that administrative officers, not courts, determined many civil rights obligations like those connected with military service and taxation. Pieter van Dijk observes that these particular "civil rights and obligations" were not of a private law character and concludes that Roosevelt understood "civil" to include all nonpenal or noncriminal matters rather than solely private law matters: van Dijk, "One More Step", *ibid.* at 137.

³³ van Dijk, "One More Step", *ibid.* at 136.

wording might have entailed the risk of such a restriction, were criticized for that reason and rejected or amended.³⁴

Second, the term “in a suit at law” was apparently intended to remove *some* matters from the scope of article 14(1). After reviewing the record of the drafting committees, Weissbrodt concludes that the article “may not apply to administrative proceedings in the first instance as to subject matters unrelated to human-rights concerns, such as taxation.”³⁵

It can be argued that, in their application, the article 14(1) safeguards resemble the common law duty of procedural fairness in Canadian administrative law. Whether a decision maker owes a duty of procedural fairness to an individual affected by a particular decision depends on where the decision falls on a “decision-making spectrum”. The duty of procedural fairness undoubtedly applies to decisions that have a significant impact on substantial individual interests and involve fundamental human rights of life, liberty, and security of the person, like decisions in criminal proceedings.³⁶ Similarly, article 14(1) expressly covers criminal charges. At the bottom end of the decision-making spectrum, legislative actions, including the setting of rates and rules of taxation, do not attract the duty of fairness in Canadian administrative law.³⁷ Likewise, such decision making was excluded from the scope of article 14(1) through the addition of Eleanor Roosevelt’s “in a suit at law” wording. One can read the *travaux préparatoires*, as Weissbrodt does, as revealing the intent to extend the protections of article 14(1) to administrative hearings that engage individual fundamental rights or interests that are closer to the top of the decision-making spectrum, even if they are less substantial than those at stake in criminal proceedings.³⁸ The suggestion in the *travaux préparatoires* that the phrase “in a suit at

³⁴ *Ibid.* at 137.

³⁵ Weissbrodt, *supra* note 31 at 51.

³⁶ See *Baker*, *supra* note 15 at para. 23, where the Supreme Court confirmed that a decision with a significant impact on the interests of an individual will usually attract a duty of procedural fairness on the part of the decision maker.

³⁷ See *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 754, 115 D.L.R. (3d) 1, where the Supreme Court refused to attach a duty of fairness to the decision of the federal Cabinet to deny an appeal from a decision of the Canadian Radio-Television and Telecommunications Commission fixing telephone rates for millions of Canadian telephone subscribers of Bell Canada, because the fixing of rates for a public utility was “legislative action in its purest form.” See also *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 83 Sask. R. 81: “Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty” (*ibid.* at 670). Finally, see *Canadian Association of Regulated Importers v. Canada (A.G.)*, [1994] 2 F.C. 247, 17 Admin. L.R. (2d) 121 (F.C.A.), where the Federal Court of Appeal described the setting of import quotas as a legislative or policy matter, in which courts did not normally interfere. For a critique, see Geneviève Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 U.T.L.J. 217.

³⁸ On the concept of a “threshold” between administrative and specific decisions and legislative and general decisions below which decision makers owe no duty of procedural fairness, see David J.

law” was added to emphasize that proceedings subject to article 14(1) would be of a “judicial nature” is also reminiscent of the doctrinal efforts of Canadian courts to determine the threshold for the application of the common law duty of procedural fairness, and in particular their distinction between judicial or quasi-judicial decisions and administrative decisions.³⁹ To determine the applicability of procedural fairness, Canadian judges no longer focus exclusively on whether a particular decision is judicial or quasi-judicial in nature. However, they do consider the nature of the decision and of the decision maker, and have held that the more closely the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making (characterized, for example, by the application of clear legal standards or criteria to the precise circumstances of an individual), the more likely it is that the duty of fairness will require procedural protections closer to a traditional trial model.⁴⁰

b. The Scope of Article 14(1) in the Committee’s Jurisprudence

The Human Rights Committee appeared to confirm that article 14(1) applies to administrative proceedings in *Y.L. v. Canada*.⁴¹ The author of the communication, a former soldier discharged from the armed forces, applied to the Canadian Pension Commission for a disability pension and was turned down. He appealed to the Pension Review Board, which confirmed the commission’s rulings and dismissed his appeal. The author claimed that he had not been granted a fair and public hearing in violation of article 14(1). Canada replied that the communication was outside the scope of the *ICCPR* and thus inadmissible, because proceedings before the Pension Review Board were not a “suit at law”. Canada argued that the relationship between the author—a member of the armed forces—and the state was a matter of public law and did not concern “civil rights and obligations”, an expression taken from the French-language version of article 14(1), which refers to “contestations sur ses *droits et obligations de caractère civil*”. While the English-language text appears to focus on the forum or proceeding in which the rights and obligations are determined (i.e., “suit at law”) as the relevant characteristic, the French-language text seems to focus on the private law nature of the rights and obligations to be determined. Noting this difference, the Human Rights Committee sought to interpret article 14(1) in a manner that reconciled the English- and French-language texts:

[T]he concept of a “suit at law” or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the

Mullan, *Administrative Law: Cases, Text and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003) at 99ff. [Mullan, *Administrative Law: Cases, Text and Materials*].

³⁹ See *ibid.* at 100-102.

⁴⁰ See *Baker*, *supra* note 15 at para. 23.

⁴¹ Committee on Human Rights, Communication No. 112/1981, *Y.L. v. Canada*, UN GAOR, 41st Sess., Supp. No. 40, UN Doc. A/41/40 (1986) 145 [Y.L.].

right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in light of its particular features.⁴²

The Committee therefore examined the right to a fair hearing in relation to the author's pension claim, and noted that it was clear "that the Canadian legal system subjects the proceedings in [the various administrative bodies before which the author pursued his pension claim] to judicial supervision and control, because the *Federal Court Act* does provide the possibility of judicial review in unsuccessful claims of this nature."⁴³ It concluded that the first instance hearing before the Pension Review Board, coupled with the availability of judicial review of the board's decision, appeared to comply with article 14(1):

It has not been claimed by the author that this remedy would not have complied with the guarantees provided [in article 14(1)]. Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

... [T]herefore, it would appear that the Canadian legal system does contain provisions in the *Federal Court Act* to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.⁴⁴

A minority of members dissented from the Committee's application of article 14(1) to the proceedings for two reasons. First, the right in question, based on the relationship between a soldier and the Crown (as opposed to an ordinary employment contract), was of a public rather than private nature. Second, the forum provided to adjudicate the question—the Pension Review Board—was an administrative body "functioning within the executive branch of the Government of Canada, lacking the quality of a court."⁴⁵

Although the Committee did not expressly state that the pension proceeding was a "suit at law", this can be implied from its views for several reasons. First, the Committee's decision in *Y.L.* contains none of the disclaimers commonly found in other Committee views that expressly state, for example, that "in the circumstances, the Committee need not decide whether the impugned decision was determinative of

⁴² *Ibid.* at para. 9.2.

⁴³ *Ibid.* at para. 9.4.

⁴⁴ *Ibid.* at paras 9.4-9.5.

⁴⁵ *Ibid.* at para. 3 (Appendix).

the author's rights and obligations in a suit at law."⁴⁶ Second, far from avoiding the question of whether a proceeding before the Pension Review Board was a "suit at law", the Committee asked Canada for additional information to help it determine that very point.⁴⁷ Third, the Committee did not simply conclude that the availability of judicial review satisfied the requirements of article 14(1) without pronouncing itself on the scope of that provision; instead, the Committee looked into the meaning of "suit at law" in some depth. Finding that the concept of "suit at law" is based on the "nature of the right in question," the Committee attributed a pivotal importance to the question whether the author's claim was "of a kind" subject to judicial supervision and control.⁴⁸ It found that claims "of the nature" of pension claims were subject to judicial review, and again emphasized the importance of determining whether the author's claim "was of a kind subject to judicial supervision and control." It concluded that the author's right to a fair hearing before the Pension Review Board could have been secured by having the Federal Court quash the Board's initial decision on judicial review and order it to decide the claim afresh, in a fair hearing. Fourth, the three dissenting Committee members evidently believed that the Committee had found that article 14(1) applied to the Pension Review Board proceedings, since their dissent focused on establishing that the ex-soldier's pension claim did not come within the scope of article 14(1). Fifth, many academic observers commenting on the *Y.L.* decision have concluded that the Committee recognized that the Pension Review Board proceedings concerned the determination of rights and obligations in a "suit at law". David Weissbrodt, former special rapporteur on the rights of noncitizens to the United Nations Subcommission on the Promotion and Protection of Human Rights, has written that "[t]he Committee found an action is a suit at law in two circumstances: (1) if the forum where the particular question is adjudicated is one where courts normally exercise control over the proceedings; or (2) where the right in question is subject to judicial control or judicial review."⁴⁹ Stephen Bailey admits that the Committee's decision "is obscurely reasoned and difficult to analyze," but concludes that "[o]n the facts of *Y.L.*, the Committee majority seems to have regarded the claim as a 'suit at law' with sufficient protection for the purposes of

⁴⁶ See e.g. Committee on Human Rights, Communication No. 1051/2002, *Ahani v. Canada*, 2004, UN Doc. CCPR/C/80/D/1051/2002 at para. 10.5, and Communication No. 654/1995, *Adu v. Canada*, 1997, UN Doc. CCPR/C/60/D/654/1995 at para. 6.3 [*Adu*].

⁴⁷ *Y.L.*, *supra* note 41 at para. 5. The Committee sought information on whether the relationship between a soldier and the state was governed by civil law or public law rights and obligations, whether the employment of civil servants in Canada was governed by a statutory (public law) or contractual (private law) regime, whether there was a distinction in Canadian law between persons employed by private employers under a labour contract and government employees, and information regarding the judicial review of pension board decisions before the Federal Court of Appeal.

⁴⁸ *Ibid.* at para. 9.4.

⁴⁹ Weissbrodt, *supra* note 31 at 139.

Article 14(1) provided by the right to seek judicial review.”⁵⁰ David John Harris suggests that the majority of the Committee may have intended a two-part test to determine whether article 14 applies to a given dispute:

First, it looks to the “nature of the right,” with the determination of private law rights being within Article 14, but not the determination of public law rights (*i.e.* rights that an individual has in his relations with the state). Secondly, if a case does not involve the determination of a private law right, it will, nonetheless, involve a “suit at law,” if, in the legal system concerned, it can be determined on the merits before a court of law or the executive decision determining the public law right in question is subject to judicial review.⁵¹

Dominic McGoldrick shares this view, and observes that “the critical factor” in the Committee’s decision that article 14(1) applied in *Y.L.* “appears to be that the claim was of a kind subject to judicial supervision and control.”⁵² Sarah Joseph notes that the majority’s views “certainly hinted” that the Pension Review Board proceedings concerned a “suit at law” and suggests that the majority’s focus “on the nature of the right and whether the claim was of a kind subject to judicial supervision and control” was preferable to the dissenting opinion, which threatened to dilute article 14(1) protection by focusing on “perverse” domestic classifications of a claim.⁵³

Oddly, in its subsequent decision in *V.M.R.B. v. Canada*,⁵⁴ the Committee did not apply the broad interpretation of “suit at law” it had developed in *Y.L.* The author was detained by immigration authorities while investigations were made to determine whether he posed a danger to national security. He claimed that reviews of his detention by immigration adjudicators were not fair and impartial and violated article 14(1). Leaving open the question of whether such immigration proceedings were subject to article 14(1), the Committee held that assuming article 14(1) applied, the provision had not been infringed because “[the author] was given ample opportunity, in formal proceedings, including oral hearings with witness testimony, both before the Adjudicator and before the Canadian courts, to present his case for sojourn in Canada.”⁵⁵

⁵⁰ Stephen Bailey, “Rights in the Administration of Justice” in David Harris & Sarah Joseph, eds., *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995) at 212.

⁵¹ D. J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet and Maxwell, 1998) at 672 [footnote omitted].

⁵² Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) at 416 [footnote omitted]. See also Peter Boeles, *Fair Immigration Proceedings in Europe* (The Hague: Martinus Nijhoff, 1997) at 137.

⁵³ Sarah Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000) at 281.

⁵⁴ Committee on Human Rights, Communication No. 236/1987, *V.M.R.B. v. Canada*, 1988, UN Doc. CCPR/C/33/D/236/1987 [*V.M.R.B.*].

⁵⁵ *Ibid.* at para. 6.3.

The Committee has since held that article 14(1) applies to proceedings involving governments as parties. In *Casanovas v. France*, it determined that proceedings filed by the author before the Administrative Tribunal of Nancy concerning his dismissal from employment constituted the determination of rights and obligations in a suit at law.⁵⁶ In contrast, it found that the selection and appointment of judges by Cyprus' Supreme Council of Judicature was not a determination of rights and obligations in a suit at law.⁵⁷ Contrary to *Casanovas*, which concerned removal of the petitioner from public employment, *Kazantzis* concerned the denial of an application for employment in the judiciary by a body exercising a "nonjudicial" task.⁵⁸

Like the *travaux préparatoires*, which suggest that the phrase "suit at law" was added to emphasize that proceedings subject to article 14(1) would be of a "judicial" nature, the Committee's allusion to "nonjudicial" and "judicial" tasks is reminiscent of the efforts of Canadian courts to determine the threshold for the application of the common law duty of procedural fairness, and in particular their distinction between administrative decisions and judicial or quasi-judicial decisions.⁵⁹ Drawing on this analogy, the Committee's recent focus on whether the impugned decision is of a judicial nature can be reconciled with its decision in *Y.L.* In *Y.L.*, the Committee was essentially preoccupied with the following question: Was the author's claim the kind of claim over which courts would normally exercise control and supervision to ensure it was decided fairly? In *Kazantzis*, it found that the author's application for a judicial appointment did not entail decision making of a "judicial" nature. Courts would not normally recognize that the author was owed a duty of fairness for the determination of this kind of claim and would not enforce such a duty. Therefore, under the *Y.L.* test, claims of this nature were not within the scope of article 14(1).

In sum, to ask whether article 14(1) applies to the determination of an individual's claim is to ask whether a duty of fairness is owed to the claimant. Under the *Y.L.* test, as at common law, the answer to that question depends on the nature of the claim.⁶⁰ If the determinations required to reach a decision on the author's claim are closer to

⁵⁶ Committee on Human Rights, Communication No. 441/1990, *Casanovas v. France*, 1994, UN Doc. CCPR/C/51/D/441/1990 at paras. 5.2, 7.4. It held that fair hearings had to be expeditious, but that the delay between the author's filing of his claim and the tribunal's final decision was not long enough to violate article 14(1). In Communication No. 454/1991, *Pons v. Spain*, 1995, UN Doc. CCPR/C/55/D/454/1991 at para. 9.6, the Committee determined that the proceedings to determine a civil servant's entitlement to unemployment benefits had not infringed his article 14 right to a fair hearing. Though it did not expressly address the point, it presumably assumed that such proceedings involved the determination of rights and obligations in a suit at law: see Harris, *supra* note 51 at 672, n. 20.

⁵⁷ Committee on Human Rights, Communication No. 972/2001, *Kazantzis v. Cyprus*, 2003, UN Doc. CCPR/C/78/D/972/2001 at para. 6.5.

⁵⁸ *Ibid.* at para. 6.5.

⁵⁹ See Mullan, *Administrative Law: Cases, Text and Materials*, *supra* note 38 at 100-02.

⁶⁰ See especially *Baker*, *supra* note 15 at paras. 23-25. See also Mullan, *Administrative Law: Cases, Text and Materials*, *supra* note 38 and accompanying text.

judicial than legislative decision making, and if that decision significantly impacts the author's life, the claim is of a kind normally subject to judicial supervision and control to ensure its fair determination. In that case, the *Y.L.* test is satisfied and article 14(1) applies.⁶¹

2. Content of the Right to an Independent Tribunal

Article 14 requires that determinations of rights and obligations in a suit at law be made by a competent, independent and impartial tribunal established by law. This part describes the meaning of tribunal independence under article 14(1), drawing from the views and observations of the Committee and of other UN bodies.

a. *The Meaning of "Tribunal"*

While "tribunal" usually refers to national civil courts, administrative authorities may also be considered "tribunals" under article 14(1).⁶² A tribunal "established by law" is one whose jurisdiction, both in relation to subject matter and territorial application, is "determined generally and independently of the given case" rather than set arbitrarily by administrative fiat.⁶³

b. *Independence*

Unless there are compelling circumstances that militate otherwise, adjudicative tribunals ought to be independent. The Committee has stated that in determining whether a tribunal is independent, it considers "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition[s] governing promotion, transfer and cessation of their functions and *the actual independence of the judiciary from the executive branch and the legislative.*"⁶⁴ These criteria were likely inspired by a significant standard-setting exercise initiated by the United Nations and other international bodies to define the basic principles or minimum standards flowing from the right to an independent tribunal guaranteed in

⁶¹ It should come as no surprise that the factors used to determine whether a claim falls within the scope of article 14(1) resemble those used by Canadian courts to decide whether its determination is subject to a duty of procedural fairness: common law courts have been pondering for centuries in what circumstances to apply the guarantee of a fair hearing. See David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 156-58, discussing *Cooper v. Board of Works for Wandsworth District* (1863), 143 E.R. 414 (C.P.) and *Dr. Bentley's Case* (1723), 1 Str. 557, 93 E.R. 698 (K.B.).

⁶² See Manfred Nowak, *U.N. Covenant on Civil and Political Rights—CCPR Commentary* (Kehl am Rhein: N.P. Engel, 1993) at 244-45.

⁶³ *Ibid.*

⁶⁴ Human Rights Committee, *General Comment 13*, UN GAOR, 21st Sess., Supp. No. 40, CCPR General Comment #13, UN Doc. HRI/GEN/1/Rev.1 (1994) 14 at para. 3 [emphasis added].

the *UDHR* and *ICCPR*.⁶⁵ The United Nations' "principal instrument" for defining judicial independence is a document titled *Basic Principles on the Independence of the Judiciary*.⁶⁶ Adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, the *Basic Principles* were endorsed by the UN General Assembly, which invited states to "respect them and to take them into account within the framework of their national legislation and practice."⁶⁷ To encourage states to give effect to these basic principles, the UN Economic and Social Council adopted "Procedures for the Effective Implementation of the *Basic Principles on the Independence of the Judiciary*", a document also endorsed by the General Assembly.⁶⁸

In parallel, the UN Commission on Human Rights' Subcommittee on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur, Dr. L. M. Singhvi, to conduct an exhaustive study of state constitutions, legislation, and supporting state practice and to produce a report on the independence and impartiality of the judiciary, jurors, and assessors and the independence of lawyers. In his seminal final report and a subsequent follow-up report, Dr. Singhvi developed a *Draft Universal Declaration on the Independence of Justice*.⁶⁹ The *Basic Principles* and the *Singhvi Declaration* include the traditional guarantees of security of tenure, financial security, and administrative control recognized in Canada since *Valente*.⁷⁰ However,

⁶⁵ For a more detailed description of the development of these standards, see R. Brody, "Introduction" in R. Brody, ed., *C.I.J.L. Bulletin No. 25-26, Special Issue—The Independence of Judges and Lawyers: A Compilation of International Standards* (Geneva: Centre for the Independence of Judges and Lawyers, 1990) at 3-13 [Brody, *C.I.J.L. Special Bulletin*].

⁶⁶ United Nations, *Basic Principles on the Independence of the Judiciary* in Brody, *C.I.J.L. Special Bulletin*, *ibid.* at 14 [*Basic Principles*].

⁶⁷ *Human Rights in the Administration of Justice*, GA Res. 40/146, UN GAOR, 40th Sess., UN Doc. A/RES/40/146 (1986).

⁶⁸ *Human Rights in the Administration of Justice*, GA Res. 44/162, UN GAOR, 44th Sess., UN Doc. A/RES/44/162 (1990).

⁶⁹ Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers—Report by the Special Rapporteur, Mr. L. M. Singhvi, Pursuant to Subcommittee Resolution 1987/23 of 3 September 1987, Addendum*, UN ESCOR, 40th Sess., UN Doc. E/CN.4/Sub.2/1988/20/Add.1 (1988) in Brody, *C.I.J.L. Special Bulletin*, *supra* note 63 at 38 [*Singhvi Declaration*]. This document was greatly influenced by the "Universal Declaration on the Independence of Justice", adopted at the First World Conference on the Independence of Justice held in Montreal in 1983, and reproduced in Shimon Shetreet & Jules Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985) at 447ff.

⁷⁰ *Infra* note 189. Article 11 of the *Basic Principles*, *supra* note 66, provides that "[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law". See also *Singhvi Declaration*, *supra* note 69, art. 18, which requires that judges be provided with adequate salaries and pensions. Article 12 of the *Basic Principles* mandates guaranteed tenure until a fixed retirement age or the expiry of the judge's term in office: see also *Singhvi Declaration*, art. 16. The discipline, suspension, and removal of judges is governed by strict limits: *Basic Principles*, arts. 17-20; *Singhvi Declaration*, arts. 26-31. Article 14 of the *Basic Principles* reserves to the judiciary the task of assigning individual cases to

both documents place much emphasis on the appointment and promotion of judges, an issue seldom broached by Canadian courts. For example, article 10 of the *Basic Principles* states in part that “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.”⁷¹ Article 11 of the *Singhvi Declaration* deals more explicitly with the danger of executive control of the appointments process, and recommends the involvement of the judiciary in appointing judges:

11. (a) The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

(b) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives.

(c) Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, ... [an] endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively.⁷²

Dr. Singhvi notes that in relation to the principle of independence, the doctrine of separation of powers postulates, among others, “the insulation of the judiciary in respect of appointment, promotion, posting, transfer, removal, emoluments and other conditions of work and service from external and extraneous influence of the legislature and the executive.”⁷³ An executive that engages in “[n]epotism, favouritism and partisanship” and ignores professional merit in appointing judges undermines “the professional ethos and morale of the judiciary” and erodes judicial independence.⁷⁴

judges. See *Singhvi Declaration*, arts. 32-36: article 32 confers on the judiciary or a body on which the judiciary is represented responsibility for court administration, including control of court staff.

⁷¹ Similarly, article 13 of the *Basic Principles*, *supra* note 66, states that “[p]romotion of judges ... should be based on objective factors, in particular ability, integrity and experience.”

⁷² Similarly, article 14 of the *Singhvi Declaration*, *supra* note 69, requires that judges be promoted “based on objective assessment of the judge’s integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law” and not for improper motives.

⁷³ Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers—Final Report by the Special Rapporteur, Mr. L. M. Singhvi*, UN ESCOR, 38th Sess., UN Doc. E/CN.4/Sub. 2/1985/18 (1985) at para. 108 [*Singhvi Final Report*].

⁷⁴ *Ibid.* at para. 109.

While the *Basic Principles* and the *Singhvi Declaration* were developed primarily in relation to the independence of the judiciary, they are still relevant to the independence of administrative decision makers:

In many countries, tribunals such as Fiscal Tribunals, Revenue Boards, Customs and Excise Tribunals, Income Tax Tribunals and Contentious Administrative Tribunals perform traditional adjudicative functions. Generally, tribunals ... are judges of facts as well as of law. Members of judicial tribunals as well as members of many administrative tribunals are a part of the judiciary within the narrow sense of that term.⁷⁵

In Dr. Singhvi's estimation, "[t]he principles of impartiality and independence apply to both judges and others, who, without being judges in the formal sense, perform judicial roles and functions."⁷⁶ In contrast, "[t]he impartiality and independence of such administrators and policymakers who are also entrusted with functions of an adjudicating nature are vital principles but they cannot be secured in the same way as in the case of judges and tribunals whose functions are primarily judicial and who belong by their appointment to the machinery of justice."⁷⁷ This does not mean that the principles of independence and impartiality do not apply to "administrators and policymakers"—they apply "by analogy with suitable modifications and as far as practicable but not in a full normal sense".⁷⁸

The terms and tenures of those who are not a part of the judiciary are necessarily different; so are their background and appointment procedures. Safeguards applicable to members of the judiciary cannot, therefore, be made applicable to them. They may nevertheless be called upon to discharge duties of a judicial and quasi-judicial nature in an impartial and independent manner. ... With regard to those who also perform judicial or quasi-judicial roles but who are [not] strictly a part of the judiciary, judicial standards and other safeguards apply as far as possible.⁷⁹

In sum, the safeguards dictated by the principles of independence and impartiality apply to the fullest extent to regular courts and to tribunals exercising primarily judicial functions. In the case of administrators and policy-makers who also have an adjudicative function, the principles of independence and impartiality apply by analogy with suitable modifications, and "judicial" safeguards apply only as far as possible. The principles of independence and impartiality developed by the United Nations as applied to the judiciary remain relevant along the entire decision-making spectrum but require stronger safeguards for decision makers whose functions more closely resemble that of courts.

The Committee has had occasion to elaborate on the requirements of the article 14(1) guarantee of independence in its concluding remarks on the periodic reports of

⁷⁵ *Ibid.* at para. 11.

⁷⁶ *Ibid.* at para. 14.

⁷⁷ *Ibid.* at para. 13.

⁷⁸ *Ibid.* at para. 14.

⁷⁹ *Ibid.* at para. 14.

various state parties to the *ICCPR* and in its views on individual communications. Underlining that security of tenure was an important prerequisite to independence, it expressed concern that the President of Belarus could dismiss judges of that nation's constitutional court and supreme court without any safeguards.⁸⁰ Invoking the *Basic Principles*, the Committee observed that the procedures relating to tenure, disciplining, and dismissal of judges at all levels did not comply with the principle of independence and urged the Belarus government to take all appropriate measures to ensure that judges were independent of any political or other external pressure.⁸¹ The Committee has also discussed the impact on judicial independence of inappropriate state procedures to nominate and promote judges. Where evidence indicated that the President of Equatorial Guinea directly nominated all judges and magistrates and controlled the judiciary, it observed that a situation where “the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal”⁸² Similarly, the lack of any independent mechanism responsible for the recruitment and discipline of Congolese judges threatened their independence.⁸³ The Committee expressed concern that the election of state judges in the United States adversely impacted article 14(1) guarantees of independence and impartiality and it welcomed state reforms in favour of merit-based appointments.⁸⁴ Concerned that Sudanese judges were not selected primarily on the basis of their legal qualifications, were subject to pressure through a government-controlled supervisory authority, and were predominantly Muslim males, the Committee advised Sudan to improve the independence and technical competence of

⁸⁰ Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations by the Human Rights Committee: Belarus*, UN CCPROR, Human Rights Committee, 61st Sess., UN Doc. CCPR/C/79/Add.86 (1997) at paras. 13-14.

⁸¹ *Ibid.*

⁸² Committee on Human Rights, Communication No. 468/1991, *Bahamonde v. Equatorial Guinea*, UN GAOR 49th Sess., Supp. No. 14, UN Doc. A/CCPR/C/49/0/468/1991 183 at para. 9.4. The Committee has encouraged other States to achieve a clearer separation of powers. Concerned about threats to the independence of the Romanian judiciary through executive interference, it urged Romania to “establish a clear demarcation between the competence of the executive and judicial bodies” (Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: Romania*, UN CCPROR, Human Rights Committee, 65th Sess., UN Doc. CCPR/C/79/Add.III (1999) at para. 10).

⁸³ Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: Congo*, UN CCPROR, Human Rights Committee, 66th Sess., UN Doc. CCPR/C/79/Add.118 (2000) at para. 14.

⁸⁴ Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: United States of America*, UN CCPROR, Human Rights Committee, 53rd Sess., UN Doc. CCPR/C/79/Add.50 (1995) at para. 23.

its judges and to recruit more judges from among women and ethnic minorities.⁸⁵ Regarding the promotion of judges, the Committee expressed concern at the requirement under Lithuanian law that district judges be reviewed by the executive after five years of service before securing a permanent appointment.⁸⁶ In light of the threats that this process posed to judicial independence, the Committee recommended that reviews be carried out by an independent professional body looking only at the judges' competence.⁸⁷

The independence guarantee in article 14(1) has seldom been discussed by the Committee in the context of administrative decision making. In arguing before the Committee that the Immigration and Refugee Board was an independent tribunal, Canada observed that board members were appointed for seven-year terms and could only be removed on limited grounds in the context of an inquiry presided by a judge, and that the board had its own budget, operated autonomously, and was subject to judicial supervision.⁸⁸ In *Torres v. Finland*, an asylum seeker, detained pending his extradition to Spain, complained that he had been deprived of a review of his detention by a court contrary to article 9(4) of the *ICCPR*.⁸⁹ The Committee agreed that Finnish law, which allowed the asylum seeker to appeal his detention to the minister of the interior, did not meet the requirements of article 9(4), which aimed to achieve a higher level of objectivity and independence in the review of detentions.⁹⁰

An appellate hearing before a tribunal that complies with article 14(1) may cure the defects of an initial hearing before a noncompliant tribunal. In *Karttunen v. Finland*, the Committee found a lack of impartiality when one of the lay judges sitting on a panel considering charges of fraudulent bankruptcy against a petitioner should have been disqualified under the Finnish *Code of Judicial Procedure* since he was related to one of the complainants in the case.⁹¹ The Committee noted that this

⁸⁵ Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: Sudan*, UN CCPROR, Human Rights Committee, 61st Sess., UN Doc. CCPR/C/79/Add.85 (1997) at para. 21.

⁸⁶ Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: Lithuania*, UN CCPROR, Human Rights Committee, 61st Sess., UN Doc. CCPR/C/79/Add.87 (1997) at para. 16.

⁸⁷ *Ibid.* See also Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: Slovakia*, UN CCPROR, Human Rights Committee, 61st Sess., UN Doc. CCPR/C/79/Add.118 (1997) at para. 18, where the Committee asked the Slovakian government to protect the judiciary by adopting laws regulating the appointment, remuneration, tenure, dismissal, and disciplining of judges. Of particular concern were the election of judges on a probationary basis and the power of the Justice minister to dismiss the president and vice-president of the Supreme Court.

⁸⁸ See *Adu*, *supra* note 46 at para. 4.15.

⁸⁹ Committee on Human Rights, Communication No. 291/1988, *Torres v. Finland*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990).

⁹⁰ *Ibid.* at para. 7.2.

⁹¹ The Committee has stated that impartiality implies that “judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one

deficiency could have been corrected had an impartial and independent appeal court been willing to rehear the evidence in a public, in-person hearing.⁹²

To date, as noted earlier, article 14 of the *ICCPR* has not successfully been invoked to challenge Canada's system of administrative justice. In contrast, administrative decision making in many European states, notably the United Kingdom, has been scrutinized for compliance with article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁹³ The next Section reviews the jurisprudence of the European Court of Human Rights ("European Court") regarding the scope and content of the right to a fair hearing before an independent tribunal.

B. The European Convention

Textually analogous to article 14 of the *ICCPR*, article 6 of the *European Convention* states in part:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

The European Court's jurisprudence under article 6(1) of the *ECHR* provides evidence of the scope and content of the norm of tribunal independence in states with highly developed systems of administrative justice.

1. Scope of the Right to an Independent Tribunal

As in the case of article 14(1) of the *ICCPR*, the extent to which article 6(1) of the *ECHR* applies to public law disputes is a contentious question. Generally, the European Court has found that article 6(1) applies outside the criminal context where (1) the impugned proceedings involve a dispute ("contestation") over a right or obligation; (2) the impugned proceedings lead to a "determination" of the right or obligation; and (3) the right or obligation in issue is of a "civil" nature.

The court must decide whether there is a dispute over a "right" which can be said on arguable grounds to be recognized under domestic law. The concepts of "right" and "obligation" have an autonomous meaning under the *European Convention* and while the European Court takes into account whether the national legal system

of the parties" (Committee on Human Rights, Communication No. 387/1989, *Karttunen v. Finland*, UN GAOR, 46th Sess., Supp. No. 40, UN Doc. A/46/40 (1991) at para. 7.2 [*Karttunen*]).

⁹² *Ibid.* at para. 7.3.

⁹³ The Committee has recently hinted that it is prepared to equate article 14(1) of the *ICCPR* with article 6(1) of the *ECHR* in cases where it has given effect to reservations of European parties to the *Optional Protocol* that deny the Committee competence to consider communications regarding matters previously examined under the *ECHR*: Committee on Human Rights, Communication No. 989/2001, *Kollar v. Austria*, UN GAOR, 58th Sess., Supp. No. 40, UN Doc. A/58/40 at para. 8.6. On the subject of such reservations to the *Optional Protocol*, see generally Joseph, *supra* note 53 at 69-73.

classifies an interest or privilege as a “right”, it is not bound by this determination but must also consider the “substantive content and effects” of the interest or privilege and the object and purpose of the *ECHR*.⁹⁴ An entitlement or right expressly provided for by statute is clearly “recognized under domestic law”. A right may also be found to exist in the face of a broad statutory discretion to confer a benefit or issue a licence, even where the applicant cannot claim entitlement to a specific outcome. For example, when a property owner sought to challenge a building committee’s refusal to exempt him from the criteria governing the issuance of a building permit, the European Court decided that a dispute over a right arose where the applicant could arguably claim that the state authority had exercised its statutory discretion in a manner contrary to generally recognized legal and administrative principles.⁹⁵ The court has further held that the “contestation” must be of a genuine and serious nature, may relate to the actual existence of a right, to its scope, or to the manner in which the right may be exercised, and may concern questions of both fact and law.⁹⁶

The impugned proceedings must lead to a “determination” of the civil right or obligation. While the link between the outcome of the proceedings and the impact on the exercise of the right may not be tenuous or remote, the impugned proceedings need not be designed for the specific purpose of restricting or defining an individual’s “civil” right. Rather, the outcome of the impugned proceedings must be “decisive for”, “affect”, or “relate to” the determination or exercise of a “civil” right.⁹⁷ For example, disciplinary proceedings against a doctor, although designed primarily to protect patients and promote public confidence in the medical profession, had a sufficient impact on the doctor’s right to practice his profession that it effectively determined this “civil” right.⁹⁸

The general entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal is limited to cases involving the determination of individuals’ “civil rights and obligations” or of criminal charges against them. The French-language version of the text states that article 6(1) applies to proceedings to decide “contestations sur ses droits et obligations *de caractère civil*.” This terminology is identical to that in article 14(1) of the *ICCPR*, even though the English-language versions of the two conventions differ. The European Court has not

⁹⁴ See *Kaplan v. U.K.* (1980), 21 Eur. Comm. H.R.D.R. 5.

⁹⁵ *Skärby v. Sweden* (1990), 13 E.H.R.R. 90 at para. 28, 180 Eur. Ct. H.R. (Ser. A) 28. But see *Masson and van Zon v. Netherlands* (1996), 22 E.H.R.R. 491, 327 Eur. Ct. H.R. (Ser. A) 1, and *Leutscher v. Netherlands* (1996), 24 E.H.R.R. 181, 39 Y.B. Eur. Conv. H.R. 209, where the court decided there was no “right” to compensation for loss of liberty while in unlawful detention under the Dutch *Code of Criminal Procedure*, because it conferred on Dutch courts a discretion to grant such compensation on equitable grounds. See also P. van Dijk & G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d ed. (The Hague: Kluwer Law International, 1998) at 395.

⁹⁶ *Bentham v. Netherlands* (1985), 8 E.H.R.R. 1 at para. 32, 97 Eur. Ct. H.R. (Ser. A) 1 [*Bentham*].

⁹⁷ van Dijk & van Hoof, *supra* note 95 at 397.

⁹⁸ *Le Compte, Van Leuven and De Meyere v. Belgium* (1981), 4 E.H.R.R. 1 at paras. 47-48, 43 Eur. Ct. H.R. (Ser. A) 1 [*Le Compte*].

comprehensively defined the meaning of “civil” right or obligation, opting instead to develop the concept in a piecemeal fashion, perhaps to the detriment of clarity and certainty.⁹⁹ The major point of contention is whether “civil” right should be equated with “private” right, limiting the application of article 6(1) to proceedings meant to determine rights of a “private” nature, such as individual property rights or rights arising in tort or contract law. There are strong arguments, based on the *travaux préparatoires* and drafting history of articles 14(1) of the *ICCPR* and 6(1) of the *ECHR*, that this was not the intention of the drafters of either provision,¹⁰⁰ and that the term “civil” rights was intended to cover the determination of all legal rights that were not of a criminal nature.¹⁰¹ However, the European Court has “created the impression that it started from the assumption that ‘civil’ meant ‘private’, and that it employed these terms as synonyms.”¹⁰² The court has developed four principles in relation to the question of whether a right or obligation can be characterized as “civil”.¹⁰³ First, the concept of “civil right or obligation” has its own meaning in European convention law and cannot be interpreted solely by reference to whether the domestic law of the respondent state classifies a right as “private” instead of public. Second, article 6(1) does not only cover “private law” disputes in the traditional sense (i.e., disputes between individuals), excluding disputes between individuals and the state acting in its sovereign capacity. Third, the character of the legislation governing the matter to be determined, and the nature of the authority having jurisdiction in the matter (either ordinary court or administrative body), are of little consequence in determining whether the right or obligation is civil in character. Fourth, whether a right is to be regarded as civil must be determined by reference to its substantive content and effects.

Applying these principles on a case by case basis, the European Court has extended the application of article 6(1) beyond disputes concerning traditional private rights to cases involving proceedings with a strong “public” flavour but whose outcomes impact on private rights. For example, the court applied article 6(1) to the withdrawal of a liquor permit despite Sweden’s claim that the regulation of alcohol distribution and consumption was an important part of its social policy and fell within an essential field of public law.¹⁰⁴ The permit conferred “civil” rights because it was essential for the applicant to carry on its business activities as a restaurant and its revocation impacted on a private commercial activity based on the contractual relationship between the permit holder and its customers.¹⁰⁵ Similarly, article 6(1) was

⁹⁹ See van Dijk & van Hoof, *supra* note 95 at 404.

¹⁰⁰ See *ibid.* at 392-94. See also van Dijk, “One More Step”, *supra* note 31 and accompanying text.

¹⁰¹ This view is set out convincingly in the dissenting opinion of Judge Loucaides in *Maaouia v. France* (2000), 33 E.H.R.R. 42 at paras. O-IV3–O-IV8, [2000] 10 Eur. Ct. H.R. 301 [*Maaouia*].

¹⁰² van Dijk & van Hoof, *supra* note 95 at 404 [footnote omitted].

¹⁰³ See *Bentham*, *supra* note 96 at para. 34.

¹⁰⁴ *Tre Traktörer Aktiebolag v. Sweden* (1989), 13 E.H.R.R. 309 at para. 42, 159 Eur. Ct. H.R. (Ser. A) 1.

¹⁰⁵ *Ibid.* at para. 43.

found to govern zoning decisions that subjected the future use by a property holder of his or her property to government preauthorization,¹⁰⁶ as well as decisions of professional disciplinary tribunals to restrict or eliminate individuals' right to exercise professions.¹⁰⁷ A dispute regarding a person's entitlement to health insurance under social security legislation was also found to concern a civil right.¹⁰⁸ The compulsory nature of health insurance, the comprehensive statutory scheme regulating health insurance, and the state's large role in the scheme gave the applicant's claim a strong "public" flavour. However, taken cumulatively, the scheme's private law features—including its resemblance to private insurance schemes, the connection between the availability of benefits and the applicant's employment under a private law contract, and most importantly, the personal, economic and individual nature of the right, of crucial importance to a person who by reason of illness has no other source of income—"confer[red] on the asserted entitlement the character of a civil right ..."¹⁰⁹ In *Salesi v. Italy*,¹¹⁰ the court went further, applying article 6(1) to a claim of entitlement to welfare allowances. This time, it did not advert to any similarities between Italy's statutory welfare assistance program and private schemes, but relied almost exclusively on the fact that Salesi suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the constitution.¹¹¹ The court recently confirmed that complaints of discrimination in hiring or tendering processes brought under human rights codes involve the determination of civil rights.¹¹²

The broadening scope of article 6(1) does not extend to all proceedings of a public law nature. The European Court recently determined in *Maaouia v. France* that decisions regarding the entry, stay, and, deportation of aliens do not concern the determination of their civil rights or obligations or of a criminal charge against them

¹⁰⁶ *Oerlemans v. Netherlands* (1991), 15 E.H.R.R. 561, 219 Eur. Ct. H.R. (Ser. A) 1.

¹⁰⁷ *Le Compte*, *supra* note 96.

¹⁰⁸ *Feldbrugge v. Netherlands* (1986), 8 E.H.R.R. 425, 99 Eur. Ct. H.R. (Ser. A) 1.

¹⁰⁹ *Ibid.* at para. 40.

¹¹⁰ (1993), 26 E.H.R.R. 187, 257 Eur. Ct. H.R. (Ser. A) 54 [*Salesi*].

¹¹¹ The court noted that, under the Italian statute, disputes over the right to welfare came within the jurisdiction of the ordinary courts (*Salesi*, *ibid.* at para. 19). See also *Schuler-Zraggen v. Switzerland* (1993), 16 E.H.R.R. 405 at para. 46, 263 Eur. Ct. H.R. (Ser. A) 1, where the court applied the same reasoning to an applicant's entitlement to a disability pension, which it found to be an individual economic right flowing from specific rules laid down in a federal statute. As in Canadian administrative law, the significance of the decision's impact on the individual's fundamental interests or rights is central to the court's decision to apply article 6(1).

¹¹² *Tinnelly & Sons Ltd v. United Kingdom* (1998), 2 E.H.R.R. 249, [1998] 79 Eur. Ct. H.R. 1633. The European Court observed that the human rights code "guaranteed persons a right not to be discriminated against ... in the job market including ... when bidding for a public works contract" (*ibid.* at para. 61). Moreover, the Fair Employment Tribunal was empowered to assess the applicants' losses and order damages for loss of profits. The clearly defined statutory right not to be discriminated against, "having regard to the context in which it applied and to its pecuniary nature", could be classified as a "civil right" (*ibid.*). See also *Devlin v. United Kingdom* (2001), 34 E.H.R.R. 43, 29545/95 (HUDOC).

under article 6(1).¹¹³ Its decision was based primarily on the Council of Europe’s adoption, twenty-four years after the ratification of the *European Convention*, of a separate protocol providing minimal procedural administrative safeguards to aliens in expulsion proceedings. A majority of the court accepted that the state parties to the convention had not intended immigration proceedings to be covered by article 6(1), reasoning that the protocol was adopted precisely to fill the gap resulting from the lack of article 6(1) guarantees.¹¹⁴

In dissent, Judges Loucaides and Traja roundly criticized the majority judgment. First, they rejected the majority’s interpretation of the concept of “civil rights and obligations” as unduly narrow and at odds with both the purposive interpretation of treaties required by the Vienna Convention and the drafting history of article 6(1).¹¹⁵ It would be preferable to read “civil right” to include all legal rights that were not of a criminal nature, because this interpretation enhanced individual rights in line with the object and purpose of the *European Convention*.¹¹⁶ Further, it was inconceivable that a convention intended to implement the rule of law could provide for the fair administration of justice in respect of rights between individuals but fail to do so in respect of rights and obligations “*vis-à-vis* the administration where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State.”¹¹⁷ Second, the dissenting judges questioned the majority’s reliance on the protocol, arguing that while its procedural protections for the expulsion of aliens were intended to govern proceedings before competent administrative authorities, they did not purport to restrict any judicial guarantees that aliens enjoyed under article 6(1), but instead supplemented these guarantees.¹¹⁸ In other words, the Council of Europe’s decision to require states to put in place an administrative authority governed by minimal procedural guarantees could not be taken, without express language, to restrict or remove aliens’ right to a fair hearing under article 6(1). A protocol entered into long after the ratification of the *European*

¹¹³ *Maaouia*, *supra* note 101 at para. 40. It found that proceedings for the rescission of exclusion orders did not concern the determination of a criminal charge or the determination of aliens’ civil rights, even though exclusion orders significantly affected their private and family life and prospects of employment (*ibid.* at paras. 38-39).

¹¹⁴ The court relied on an “explanatory report” on the protocol, which noted that the protocol “d[id] not affect” the European Commission’s interpretation of article 6, denying that it applied to deportation proceedings (*ibid.* at paras. 35-37).

¹¹⁵ *Maaouia*, *supra* note 101 at paras. O-IV4–O-IV11. See van Dijk, “One More Step”, *supra* note 31.

¹¹⁶ *Maaouia*, *supra* note 101 at para. O-IV7.

¹¹⁷ *Ibid.* According to the dissent, the majority’s narrow view of the meaning of “civil rights” had obliged the court to adopt artificial distinctions in order to extend article 6 protection to proceedings that did not involve private law, such as claims for pensions, social security and social assistance (*ibid.* at para. O-IV6).

¹¹⁸ *Ibid.* at O-IV15–O-IV17.

Convention and meant to form part of the convention could not qualify or abolish the human rights previously safeguarded in the main body of the convention.¹¹⁹

The *Maaouia* dissent advances powerful reasons against excluding immigration proceedings from the scope of article 6(1) based on a narrow interpretation of the term “civil rights”. The broad interpretation urged by the dissenting judges is even more compelling in the context of article 14(1) of the *ICCPR*, whose drafters expressly dropped the adjective “civil” from the English-language version to include public law proceedings within the scope of the provision.¹²⁰ The broad interpretation is also consistent with the provisions of other regional human rights instruments.¹²¹ The result in *Maaouia* is driven less by the text of article 6(1) and the court’s article 6(1) jurisprudence than by the implied effect of a specific protocol, and should not change our assessment of the scope of the international norm of tribunal independence under article 14(1) of the *ICCPR*.

2. Content of the Right to an Independent Tribunal

Article 6(1) of the *ECHR* guarantees to individuals whose civil rights are to be determined a right of access to proceedings before a tribunal whose organization and composition meet minimum standards of independence and impartiality:

Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6(1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.¹²²

¹¹⁹ As the dissenting judges put it: “Protocols add to the rights of the individual. They do not restrict or abolish them” (*ibid.* at para. O-IV14).

¹²⁰ Commentators have criticized the majority judgment for similar reasons: see Hanneke Steenbergen, Pieter Boeles & Christa Wijnakker, “Case Reports of the European Court of Human Rights” (2001) 3 *Eur. J. Migr. & L.* 97 at 101.

¹²¹ Article XVIII of OAS, Ninth International Conference of American States, *American Declaration of the Rights and Duties of Man* (1948), 43 *A.J.I.L.* 133, makes no distinction between “civil” or private and “public” law rights but simply provides that “every person may resort to the courts to ensure respect for his legal rights.” While it does not specify a right to a fair hearing before an independent and impartial tribunal, resort to a court would likely provide such guarantees. Similarly, article 8(1) of OAS, Inter-American Specialized Conference on Human Rights, *American Convention on Human Rights* (1969), 65 *A.J.I.L.* 679, extends the right to a hearing to “the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.” On their face, both provisions are broad enough to extend the fair hearing guarantees to refugee determination or removal proceedings.

¹²² *Golder v. United Kingdom* (1975), 1 *E.H.R.R.* 524 at para. 36, 18 *Eur. Ct. H.R.* (Ser. A) 1.

The European Court has held that access to the courts in civil matters is essential to maintain the rule of law and that, to fulfill this purpose, article 6 must be interpreted broadly.

a. *The Meaning of “Tribunal”*

A tribunal is a decision-making body that must be established by law, a requirement premised on the principle that “judicial organization in a democratic society must not depend on the discretion of the Executive, but ... should be regulated by law emanating from Parliament.”¹²³ To be recognized as a tribunal under article 6, the decision-making body’s function must be to “determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.”¹²⁴ It must have a power of binding decision in its area of jurisdiction¹²⁵ over questions of fact and questions of law.¹²⁶ However, it need not be “a court of law of the classic kind, integrated within the standard judicial machinery of the country.”¹²⁷ In sum, administrative decision makers may qualify as tribunals.

b. *Independence*

Article 6(1) provides that the tribunal must also be “independent”. Independence requires that decision-making bodies be free to exercise their powers without interference from the state’s executive or legislature or from the parties to the dispute.¹²⁸ The European Court recently held that article 6 does not require states to comply with any “theoretical constitutional concepts” regarding the separation of the judicial from the legislative or executive powers.¹²⁹ However, the concept of separation of powers is increasingly mentioned in dissenting and majority judgments as an important foundation of the principle of independence.¹³⁰

¹²³ *Crociani v. Italy* (1980), 22 Eur. Comm. H.R.D.R. 147 at para. 8 [*Crociani*].

¹²⁴ *Sramek v. Austria* (1984), 7 E.H.R.R. 351 at para. 36, 84 Eur. Ct. H.R. (Ser. A) 1, where the court determined that a statutory body established to review land transfers was a tribunal.

¹²⁵ *Campbell and Fell v. United Kingdom* (1984), 7 EHRR 165 at para. 76, 80 Eur. Ct. H.R. (Ser. A) 1 [*Campbell and Fell*].

¹²⁶ *Le Compte, supra* note 98 at para. 51. But see *Bryan v. United Kingdom* (1995), 21 E.H.R.R. 342, 44/1994/491/573 (HUDOC) [*Bryan*].

¹²⁷ *Campbell and Fell, supra* note 125 at para. 76.

¹²⁸ See *Crociani, supra* note 123 at para. 10, and *Campbell and Fell, supra* note 125 at para. 78. Strictly speaking, “independence from the parties” is more closely related to impartiality.

¹²⁹ *Kleyn v. Netherlands* (2003), 38 E.H.R.R. 14 at para. 193, [2003] 6 Eur. Ct. H.R. 61 [*Kleyn*].

¹³⁰ In relation to the separation of legislative and judicial powers, see *Stran Greek Refineries and Stratis Andreadis v. Greece* (1994), 19 E.H.R.R. 293, 301 Eur. Ct. H.R. (Ser. A) 62, and *McGonnell v. United Kingdom* (2000), 30 E.H.R.R. 289, [2000] 2 Eur. Ct. H.R. (Ser. A) 107. Regarding the separation of executive and judicial powers, see *V. v. United Kingdom* (1999), 30 E.H.R.R. 121, [1999] 9 Eur. Ct. H.R. (Ser. A) 111; *Stafford v. United Kingdom* (2002), 35 E.H.R.R. 32 at para. 78, [2002] 4 Eur. Ct. H.R. (Ser. A) 115; and *Easterbrook v. United Kingdom* (2003), 37 E.H.R.R. 40,

In the seminal case of *Campbell and Fell*, the court sought to determine whether a prison's "board of visitors", charged with supervising the administration of a prison and adjudicating prisoners' alleged violations of prison regulations, was independent. In determining whether a tribunal is independent, the court held, three criteria were relevant: the manner of appointment of the tribunal's members and their term of office, the existence of guarantees against outside pressure, and whether the tribunal presents an appearance of independence.

i. The Manner of Appointment of Tribunal Members and Their Term of Office

The court observed that the fact that tribunal members are appointed by the executive does not deprive them of independence. The executive can even provide them with guidelines regarding the performance of their functions without imperiling their independence as long as they are not subject to instructions in their adjudicatory role. While the three-year term of members of the board of visitors in *Campbell and Fell* was relatively short, the court made allowance for the fact that they were unpaid, and might refuse longer appointments.¹³¹ In *Ettl v. Austria*, a land reform board was found to be independent despite the fact that a majority of its members were civil servants because Austria's constitution and federal law stipulated that board members discharged their duties independently and were not subject to any instructions from the executive.¹³² The board's independence was strengthened by the five-year terms of its members and their virtual irremovability guaranteed by federal law.¹³³ In these circumstances, the court noted, it was appropriate for Austria to rely on civil servants with expertise in the complex field of land consolidation.¹³⁴

48015/99 (HUDOC) [*Easterbrook*], where the European Court determined that the power of the United Kingdom's Home Secretary to fix the minimum duration of an offender's prison sentence (the "tariff") and to decide on the prisoner's release following expiry of the sentence violates article 6(1). The court expressly invoked in its reasons the United Kingdom's failure to comply with the separation of powers:

The Court would observe that the sentencing exercise carried out in criminal cases must necessarily be carried out by an independent and impartial tribunal, namely, a court offering guarantees and procedure of a judicial nature. It was not a court that fixed the applicant's tariff in a public, adversarial hearing and in the circumstances it is not sufficient to satisfy the fundamental principle relating to the separation of powers that the member of the executive who issued the decision was guided by judicial opinion (*ibid.* at para. 28).

¹³¹ *Campbell and Fell*, *supra* note 125 at paras. 79-80. But see *Belilos v. Switzerland* (1988), 10 E.H.R.R. 466 at para. 67, 132 Eur. Ct. H.R. (Ser. A) 1, where a complainant before a police board could legitimately doubt the board's independence and organizational impartiality because it consisted of a single member, a municipal civil servant likely to return to other departmental duties.

¹³² (1987), 10 E.H.R.R. 255 at para. 38, 117 Eur. Ct. H.R. (Ser. A) 1 [*Ettl*]. See also *Stallinger and Kuso v. Austria* (1997), 26 E.H.R.R. 81, [1997] 35 Eur. Ct. H.R. (Ser. A) 666.

¹³³ *Ettl*, *ibid.* at paras. 20, 41.

¹³⁴ *Ibid.* at para. 40.

ii. The Existence of Guarantees against Outside Pressure

The irremovability of judges by the executive during their term of office is generally a corollary of independence and is guaranteed by article 6(1). Formal recognition of the irremovability of tribunal members in a statute or regulation governing the removal of tribunal members is the strongest indicator of independence. In the absence of formal guarantees of independence, such as security of tenure, the court examines whether these guarantees are recognized in practice and whether other guarantees are present. A tribunal may still be regarded as independent provided its members are irremovable in practice.¹³⁵ In *Campbell and Fell*, the prison board's independence was not threatened by the Home Secretary's power to require board members to resign because, in practice, he could only exercise it in exceptional circumstances.

The presence of additional guarantees against outside pressure played a crucial role in the European Court's assessment of the independence of military tribunals in the United Kingdom. In *Morris v. United Kingdom*,¹³⁶ the permanent president of the court martial, appointed for a four-year term to serve on panels with an independent judge advocate and two serving officers, did not enjoy formal security of tenure. However, the European Court found that this did not call into question the court martial's independence for several reasons: permanent presidents had never been removed from office and thus enjoyed de facto security of tenure; officers accepted the position of permanent president as the last appointment of their careers, which meant that they could not be influenced by any reports and promotions concerns; and permanent presidents worked outside the chain of command.¹³⁷ In contrast, serving officers were appointed on an ad hoc basis for individual proceedings. Relatively junior officers with no legal training, they remained subject to army discipline and reports and were not protected by statute from external army influence while hearing a case. Despite rules governing their selection, the requirement that they swear an oath promising impartiality, the right of the accused to object to any member of the court martial, the confidentiality of deliberations, and the rule that the most junior members expressed their view on verdict and sentence first, the court found that there were insufficient safeguards against outside pressure being brought to bear on serving officers.¹³⁸ They were exposed to outside pressure that jeopardized their independence because they belonged to the army, which takes its orders from the executive, and more importantly because they were subject to military discipline and assessment reports that impacted on their careers.

The court revisited the *Morris* decision in *Cooper v. United Kingdom*,¹³⁹ which dealt with the Royal Air Force Court Martial, a tribunal similar in most respects to

¹³⁵ See *Campbell and Fell*, *supra* note 125 at para. 80.

¹³⁶ (2002), 34 E.H.R.R. 52, [2002] 1 Eur. Ct. H.R. (Ser. A) 387 [*Morris*].

¹³⁷ *Ibid.* at paras. 68-69.

¹³⁸ *Ibid.* at para. 72.

¹³⁹ (2003), 39 E.H.R.R. 8, 48843/99 (HUDOC) [*Cooper*].

that in *Morris*. Considering additional safeguards newly disclosed by the United Kingdom, the court was satisfied that the independence of the ordinary members of the court martial (equivalent to the serving officers in *Morris*) was sufficiently protected. The most important safeguard was the distribution by the Court Martial Administration Unit of training material to the members of the court martial. Briefing notes provided the ordinary members a step-by-step guide to court martial procedures, their role in the proceedings, and those of the judge advocate and permanent president. Most importantly, they underlined the importance of independent decision making:

[T]he Briefing Notes fully instructed ordinary members of the need to function independently of outside or inappropriate influence or instruction and of the importance of this being seen to be done, providing practical and precise indications of how this could be achieved or undermined in a particular situation. The Court considers that those instructions served not only to bring home to the members the vital importance of independence but also to provide a significant impediment to any inappropriate pressure being brought to bear.¹⁴⁰

Finally, the court noted that court martial members were prohibited from disclosing any opinion expressed or vote cast during court martial proceedings, a fact which effectively prevented the ordinary officers' superiors from subjecting their performance to assessment reports.¹⁴¹

iii. Whether the Tribunal Presents an Appearance of Independence

In *Campbell and Fell*, the court observed that a penitentiary's board of visitors could still be viewed as independent despite its dual supervisory and adjudicatory roles. The board's supervisory role of exercising "independent oversight" of the prison's administration meant that it was frequently in contact with prison officials and inmates. This contact was not enough, however, to compromise its independence.¹⁴² In contrast, in a case involving the independence of an inspector charged with adjudicating town-planning appeals, the existence of a power of the secretary of state to revoke the inspector's power to decide an appeal, irrespective of evidence showing that the secretary's power was rarely used and had not been used in the case at bar, was enough to deprive the inspector of the requisite appearance of independence.¹⁴³

¹⁴⁰ *Ibid.* at para. 124.

¹⁴¹ *Ibid.* at para. 125. See also *Incal v. Turkey* (1998), 29 E.H.R.R. 449 at para. 68, [1998] 78 Eur. Ct. H.R. 1547, and *Çiraklar v. Turkey* (1998), 32 E.H.R.R. 23 at para. 39, [1998] 94 Eur. Ct. H.R. 3059.

¹⁴² *Campbell and Fell*, *supra* note 125 at paras. 81-82.

¹⁴³ *Bryan*, *supra* note 126 at para. 38.

c. *The Role of Judicial Review in Satisfying the Guarantee of Independence under Article 6(1)*

Article 6(1) of the *ECHR* does not guarantee parties the opportunity to directly submit disputes over civil rights to independent and impartial tribunals. The European Court recognizes that:

Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the [article 6] requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system.¹⁴⁴

However, for a particular decision-making process to comply with article 6(1), the dispute must eventually be reviewed by a tribunal meeting the requirements set out in that provision. This principle, referred to as the “composite approach”,¹⁴⁵ was first adopted by the European Court in *Albert and Le Compte*, a case involving the decision of a professional discipline tribunal to suspend the applicant doctors from medical practice:

In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6(1) is applicable, conferring powers in this manner does not in itself infringe the Convention. *Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).*¹⁴⁶

But what did “full jurisdiction” mean? In *Albert and Le Compte*, the disciplinary proceedings involved three stages: an initial hearing before a provincial council composed of medical practitioners, an appeal before an Appeals Council composed of ten medical practitioners and ten Court of Appeal judges, one of whom had the casting vote, and finally, an appeal on questions of law before the Court of Cassation. The Belgian government submitted that the Appeals Council did not have to meet the requirements of article 6(1) because a final appeal lay to the Court of Cassation, which met these requirements. The European Court rejected this argument, reasoning

¹⁴⁴ *Le Compte*, *supra* note 98 at para. 51. See *McMichael v. United Kingdom* (1995), 20 E.H.R.R. 205 at para. 80, 307 Eur. Ct. H.R. (Ser. A) 26, where the court acknowledged that in the “sensitive domain of family law there may be good reasons for opting for an adjudicatory body that does not have the composition or procedures of a court of law of the classic kind.” For administrative decision making in patent applications, see *British American Tobacco Company Limited v. Netherlands* (1995), 21 E.H.R.R. 409 at para. 77, 331 Eur. Ct. H.R. (Ser. A) 1.

¹⁴⁵ See M. Poustie, “The Rule of Law or the Rule of Lawyers? Alconbury, Article 6(1) and the Role of Courts in Administrative Decisionmaking” (2001), 6 Eur. H.R.L. Rev. 657 at 663.

¹⁴⁶ *Albert and Le Compte v. Belgium* (1983), 5 E.H.R.R. 533 at para. 29, 58 Eur. Ct. H.R. (Ser. A) 1 [*Albert and Le Compte*, emphasis added].

that both bodies were required to meet the requirements of article 6(1), including independence and impartiality, because the Appeals Council's findings of fact were binding and the Court of Cassation's legal determinations were binding:

Article 6(1) draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to "civil rights and obligations". Hence, the "right to a court" and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault ... It follows that Article 6(1) was not satisfied unless its requirements were met by the Appeals Council itself.¹⁴⁷

In a series of cases from the United Kingdom, the European Court determined that the judicial review of local authorities' child access orders failed to satisfy the composite approach under article 6(1).¹⁴⁸ Each case was brought by natural parents contesting the decision of a local authority to restrict or eliminate their access to a child in the authority's care ("under a care order") as an infringement of their right to private and family life under article 8 of the *ECHR*. The local authorities had acted based on their view of the child's best interests, but without involving the natural parents, and in some cases without notice. Two remedies were open to the parents under English law. First, they could apply for judicial review of the authorities' decision. This remedy was available if, in making its decision, the authority had acted illegally, ultra vires or in bad faith; failed to consider relevant considerations, took into account irrelevant considerations, or came to a decision that no reasonable authority could have made (the standard of *Wednesbury* unreasonableness); or failed to act fairly or to observe statutory procedural rules. The European Court observed that judicial review was "concerned with reviewing not the merits of the decision in question but rather the decision-making process itself."¹⁴⁹ The second possible remedy was a wardship application to the English courts, but here again the courts could not review the merits of local authority decisions on child access matters because they were exercises of discretion within the authorities' statutory jurisdiction.¹⁵⁰ As a result, wardship applications were as limited as judicial review. Since it was common ground that the local authorities were not "tribunals", the European Court examined whether the two remedies before the English courts complied with article 6(1). It decided that they did not:

In a case of the present kind, however, there will in the Court's opinion be no possibility of a "determination" in accordance with the requirements of

¹⁴⁷ *Le Compte*, supra note 98 at para. 51.

¹⁴⁸ See *W. v. United Kingdom* (1987), 10 E.H.R.R. 29, 121 Eur. Ct. H.R. (Ser. A) 1; *O. v. United Kingdom* (1987), 10 E.H.R.R. 82, 120 Eur. Ct. H.R. (Ser. A) 1; *B. v. United Kingdom* (1987), 10 E.H.R.R. 87, 121 Eur. Ct. H.R. (Ser. A) 57; and *R. v. United Kingdom* (1987), 10 E.H.R.R. 74, 121 Eur. Ct. H.R. (Ser. A) 100.

¹⁴⁹ *W. v. United Kingdom*, *ibid.* at para. 48.

¹⁵⁰ *Ibid.* at para. 49.

Article 6(1) of the parent's right in regard to access ... unless he or she can have the local authority's decision reviewed by a tribunal having jurisdiction to examine the merits of the matter. And it does not appear from the material supplied by the Government or otherwise available to the Court that the powers of the English courts were of sufficient scope to satisfy fully this requirement during the currency of the parental rights resolution.¹⁵¹

In a series of cases concerning the decisions of planning authorities, the European Commission and the European Court qualified the approach to judicial review set out in the child welfare cases. In *Zumtobel v. Austria*,¹⁵² a provincial government office decided, after a hearing, to expropriate some of the Zumtobel partnership's land to build a highway. Such expropriations could be ordered if there was no other more suitable solution from the standpoint of environmental protection, among other criteria. Zumtobel unsuccessfully challenged the decision before Austria's Administrative Court, arguing that the office did not consider environmental protection when it assessed the various relevant interests and refused to disclose expert reports. Zumtobel complained that it had not received a fair hearing from an independent and impartial tribunal, arguing that the Administrative Court did not have full jurisdiction on review because it only examined the lawfulness of the office's decision and could neither correct nor supplement the facts or decide on the merits in the office's stead. The European Court disagreed with Zumtobel. In deciding that "the scope of the competence of the Administrative Court satisfied the requirements of Article 6(1),"¹⁵³ it observed that the Administrative Court had in fact "considered [the] submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts."¹⁵⁴ The Administrative Court had indeed ruled that, on the evidence, the office had taken environmental protection into account in its decision and had not relied on the undisclosed documents or treated these as material to its decision. "Regard being had to the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and to the nature of the complaints made by the Zumtobel partnership," the Administrative Court's review had fulfilled the requirements of article 6(1).¹⁵⁵ *Zumtobel* indicates that to comply with article 6(1), and in particular the requirement of "full jurisdiction", reviewing courts do not need the power to decide "policy questions" afresh and on the merits, but must simply be able to consider the grounds of review on their merits, point by point, without having to decline jurisdiction in replying to them. In *ISKCON v. U.K.*,¹⁵⁶ another planning case, the European Commission confirmed that "it is not the role of Article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the

¹⁵¹ *Ibid.* at para. 82.

¹⁵² (1993), 17 E.H.R.R. 116, 268 Eur. Ct. H.R. (Ser. A) 1 [*Zumtobel*].

¹⁵³ *Ibid.* at para. 32.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ (1994), 76A Eur. Comm. H.R.D.R. 90.

administrative authorities on questions of expediency and where the courts do not refuse to examine any of the points raised ... ”¹⁵⁷

In *Bryan v. United Kingdom*,¹⁵⁸ the European Court further elucidated its new flexible approach to article 6(1). Bryan erected house-like buildings on his property without the necessary planning permission. The local borough council ordered him to remove them. Bryan appealed and an inspector, appointed to conduct an inquiry and determine the appeal, upheld the borough’s decision, finding that the buildings had not been designed for the purposes of agriculture but for residential use, that they did not enhance or preserve the appearance of the area and that they should be removed. Bryan applied for judicial review.¹⁵⁹ The High Court rejected his application, observing that it did not sit on appeal from the judgment of inspectors, that certain aspects of the inspector’s decision were entirely a matter of planning judgment for him, and that there was nothing irrational about the decision. Bryan claimed that he had not been afforded a hearing by an independent tribunal in accordance with article 6(1). The European Court decided that the secretary of state’s executive power to revoke the inspector’s authority to decide the appeal at any time deprived the inspector of the appearance of independence required by article 6(1). It then examined whether the inspector’s decision was subject to subsequent control by a judicial body with full jurisdiction meeting the article 6(1) requirements.¹⁶⁰ It decided that in assessing the sufficiency of judicial review of an administrative decision, it would have regard to “the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.”¹⁶¹ Addressing the manner in which the inspector’s decision was arrived at, the European Court observed that the decision was carefully reasoned and that the procedure before the inspector had a number of safeguards, including the quasi-judicial character of the decision-making process; the inspector’s duty to exercise independent judgment and not to be subject to improper influence; and the obligation on the inspector to uphold the principles of openness, fairness, and impartiality.¹⁶² Regarding the content of the dispute and, in particular, the actual grounds of appeal, the European Court noted that Bryan had disputed neither the primary facts nor the inspector’s factual inferences regarding the nature of the

¹⁵⁷ *Ibid.* at para. 4. An appeal of a local authority’s planning decision to the High Court on points of law met the requirements of article 6(1) because the court had dealt with each of the grounds of appeal on the merits without having to decline jurisdiction. The High Court could intervene if the administrative authorities failed to observe the statutory conditions and policies required to issue the planning order, failed to take into account an actual fact, considered an immaterial fact, or rendered an irrational decision.

¹⁵⁸ *Bryan, supra* note 126.

¹⁵⁹ Bryan did not seek review of the inspector’s factual finding that his buildings were not for purposes of agriculture, a significant omission in the eyes of the European Court (*ibid.* at paras. 39-42).

¹⁶⁰ *Ibid.* at para. 40.

¹⁶¹ *Ibid.* at para. 45.

¹⁶² *Ibid.* at para. 46.

buildings. The “remaining grounds” of Bryan’s appeal, which involved questions relating to a panoply of policy matters, were within the High Court’s jurisdiction, and Bryan’s submissions in this respect had been “adequately dealt with point by point.”¹⁶³ Finally, it observed that even if Bryan had sought review of questions of fact, the High Court, though unable to substitute its own findings of fact for those of the inspector, “would have had the power to satisfy itself that the inspector’s findings of fact or the inferences based on them were neither perverse nor irrational”:

Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe Member States. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens’ conduct in the sphere of town and country planning.¹⁶⁴

The upshot of *Bryan* is a relaxation of the requirement under article 6(1) that an applicant have access to an independent tribunal with “full jurisdiction” over questions of law *and* fact. When challenging a town planning decision (subject matter of the decision) on a question of fact (content of the dispute), as long as the first-instance decision was made in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1) (the manner in which the decision is arrived at), a reviewing court need not have full jurisdiction over questions of fact, in the sense of substituting its own findings of fact for those of the decision maker. It is enough for the court to intervene if these findings of fact are perverse or irrational.

The European Court has followed *Bryan* in subsequent judgments involving administrative decision making¹⁶⁵ but has not extended its relaxed approach to the criminal context.¹⁶⁶ In *De Cubber v. Belgium*, Belgium argued that a trial court sitting on a criminal trial did not have to satisfy the requirement of objective impartiality because its decision could be appealed to an appeal court that fully complied with article 6(1). The European Court disagreed:

At first sight, this plea contains an element of paradox. Article 6(1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up. However, ... it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the

¹⁶³ *Ibid.* at para. 47.

¹⁶⁴ *Ibid.*

¹⁶⁵ See *Kingsley v. United Kingdom* (2000), 33 E.H.R.R. 13, [2002] 4 Eur. Ct. H.R. (Ser. A) 57, involving administrative decision making in the gaming industry.

¹⁶⁶ *De Cubber v. Belgium* (1984), 7 E.H.R.R. 236, 86 Eur. Ct. H.R. (Ser. A) 1 [*De Cubber*].

creation of several levels of courts, namely to reinforce the protection afforded to litigants.¹⁶⁷

The court decided that it was inappropriate to apply the composite approach outlined in *Albert and Le Compte* because *DeCubber* concerned a criminal charge under Belgian law and because the Belgian trial court was “a proper court in both the formal and the substantive meaning of the term”, integrated within the standard judicial machinery of the country.¹⁶⁸ The reasoning adopted in *Albert and Le Compte* and *Campbell and Fell* could not “justify reducing the requirements of Article 6(1) in its traditional and natural sphere of application.”¹⁶⁹

After *Bryan* and *De Cubber*, it remained unsettled whether English administrative decision making subject to the traditional judicial review jurisdiction of English courts satisfied article 6(1). The enactment of the *Human Rights Act 1998* gave English courts the opportunity to clarify this area of law.¹⁷⁰ The *HRA* prohibits local authorities from acting in contravention of the *European Convention*, allows courts to declare laws to be incompatible with the convention,¹⁷¹ and requires them to take into account European Court decisions insofar as they are relevant. Many individuals and companies have challenged administrative decisions, arguing that the decision makers involved lacked the independence and impartiality guaranteed by article 6(1). English courts responded to these challenges by adopting an approach to the interpretation of article 6(1), based on *Zumtobel* and *Bryan*, that upholds the traditional structure of administrative decision making and judicial review in the United Kingdom.

In the *Alconbury* case,¹⁷² the House of Lords was asked to assess whether the statutory regime under which ministers take planning decisions was compatible with article 6(1). Under the *Town and Country Planning Act 1990*,¹⁷³ local authorities usually hear applications for planning permissions at first instance and adjudicators appointed by the secretary of state for the environment, transport, and the regions usually hear appeals of their decisions. The secretary of state may, however, decide to deal himself with first instance applications or appeals. In such cases, the secretary of state appoints an inspector who holds an inquiry and produces a report stating conclusions and making recommendations. The secretary of state then decides the application or appeal on the basis of the report. If she or he proposes to decide against the recommendations of the inspector, he must allow the parties to make submissions.

¹⁶⁷ *Ibid.* at para. 32.

¹⁶⁸ *Ibid.* In contrast, the “disciplinary” litigation in *Albert and Le Compte* fell at the periphery of the expanded, autonomous concept of civil rights and obligations and the professional authorities involved were not “courts of the classic kind” (*De Cubber, ibid.*).

¹⁶⁹ *Ibid.* See also *Findlay v. United Kingdom* (1997), 24 E.H.R.R. 221, [1997] 30 Eur. Ct. H.R. 263.

¹⁷⁰ *Human Rights Act 1998* (U.K.), 1998, c. 42 [*HRA*].

¹⁷¹ *Ibid.*, s. 6 and s. 4 respectively.

¹⁷² *R. (on the application of Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport, and the Regions* [2001] 2 All E.R. 929, [2001] 2 W.L.R. 1389 (H.L.) [*Alconbury*].

¹⁷³ Some planning decisions at issue in *Alconbury* were taken under other similar statutes.

Parties aggrieved by the secretary of state's decision have a statutory right to challenge its validity before the High Court on the grounds that it is not within the powers of the *Town and Country Planning Act* or that relevant requirements have not been complied with.¹⁷⁴ The appellants in *Alconbury* claimed that the secretary of state was not independent or impartial because his department laid down the policies and guidelines that planning officials were required to follow. As policy-maker, he could not also be a decision maker in specific cases. Further, they argued that the statutory judicial review powers of the High Court were insufficient. Unlike the inspector in *Bryan*, they claimed, the secretary of state did not approach the status of an independent and impartial tribunal because his decision making was not surrounded by the same statutory protections. Without such protections at first instance, the High Court, with its limited review powers, could not be considered to be a tribunal with "full jurisdiction" as required by the European Court's composite approach. Accepting these arguments, the English Divisional Court held that the *Town and Country Planning Act* and other similar planning statutes were incompatible with article 6(1).¹⁷⁵

On appeal to the House of Lords, the secretary of state conceded that his role in making policy and applying it in particular cases meant that in deciding applications or appeals, he was not an independent or impartial tribunal. The only remaining question, therefore, was whether the High Court, in reviewing the secretary of state's decision, had full jurisdiction. Each of the Law Lords answered this question in the affirmative. Relying on *Zumtobel*, Lords Hoffman and Clyde underlined that article 6(1) required only that reviewing courts have "full jurisdiction to deal with the case as the nature of the decision requires,"¹⁷⁶ not that they be empowered to decide the matter afresh. In other words, the safeguards required of first-instance decision makers and the scope of review jurisdiction required of reviewing courts varied depending on the context of the case, including the content of the dispute, the subject matter of the decision, and the manner in which it was taken.¹⁷⁷ Regarding the content of the dispute, *Zumtobel* had decided that policy decisions could be taken by decision makers lacking independence and impartiality without any safeguards as long as traditional judicial review of the decision's legality is available. *Bryan* had held that decisions involving findings of fact must be taken by a decision maker who wears some, if not all, of the badges of independence in a quasi-judicial process whose fairness is subject to ordinary judicial review.¹⁷⁸ Depending on the subject matter of the decision, article 6(1) may require more substantial safeguards and a more exhaustive judicial review. For example, disciplinary proceedings would attract higher safeguards than planning decisions because the right to use land is not absolute but

¹⁷⁴ *Town and Country Planning Act 1990* (U.K.), 1990, c. 8, s. 288.

¹⁷⁵ *Alconbury*, *supra* note 170 at para. 58, Nolan L.J. This effectively meant that the secretary of state's discretion to intervene in planning permission applications and appeals should be removed.

¹⁷⁶ *Ibid.* at para. 87.

¹⁷⁷ *Ibid.* at paras. 154-58.

¹⁷⁸ *Ibid.* at paras. 128-30.

subject to the controls of a planning regime.¹⁷⁹ Finally, where the decisions were taken after a public inquiry and subject to rules designed to ensure fairness, article 6(1) required a less intense level of scrutiny on judicial review. The Law Lords also noted that the traditional scope of judicial review was broader than the Divisional Court had assumed, and that factual mistake was an accepted ground of review that gave courts the jurisdiction to quash the secretary of state's decisions for misunderstanding or ignoring an established and relevant fact.¹⁸⁰

The House of Lords elaborated on its approach to article 6(1) in *Begum v. Tower Hamlets London Borough Council*.¹⁸¹ Begum, a homeless person, refused a flat offered by the Tower Hamlets London Borough Council, complaining that it was located in an area plagued by drug addiction, crime, and racism. The council decided that she had unreasonably refused suitable accommodation and that it had discharged its duty under the *Housing Act* to secure accommodation for her. She requested a review of the council's decision. A reviewing officer not involved in the original decision and senior to the original decision maker investigated Begum's reasons for refusing the flat, rejected these as unreasonable, and made findings of fact and credibility unfavourable to Begum. She appealed the officer's decision to the County Court, which was empowered under the *Housing Act* to review the decision on points of law. Begum claimed that the decision-making process, including judicial review on points of law, did not meet the requirements of article 6(1).

Lord Hoffman, with whom Lords Bingham, Walker, Hope, and Millett agreed, concluded that the reviewing officer, as an officer of the council conducting an internal review for that same council, was not an independent tribunal. The only remaining question was whether the appellate County Court had full jurisdiction "to deal with the case as the nature of the decision requires."¹⁸² Begum argued that the reviewing officer's decision raised disputed questions of fact, as in *Bryan*, rather than the interpretation and application of planning policy, as in *Alconbury*. Therefore, as in *Bryan*, article 6(1) would be satisfied only if the appellate court had full jurisdiction to review the facts or if the primary decision-making process was attended with sufficient safeguards to make it virtually judicial.¹⁸³ Lord Hoffman noted that the findings of fact in *Begum* were made in a very different context than *Bryan*:

The inspector's decision that Bryan had acted in breach of planning control was binding upon him in any subsequent criminal proceedings for failing to comply with the notice. This part of the appeal against the enforcement notice was closely analogous to a criminal trial and, as I noted in ... *Alconbury* ..., used to come before the magistrates.

¹⁷⁹ *Ibid.* at paras. 154-55.

¹⁸⁰ *Ibid.* at para. 53, per Slynn L.J.; *ibid.* at para. 61, per Nolan L.J.; and *ibid.* at para. 169, per Clyde L.J.

¹⁸¹ [2003] 1 All E.R. 731, [2003] 2 A.C. 430 (H.L.) [*Begum*].

¹⁸² *Ibid.* at para. 33, citing *Alconbury*, *supra* note 170 at para. 87.

¹⁸³ *Ibid.* at para. 37.

A finding of fact in this context seems to me very different from the findings of fact ... made by central or local government officials in the course of carrying out regulatory functions (such as licensing or granting planning permission) or administrative schemes of social welfare such as Part VII [of the *Housing Act*]. The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision-maker (see *De Cubber v. Belgium*).¹⁸⁴

Lord Hoffman observed that the judicialization of dispute procedures was appropriate in the realm of criminal law and private rights but that in designing a statutory scheme for regulation or social welfare, Parliament was justified on grounds of efficient administration in providing fewer procedural and institutional safeguards.¹⁸⁵ It was therefore not necessary for the reviewing court to apply a more intensive approach to review of fact going beyond conventional principles of judicial review. Or, in terms of the European Court's approach in *Bryan*, conventional judicial review was sufficient given the subject matter of the decision appealed against—the suitability of accommodation for Runa Begum—“a ‘classic exercise of an administrative discretion’” that engaged no human rights other than article 6.¹⁸⁶

C. Summary

In sum, conventional international law generally entitles individuals to have their rights and obligations adjudicated by an independent tribunal. Under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *International Covenant on Civil and Political Rights*, the right to an independent tribunal is limited to the determination of “civil” rights and obligations or of rights and obligations “in a suit at law”. However, the Human Rights Committee, other UN bodies, and the European Court have interpreted the right to an independent tribunal purposively, and have recognized its application to decision making by administrative tribunals in public law contexts ranging from town planning and economic regulation to social assistance and human rights protection. While these bodies have recognized the importance of formal guarantees of security of tenure, financial security, and administrative independence to ensure tribunal independence, they also emphasize the need to ensure that tribunals are “actually” independent—in appearance and practice—from the executive branch and the legislature, particularly in the appointment process. The power of states to design decision-making schemes

¹⁸⁴ *Ibid.* at paras. 41-42 [citations omitted].

¹⁸⁵ *Ibid.* at paras. 43-46, citing the US Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 at 347 (1976).

¹⁸⁶ *Begum*, *supra* note 181 at para. 52.

involving adjudicative bodies that do not fully comply with the requirements of tribunal independence has been upheld under the *ECHR* and *ICCPR*,¹⁸⁷ so long as their decisions are subject to subsequent review by a tribunal that meets these requirements and has sufficient jurisdiction over the merits of the dispute. It is difficult to pinpoint precisely what degree of jurisdiction over the merits is “sufficient” for judicial review of administrative decision making to satisfy the international norm of tribunal independence since, as demonstrated by our review of the European Court’s jurisprudence, the meaning of these concepts is continuously evolving. However, it would appear that disputes involving fundamental human rights adjudicated at first instance by non-independent decision makers will require more intense review by independent tribunals with jurisdiction over questions of fact and law. We return to these questions in Part III of this article. But first, we explore how Canadian norms of tribunal independence have developed relative to their counterparts in international human rights law. In particular, Part II examines the evolution in Canada of the principle of institutional independence and recent judicial efforts to limit its application in the context of administrative decision making.

II. The Sort-of-Quasi-Right to Institutional Independence in Canadian Administrative Law

There is no general constitutional right to institutional independence for adjudicative decision makers in Canada. There are however a number of common law, quasi-constitutional and constitutional guarantees which in some circumstances and in some jurisdictions in the country provide a right to an independent decision maker. Below, I explore this partial and patchwork quilt of legal protections.

It should be stated at the outset that the “right” of institutional independence is not a right enjoyed by a tribunal but rather a right enjoyed by those whose claims and disputes are adjudicated by that tribunal.¹⁸⁸ Tribunals do not constitute a separate branch of government with jurisdictional integrity to guard. Much of the particularity and the peculiarity of institutional independence in Canadian administrative law, however, arise because the institutional independence protection at common law has been modelled on the constitutional norm of judicial independence. In *Valente v. The Queen*,¹⁸⁹ the Supreme Court of Canada noted that, broadly speaking, the test for independence in the judicial setting is “the one for reasonable apprehension of bias, adapted to the requirement of independence.”¹⁹⁰ The Court further noted that, although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements:

¹⁸⁷ See *Karttunen*, *supra* note 91.

¹⁸⁸ Once again, in this sense, the analogy to judicial independence holds. See Binnie J. (in dissent) in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 245 N.B.R. (2d) 299.

¹⁸⁹ [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161 [*Valente* cited to S.C.R.].

¹⁹⁰ *Ibid.* at 684.

The word “impartial” ... connotes absence of bias, actual or perceived. The word “independent” in s. 11(d) [of the *Charter*] reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.¹⁹¹

While administrative tribunals are viewed as part of the executive branch in a separation of powers context,¹⁹² the Court chose to adopt the framework of institutional independence for administrative bodies directly from this judicial framework.¹⁹³ According to that framework, there are three essential conditions of judicial independence: security of tenure, financial security, and administrative independence. The Court described “the essentials of security of tenure” as follows:

[T]hat the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) [of the *Charter*] is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.¹⁹⁴

In *Canadian Pacific Ltd. v. Matsqui Indian Band*,¹⁹⁵ the Supreme Court of Canada held that the test for institutional independence enunciated in *Valente* applied, with added flexibility, to administrative tribunals. Chief Justice Lamer¹⁹⁶ stated:

I begin my analysis of the institutional independence issue by observing that the ruling of this Court in *Valente* provides guidance in assessing the independence of an administrative tribunal. ...

This court has considered *Valente* in at least one case involving an administrative tribunal, *IWA v. Consolidated-Bathurst Packaging Ltd.*, in which the independence of the Ontario Labour Relations Board was at issue. There, Gonthier J. stated at p. 332:

¹⁹¹ *Ibid.* at 685.

¹⁹² As Katrina Wyman put it, “The doctrine of tribunal independence is not concerned with establishing administrative tribunals as a fourth branch of government”: K. Wyman, “The Independence of Tribunals in an Era of Ever Expansive Judicial Independence” (2000) 14 C.J.A.L.P. 61 at 100. See also Donald J. M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 1998) at 11:4120, who note that where an executive body appears before an executive tribunal, a conflict does not inherently arise.

¹⁹³ In earlier cases, such as *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] S.C.R. 282 at 332-33, 68 D.L.R. (4th) 524 [*Consolidated-Bathurst*], the term “judicial independence” was used by this Court to characterize the common law standards applicable to a labour tribunal.

¹⁹⁴ *Valente*, *supra* note 189 at 698.

¹⁹⁵ (1995), 122 D.L.R. (4th) 129 [*Matsqui*].

¹⁹⁶ While Justice Sopinka appeared to write for the greatest number of judges on this point, it is Chief Justice Lamer’s decision that has become the dominant articulation of institutional independence in Canada.

Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection.

I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valente* are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted.¹⁹⁷

Chief Justice Lamer concluded that the *Valente* principles apply to administrative tribunals on the basis of natural justice principles, but that the test for institutional independence may be less strict than for courts:

Therefore, while administrative tribunals are subject to the *Valente* principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

In some cases, a high level of independence will be required. For example, where the decisions of a tribunal affect the security of the person of a party (such as the Immigration Adjudicators in *Mohammad*), a more strict application of the *Valente* principles may be warranted. In this case, we are dealing with an administrative tribunal adjudicating disputes relating to the assessment of property taxes. In my view, this is a case where a more flexible approach is clearly warranted.¹⁹⁸

The analogy between tribunal independence and judicial independence cuts at least two ways. First, it reflects an understanding of the functional similarity of adjudication between courts and tribunals. On this view, whether a dispute is adjudicated before a tribunal or a court should be less important than that the adjudication, wherever it occurs, complies with the rules of natural justice. The second dimension of the analogy is to the methodology employed to assess whether the requisite standard of independence has been breached. While early cases such as *Consolidated-Bathurst* focused on the former sense of the analogy,¹⁹⁹ the Court shifted steadily toward the latter. The Court has pursued the methodological analogy to judicial independence while downplaying the functional similarity between the two.

¹⁹⁷ *Matsqui*, *supra* note 195 at paras. 75, 79-80 [citations omitted].

¹⁹⁸ *Ibid.* at paras. 83-84 [citations omitted].

¹⁹⁹ *Consolidated-Bathurst*, *supra* note 193.

One of the cases that extended the analogy to the judicial independence methodology was *2747-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool)*.²⁰⁰ In *Régie*, the Court clarified and refined the suggestion in *Matsqui*—that administrative tribunals are subject to the *Valente* principles of institutional independence but that the requisite level of institutional independence may be lower than for a court—and concluded that the “directors” (adjudicators) of the *Régie* had sufficient security of tenure because they could not be simply removed at pleasure (i.e., without cause):

In my view, the directors’ conditions of employment meet the minimum requirements of independence. These do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed-term appointments, which are common, are acceptable. *However, the removal of adjudicators must not simply be at the pleasure of the executive.*²⁰¹

Thus, in *Régie*, the focus of the Court was on “objective guarantees” and the perceptions of an independent branch of government, not the realities of intra-executive, political interference. This focus shifted somewhat in *Hewat v. Ontario*,²⁰² where the Ontario Court of Appeal considered the issue of institutional independence in the context of a labour relations tribunal.²⁰³ The appellants were vice-chairs of the Ontario Labour Relations Board who had been appointed by order-in-council for a fixed term of three years. For reasons that were widely understood to be political incompatibility, the Ontario government revoked their appointments mid-term by way of an order-in-council, and the vice-chairs challenged the validity of these orders. The Ontario Divisional Court found that the orders revoking the appointments were “invalid” but declined to order that the vice-chairs be reinstated, awarding damages instead. The vice-chairs appealed, arguing that, if they were not reinstated to their positions, “then the government is putting tribunal officers in the same position as employees generally—they can be dismissed at will so long as the employer is prepared to pay damages.”²⁰⁴ The Ontario Court of Appeal noted the impracticality of ordering reinstatement as a remedy given the length of time that had passed since the revocations had occurred. However, the court acknowledged the validity of the vice-chairs’ arguments regarding the institutional independence of the board if the government were able to revoke appointments at will, on payment of compensation:

I do not see the issues before this court as bringing into play constitutional safeguards against the conduct of government. Indeed, it would be intellectually naïve not to recognize that elected governments must have room

²⁰⁰ *Régie*, *supra* note 8.

²⁰¹ *Ibid.* at para. 67 [emphasis added]. The Court then went on quoting Justice Le Dain’s summary of the requirements of security of tenure in *Valente*, reproduced above at note 194.

²⁰² [1998] 37 O.R. (3d) 161 (C.A.), 7 Admin. L.R. (3d) 257 [*Hewat* cited to O.R.].

²⁰³ For discussion of the significance of this case, see Katrina Miriam Wyman, “Appointments to Adjudicative Tribunals: Politics and the Courts” (1999) 57 U.T. Fac. L. Rev. 101 [Wyman, “Appointments to Adjudicative Tribunals”]. See also Craig Flood, “Case Comment: *Hewat v. Ontario*” Case Comment (1998) C.L.E.L.J. 263.

²⁰⁴ *Hewat*, *supra* note 202 at 166.

to make political decisions and to conduct themselves in a manner to assure that their political policies are implemented. We were told by counsel that, until recently, the practice over the past 25 years has been to make appointments to tribunals that have quasi-judicial functions for a fixed period of three years with the expectation gleaned from experience that in normal circumstances there would be repeated renewals of that term. There are many tribunals, agencies and boards in this province, each with different responsibilities, and it would be difficult to lay down any single rule or practice that would be suitable for all. That having been said, the Ontario Labour Relations Board in its quasi-judicial functions must of necessity maintain a public perception of independence from government if the public is to have any respect for its decisions. *Indeed, it is difficult to imagine how any tribunal with quasi-judicial functions could maintain the appearance of integrity to those who appear before it, without some degree of independence.*²⁰⁵

Could *Hewat* be construed so as to suggest that no adjudicative tribunal in Canada could escape the requirement of “some degree of independence”? Whatever the answer to this question, the Supreme Court’s landmark decision in *Ocean Port* indicated otherwise.²⁰⁶ In *Ocean Port*, the Court confirmed that the guarantee of institutional independence in adjudicative tribunal settings is not a constitutional right, but rather a common law protection, and as such, is vulnerable to the government overriding it through ordinary statutory language, at any time and for any reason.²⁰⁷

Ocean Port involved an investigation by a senior inspector with the Liquor Control and Licensing Branch, which led to allegations that Ocean Port Hotel Ltd. (“Ocean Port”) the operator of a hotel and pub, had committed five infractions of the *Liquor Control and Licensing Act* and regulations.²⁰⁸ Following a hearing, another senior inspector with the branch concluded that the allegations had been substantiated and imposed a penalty that included a two-day suspension of the respondent’s liquor licence. Ocean Port appealed to the Liquor Appeal Board by way of a hearing *de novo*. The findings on four of the five allegations were upheld, and the penalty was confirmed. Ocean Port appealed to the Court of Appeal arguing, *inter alia*, that the Liquor Appeal Board lacked the requisite institutional independence. Pursuant to section 30(2)(a) of the Act, the chair and members of the Liquor Appeal Board “serve at the pleasure of the Lieutenant Governor in Council.” In practice, members are appointed for a one-year term and serve on a part-time basis. All members but the chair were paid on a per diem basis. The chair established panels of one or three members to hear matters before the board “as the chair considers advisable”.

²⁰⁵ *Ibid.* at 169 [emphasis added].

²⁰⁶ *Supra* note 4.

²⁰⁷ For a more detailed appraisal of *Ocean Port*, see Philip Bryden, “Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*” (2002) 16 Can. J. Admin. L. & Prac. 125, and Lorne Sossin, “Developments in Administrative Law: the 2001-2002 Term” (2002) 18 Sup. Ct. L. Rev. (2d) 41.

²⁰⁸ *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237; *Liquor Control and Licensing Regulation*, B.C. Reg. 608/76.

The Court of Appeal concluded that members of the board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties, and set aside the board's decision.²⁰⁹ However, the Supreme Court of Canada pointed out that, even if the tribunal did not meet the common law natural justice requirements for institutional independence, this was not fatal to its ability to function:

It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.

Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make" (*Régie* [*supra* note 8] at para. 39).

*However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislature's intention in assessing the degree of independence required of the tribunal in question.*²¹⁰

In *Ocean Port*, the Court concluded that the provincial legislature "spoke directly to the nature of the appointments to the Liquor Appeal Board"; under its enabling legislation, the chair and members of the board were expressly stated to "serve at the pleasure of the Lieutenant Governor in Council."²¹¹ With respect to this language, Chief Justice McLachlin stated:

In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 30(2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. ... Where the intention of the legislature, as here, is unequivocal, there is no room to import common law

²⁰⁹ (1999), 68 B.C.L.R. (3d) 82 (C.A.), 174 D.L.R. (4th) 498.

²¹⁰ *Ocean Port*, *supra* note 4 at paras. 20-22 [emphasis added, citations omitted].

²¹¹ *Ibid.* at para. 25.

doctrines of independence, “however inviting it may be for a Court to do so”
(*Re W.D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.) at p. 137).²¹²

The Court clarified the scope and implication of *Ocean Port* in *Bell Canada v. Canadian Telephone Employees Association*²¹³—particularly in the context of “purely” adjudicative administrative settings. *Bell* involved complex pay equity litigation, which has dragged on for years, often ending up in Federal Court based on challenges to the impartiality and independence of the Canadian Human Rights Tribunal, which is conducting the hearing.²¹⁴ This appeal raised two such concerns: first, that the tribunal lacked independence because the Canadian Human Rights Commission, a party of interest in the proceedings, has the power to issue binding guidelines interpreting the *Canadian Human Rights Act*²¹⁵ in “classes of cases”; and second, that the tribunal lacked independence because the chair of the tribunal has discretion over whether sitting members can continue to hear cases that will run on past the expiry of their terms. While the *Canadian Human Rights Act* clearly authorized both powers, Bell argued that because the tribunal is purely adjudicative, it should enjoy the constitutional protections of “adjudicative independence”, and alternatively, that section 2(e) of the *Canadian Bill of Rights*,²¹⁶ which guarantees a “fair hearing”, is a quasi-constitutional protection that renders inoperative statutory provisions inconsistent with the standards of independence and impartiality.

The tribunal rejected Bell’s position and directed that the hearings should proceed. The Federal Court, Trial Division allowed Bell’s application for judicial review, holding that even the narrowed guideline-making power of the commission unduly fettered the tribunal, and that the chairperson’s discretionary power to extend appointments did not leave tribunal members with a sufficient guarantee of tenure.²¹⁷ The trial judge based her remedy, which was to quash the proceedings, on the fact that the institutional structure of the tribunal was inconsistent with the protection afforded under section 2(e) of the *Canadian Bill of Rights*.²¹⁸ The Federal Court of Appeal reversed that judgment.²¹⁹

The Supreme Court of Canada unanimously upheld the judgment of the Court of Appeal. The Court used its decision in *Bell* to reiterate two principles of administrative independence. First, the Court affirmed its position in *Ocean Port* that adjudicative tribunals do not enjoy any constitutionally rooted protection of judicial

²¹² *Ibid.* at para. 27.

²¹³ [2003] 1 S.C.R. 884, 227 D.L.R. (4th) 193 [*Bell* cited to S.C.R.].

²¹⁴ See *e.g. Bell Canada v. Canadian Telephone Employees Association*, [1998] 3 F.C. 244, 10 Admin. L.R. (3d) 116.

²¹⁵ R.S.C. 1985, c. H-6.

²¹⁶ S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

²¹⁷ *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392, 194 D.L.R. (4th) 499.

²¹⁸ *Ibid.* at para. 129-30.

²¹⁹ *Bell Canada v. Canada (Human Rights Commission)*, [2001] 3 F.C. 481 (F.C.A.), 199 D.L.R. (4th) 664.

independence or impartiality. Writing jointly for the Court, Chief Justice McLachlin and Justice Bastarache also rejected the attempt by *Bell* to delineate a category of tribunals, known as “quasi-judicial” or “purely adjudicative”, which would be subject to higher requirements of independence and impartiality. They made clear that the determination of the particular standard of independence and impartiality required in a particular setting must involve a contextual rather than a categorical analysis:

To say that tribunals span the divide between the executive and the judicial branches of government is *not* to imply that there are only two types of tribunals—those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to *all* of the functions of that tribunal. It is not adequate to characterize a tribunal as “quasi-judicial” on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal—such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law—as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal’s structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.²²⁰

In light of their analysis of the Human Rights Tribunal, Chief Justice McLachlin and Justice Bastarache conclude that a high degree of independence applies to the tribunal and that neither of the powers challenged infringes that standard. In particular, they characterize the guideline-making power as akin to the power of Cabinet or a ministry to make regulations. An administrative tribunal’s impartiality cannot be said to be compromised because it is bound to apply the “law” relevant to a particular setting. They conclude that “[t]he Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way.”²²¹ The fact that the commission’s guidelines were subject to the *Statutory Instruments Act*,²²² and that the process for developing guidelines involved consultations analogous to the legislative process, further distinguished them from mere administrative guidelines in the Court’s eyes.²²³ The Court also was not persuaded that the chair’s power to extend the term of

²²⁰ *Bell*, *supra* note 213 at para. 22 [emphasis in original].

²²¹ *Ibid.* at para. 26.

²²² R.S.C. 1985, c. S-22.

²²³ McLachlin C.J. and Bastarache J. elaborate in *Bell*, *supra* note 213:

While it may have been more felicitous for Parliament to have called the Commission’s power a power to make “regulations” rather than a power to make “guidelines”, the

members past its expiry adversely affected the independence or impartiality of the tribunal, especially since a similar power in relation to provincial court judges was upheld as not inconsistent with judicial independence in *Valente*.²²⁴

Because the common law standard of independence and impartiality was held not to be infringed, the Court saw no reason to embark on a discussion of section 2(e) of the *Canadian Bill of Rights*. This result implies that the standards of independence and impartiality contained in that provision's "fair hearing" right are identical to the common law standards for impartiality and independence, or put differently, it confirms that the *Canadian Bill of Rights* serves merely to "entrench" already existing common law rights rather than create new ones. Chief Justice McLachlin and Justice Bastarache stopped short of explicitly endorsing this view, finding instead that since none of the parties suggested the standards differed, the issue did not arise. This approach reveals how much unfinished business remains in relation to clarifying the distinctiveness, if any, of the procedural guarantees contained in the *Canadian Bill of Rights*. Also noteworthy is the fact that Bell raised before the Court the higher standard imposed by international human rights of institutional independence.²²⁵ The Supreme Court, however, chose not to address this argument.

Bell illustrates the ongoing convergence between the procedural and substantive aspects of administrative law.²²⁶ In approaching the requirements of administrative independence and impartiality, the Court's emphasis on a "functional and purposive" approach and the "contextual" nature of the analysis appears to reinforce the discipline of the pragmatic and functional approach to judicial review discussed below. Similarly, the Court in this context is interested in administrative realities and not simply legislative language. It is not the possibility of the commission having a conflict in its prosecutorial and legislative functions that interests the Court, but the likelihood of such a conflict. Chief Justice McLachlin and Justice Bastarache comment, "This version of Bell's objection might have been stronger had Bell provided some evidence that, in practice, the Commission had attempted to use the guidelines to influence the Tribunal's views toward it."²²⁷

The degree to which the Court should delve into administrative realities in the course of formulating administrative law standards once again calls into question the claim that the only issue for the Court is or should be legislative intent. *Bell* thus represents both the trend toward formalism on the one hand, as the Court reiterated

legislative intent is clear. A functional and purposive approach to the nature of these guidelines reveals that they are a form of law, akin to regulations. It is also worth noting that the word used in the French version of the Act is *ordonnance*—which leaves no doubt that the guidelines are a form of law (*ibid.* at para. 37).

²²⁴ See *Valente*, *supra* note 189.

²²⁵ See *Bell*, *supra* note 213 (Factum of the Appellant at paras. 40-47).

²²⁶ For discussion of this trend, see David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193.

²²⁷ *Bell*, *supra* note 213 at para. 45.

that the boundary between judicial and administrative adjudication is formal rather than functional, and the trend away from formalism on the other hand, as the Court affirmed that the actual practices of tribunals, rather than just their legislative authority or institutional structure, will guide the analysis of independence and impartiality.

The Supreme Court of Canada considered the issue of institutional independence again, this time in the context of provincial justices of the peace, in *Ell v. Alberta*.²²⁸ The issues were whether the principle of institutional independence applied to justices of the peace and, if so, whether the legislated removal of certain respondent justices from office contravened the principle. The Court concluded that the principle applied to the respondents, but that their removal did not contravene the principle because it was necessary for institutional reform and was not “a disguised attempt to remove any particular justices of the peace from office.”²²⁹ In coming to this conclusion, the Court stated:

In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard* at p. 70:

[Courts act as] protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.

This constitutional mandate gives rise to the principle’s institutional dimension: the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.²³⁰

While this reasoning appears sound, the Court clarified that it applied only to presiding justices of the peace, who were said to be responsible for judicial functions. Non-presiding justices of the peace, who were said to be responsible for administrative functions, would not have the benefit of the independence protection. At the same time, however, there are hints in *Ell* that the boundary between judicial and administrative independence may not be as well-defined. For example, when referring to the fact that independence is a relative rather than absolute standard,

²²⁸ [2003] 1 S.C.R. 857, 227 D.L.R. (4th) 217 [*Ell*].

²²⁹ *Ibid.* at para. 38.

²³⁰ *Ibid.* at para. 22.

Justice Major cites both administrative and judicial case law.²³¹ He concludes that “[t]he level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal.”²³²

Justice Major thus appears to envision a spectrum of judicial independence, akin to the sliding scale of administrative independence applicable to tribunals recognized in *Matsqui*²³³ and *Régie*.²³⁴ Superior court judges enjoy the most stringent independence protections, according to this view, while provincial court judges enjoy “less rigorous conditions” and finally, justices of the peace are entitled to “less stringent conditions.” These are vague distinctions at best, and it is not clear that, viewed from the perspective of an accused whose *Charter* rights hang in the balance, a flexible and shifting set of independence requirements is sufficient. After *Bell* and *Ell*, nor is the logic of the stark boundary between judicial and administrative independence demarcated in *Ocean Port* any more compelling. The result of the Court’s post-*Ocean Port* jurisprudence in *Bell* and *Ell* further illustrates the dilemmas to which the quilt of independence requirements in Canadian public law gives rise.

In our view, none of *Ocean Port*, *Bell* or *Ell* provides a satisfactory account of why the Court opts for a formalist over a functionalist approach to the requirements of independence in the administrative sphere. In *Ocean Port*, Chief Justice McLachlin does not adequately distinguish the principle at issue in the *Provincial Court Judges Reference*²³⁵ from the principle at issue regarding the independence of adjudicative tribunal members. Both are creatures of statute charged not with “implementing policy” but with resolving disputes by making findings of fact and law on an impartial basis. Moreover, both bodies may interpret the *Charter* and provide remedies to aggrieved parties.²³⁶ It is difficult to sustain a constitutional divide between these two types of adjudicative bodies; and is it not clear how administrative justice is served by attempting to do so. Put differently, the question the Court should have asked is whether there could *ever* be any legitimate policy rationale behind a government seeking to influence an adjudicative tribunal.

²³¹ He writes:

The manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal and the interests at stake. See *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 83, *per* Lamer C.J. and *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 65, where the Court advocated a contextual approach to judicial independence (*ibid.* at para. 30).

²³² *Ibid.* at para. 31 [emphasis added].

²³³ *Supra* note 195.

²³⁴ *Supra* note 8.

²³⁵ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577.

²³⁶ Not all administrative tribunals may make findings and provide remedies under the *Charter*. This issue is discussed in more detail in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193. Justice McLachlin (as she then was) dissented in *Cooper*, and argued for a broader approach to the jurisdiction of tribunals to decide *Charter* issues.

In *Ocean Port*, Chief Justice McLachlin characterized tribunals as “spanning the constitutional divide between the executive and judicial branches of government.”²³⁷ This very metaphor suggests a set of institutions which, functionally at least, operates within both the judicial and executive spheres. While conceding that courts and tribunals may share similar functions, Chief Justice McLachlin stressed that it is the constitutional status of each that was at issue in this case. Of tribunals, she stated, “While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature.”²³⁸

It is not at all clear why an element of natural justice as fundamental as institutional independence should flow from the categorization of a decision maker, rather than from her function. It is easy to say that courts are courts and tribunals are tribunals, but far more difficult to say that the adjudication that occurs in courts is any more significant—either for the parties involved or for the public interest—than the adjudication that occurs in tribunals. For example, consider that, as indicated above, most tribunals may now decide *Charter* issues.²³⁹ Indeed, the Court has confirmed that a range of tribunals constitute “courts of competent jurisdiction” pursuant to subsection 24(2) of the *Charter*.²⁴⁰ The effect of *Ocean Port* would be that a tribunal member appointed at the pleasure of Cabinet and who decided a *Charter* issue may be dismissed if a government is unhappy with the interpretation given, but a judge who decided the very same *Charter* issue would be protected from any political interference. Surely if a party has the right to claim the protection of the *Charter*, they have a corresponding right to an independent and impartial resolution of that claim. While Chief Justice McLachlin left open a *Charter*-based requirement of independence on the part of some tribunals, it is unclear how many tribunals would be affected by this requirement, and in what circumstances.

It is also worth noting that the British Columbia Court of Appeal in its decision in *Ocean Port* did not declare that adjudicative tribunals enjoy a constitutionally entrenched standard of institutional independence, but rather attempted to apply the Supreme Court’s earlier ruling in the analogous case of *Régie*. *Régie* also involved a challenge to the institutional independence of a liquor appeal board, and Justice Gonthier, writing for the Court in that case, stated that appointments “at pleasure” were not consistent with the requirements of institutional independence. Chief Justice McLachlin distinguished *Régie* because in that case, the Quebec *Charter of human rights and freedoms* was invoked, a quasi-constitutional statute that entrenched the

²³⁷ *Ocean Port*, *supra* note 4 at para. 24.

²³⁸ *Ibid.* at para. 32.

²³⁹ See *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 231 D.L.R. (4th) 385, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449.

²⁴⁰ See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583. The Court justified this finding, in part, due to the French version of subsection 24(2) which refers to “tribunal” rather than “cour”.

right to a “full and equal, public and fair hearing by an independent and impartial tribunal,”²⁴¹ while British Columbia had no comparable quasi-constitutional statutory provision.

The degree of independence required of a tribunal under article 23 of the Quebec *Charter* depends on where the tribunal falls on a spectrum ranging from regulatory to purely adjudicative tribunals.²⁴² A tribunal’s place on that spectrum is determined by reference to several factors, including the tribunal’s function,²⁴³ its attributes and procedures,²⁴⁴ its powers,²⁴⁵ the parties to its proceedings and their interests,²⁴⁶ and the attributes of its members.²⁴⁷ In *Barreau de Montréal*, the Quebec Court of Appeal concluded that members of the Tribunal administratif du Québec (“TAQ”), a super-tribunal with appellate jurisdiction in decision-making contexts, including social assistance, municipal property assessments, and economic regulation, required a high level of independence:

[I]l reste ... un faisceau d’éléments suffisamment significatifs pour justifier une application plus stricte des principes développés par la jurisprudence en matière d’indépendance judiciaire et pour conclure que des membres du TAQ doivent bénéficier d’un niveau de garantie plus élevé que celui généralement retenu pour les tribunaux administratifs en vertu de l’article 23 de la charte québécoise. D’abord, le TAQ exerce une fonction exclusivement juridictionnelle qui exige, malgré les objectifs énoncés de célérité et d’accessibilité, la mise en place de procédures s’apparentant à celles des cours de justice ; ensuite le TAQ dispose de compétences habituellement confiées aux cours de justice telles celles de trancher des questions constitutionnelles et d’évaluer les motifs d’une demande de secret administratif ; enfin et surtout, le TAQ est appelé à trancher un très grand nombre de recours qui mettent en jeu les intérêts financiers ou politiques de l’État en tant que partie au litige. Pris dans leur ensemble, ces éléments me paraissent justifier qu’on situe le TAQ, sur le spectre des tribunaux administratifs, à un niveau supérieur d’exigence en ce qui concerne l’indépendance judiciaire de ses membres.²⁴⁸

²⁴¹ *Charter of human rights and freedoms*, R.S.Q. c. C-12, s. 23 [Quebec *Charter*]. This provision was cited in *Ocean Port*, *supra* note 4 at para. 28.

²⁴² See *Barreau de Montréal v. Québec (P.G.)*, [2001] R.J.Q. 2058 (C.A.) at para. 115, 48 Admin. L.R. (3d) 82 [Barreau de Montréal cited to R.J.Q.].

²⁴³ Tribunals that exercise traditional “administrative” functions, such as making discretionary or policy-based decisions, require lower levels of independence than tribunals with an essentially appellate function. *Ibid.* at paras. 118-23.

²⁴⁴ Tribunals that exercise “inherent” powers in addition to powers expressly conferred by statute or that employ court-like procedures require greater levels of independence. *Ibid.* at paras. 124-29.

²⁴⁵ Tribunals with the power to decide constitutional questions and to find parties contravening its orders in contempt require higher levels of independence. *Ibid.* at paras. 130-37.

²⁴⁶ Tribunals that regularly hear cases affecting state interests and in which the state acts as a party require enhanced guarantees of independence. *Ibid.* at paras. 144-49.

²⁴⁷ Tribunals whose members wield special expertise in contrast to generalist courts may require lower levels of independence. *Ibid.* at paras. 150-54.

²⁴⁸ *Ibid.* at para. 156.

The court scrutinized regulations governing the reappointment of tribunal members and found that an informed observer would have a reasonable apprehension that tribunal members may not be sufficiently independent to adjudicate cases objectively, because the committee struck to decide their reappointment included a Justice Ministry official and the tribunal chair.²⁴⁹ It ruled that an independent committee be struck to make reappointment recommendations and that tribunal members be afforded an opportunity to be heard by the committee.²⁵⁰ The court was equally concerned with provisions linking members' salary increases with the outcome of periodic performance evaluations conducted by the tribunal chair. It found that such a regime imperilled the tribunal members' independence and recommended that the members' salaries be automatically stepped up throughout their tenure.²⁵¹

The resulting picture of institutional independence in Canada is something of a dog's breakfast. Institutional independence for administrative tribunals is clearly recognized at common law, but how much of this common law protection can survive a statutory attempt at ouster, if any, remains unclear. Institutional independence for administrative tribunals also has constitutional status that could potentially impugn an attempted statutory ouster, but only where required under the *Charter*. Constitutional status of institutional independence for administrative tribunals would also appear separately to constrain Quebec's legislature where the Quebec *Charter of human rights and freedoms* applies, and presumably also the federal parliament, where the equivalent provision in the *Canadian Bill of Rights* applies (depending on the scope of that protection in the *Canadian Bill of Rights*, which remains uncertain).²⁵² Imagine if a constitutional protection in respect of search and seizure applied in BC but not in Alberta, or if aboriginal rights applied to hunting but not to fishing, or if an equality guarantee protected a disabled person in Manitoba trying to access public records but not the same disabled person in Nova Scotia trying to access public transit.

Part II has outlined the directions in which Canadian norms of institutional independence are currently evolving under the guidance of Canada's Supreme Court. The Court's recent jurisprudence has important ramifications for both the scope and content of the right to institutional independence. The *Ocean Port* and *Bell Canada* decisions signal the adoption of a formalist approach to delimiting the reach of institutional independence in the sphere of administrative decision making. Under this

²⁴⁹ *Ibid.* at para. 182.

²⁵⁰ *Ibid.* at paras. 188-89.

²⁵¹ *Ibid.* at para. 206.

²⁵² *Canadian Bill of Rights*, *supra* note 216. Subsection 1(a) recognizes as a human right and fundamental freedom "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;" and subsection 2(e) provides that no law of Canada shall be construed so as to "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations." Depending on the interpretation of subsection 1(a), this protection might extend to Alberta, whose *Alberta Bill of Rights* has language identical to subsection 1(a) of the *Canadian Bill of Rights*. See *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 1(a).

approach, some adjudicative tribunals are open to executive or legislative interference because of their constitutional status as part of the executive branch of government. With the *Régie* decision, the Court borrowed heavily from its jurisprudence on judicial independence to define a framework for the institutional independence of administrative tribunals focused almost exclusively on the objective guarantees of judicial independence: security of tenure, financial security, and administrative independence. Part III examines these aspects of the Canadian law on institutional independence in light of the international approach to tribunal independence described in Part I, not to determine whether Canada is “breaching” any of its “binding” international law obligations, but to identify divergences between domestic and international norms of independence and to assess their significance in the Canadian context.

III. How Does Canadian Administrative Law Measure Up to International Human Rights Standards?

We suggest that the Canadian administrative law guarantees of institutional independence set out in Part II may diverge from the procedural requirements of international human rights law as elaborated in Part I in at least two significant respects: first, the deference of Canadian courts to tribunal decisions means that many bodies that enjoy no constitutional protection for independence will nonetheless be insulated from review by independent courts. Second, the emphasis in Canadian administrative law on viewing the independence of tribunals through the lens of judicial independence and the objective guarantees of security of tenure and financial remuneration leaves tribunals vulnerable to external manipulation through the significant political influence over tribunal appointments and tribunals’ policy directions.²⁵³ We briefly discuss each of these potential deficiencies below.

A. *The Deference Problem: Assessing Standards of Review*

As elaborated in the first section, international law norms do not dictate that all phases of every adjudicative process engaging human rights must be conducted to the standard of a court, but rather that there must be recourse, at some stage of such a process, to a court or to an independent and impartial body able to adjudicate the merits of the dispute. This is where the Canadian law on standard of review becomes

²⁵³ Or, as Chief Justice McLachlin stated in *Ocean Port*, *supra* note 4, “Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy” (*ibid.* at para. 24). For a discussion of the dynamics of tribunal appointments and policy-making in Canada, see France Houle & Lorne Sossin, “Policy Making in Tribunals” (Paper prepared for the Canadian Institute for the Administration of Justice and presented to the Administrative Law Roundtable, June 2004), online: Canadian Institute for the Administration of Justice <http://www.ciaj-icaj.ca/english/administrativetribunals/paper-houleand_sossin.june12004.pdf>.

germane, as it dictates the level of deference that a reviewing court will show to an administrative tribunal or decision maker, which in turn defines the level of actual recourse an unsatisfied litigant has to an independent body with authority to review the merits of a decision.

The importance of the Canadian standard of review jurisprudence to the compatibility of Canadian administrative law with international human rights norms may be illustrated by returning to *Y.L. v. Canada*.²⁵⁴ In that case, the United Nations Human Rights Committee considered a claim by a Canadian citizen who was denied certain disability pension benefits, based in part on medical records that had not been disclosed to him. The claimant maintained that the adjudication of his case before the Pension Review Board did not constitute a “fair public hearing by a competent, independent and impartial tribunal” pursuant to article 14(1) of the *ICCPR*. The Human Rights Committee held that the adjudicative process relating to pension disputes, which contained several stages, had to be viewed within the context of the availability of judicial review under the *Federal Court Act*. As we have seen in Part I, the Committee concluded:

It has not been claimed by the author that [judicial review] would not have complied with the guarantees provided in [article 14(1)]. Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

... [T]herefore, it would appear that the Canadian legal system does contain provisions in the *Federal Court Act* to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.²⁵⁵

But what if the issue of the sufficiency of judicial review had been before the Committee in circumstances where the standard of review was patent unreasonableness? In such settings, the court is precluded from revisiting the merits of an administrative decision and typically will only reverse an administrative determination where a mistake amounting to a jurisdictional error is discovered. The Supreme Court of Canada characterized a patently unreasonable decision in *Suresh* as one that “[is] made arbitrarily or in bad faith, ... cannot be supported on the evidence, or [in which] the Minister failed to consider the appropriate factors,” adding that “[t]he court should not reweigh the factors or interfere merely because it would have come to a different conclusion.”²⁵⁶

The nature of the pragmatic and functional approach, by which the Canadian courts determine whether the standard of review of correctness, reasonableness, or

²⁵⁴ *Supra* note 41.

²⁵⁵ *Ibid.* at paras. 9.4-9.5.

²⁵⁶ *Suresh*, *supra* note 8 at para. 29.

patent unreasonableness applies, is deeply contextual.²⁵⁷ That is to say, it may vary across tribunals (for example, labour boards tend to attract a more deferential standard of review than human rights boards) and across the same tribunal depending on the subject matter of the case (a refugee board may attract deference when assessing the credibility of an applicant, but not when interpreting international human rights norms). While determining the standard of review is in part an exercise in construing the standard intended by the legislature, it also includes an appreciation of how the decision-making process works in practice.²⁵⁸ As Chief Justice McLachlin asserted in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*:

To determine [the] standard of review [based] on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo “significant searching or testing”, or be left to the near exclusive determination of the decision maker.²⁵⁹

Thus, the question is whether judicial deference to the “near exclusive determination of the decision maker” falls short of international human rights standards where those decision makers are not independent.²⁶⁰ Put another way, Canadian administrative law contains no guarantee that affected parties will have recourse to an independent body

²⁵⁷ The pragmatic and functional approach calls on courts to determine the standard of review by recourse to four related factors: (1) the presence or absence of a clause negating the right of appeal; (2) the relative expertise of the decision maker; (3) the purpose of the provision and the legislation generally; and (4) the nature of the question. See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29-38, 160 D.L.R. (4th) 193.

²⁵⁸ For an elaboration of the tensions in the jurisprudence with respect to how significant a role practices as opposed to statutory provisions should play in this analysis, see Lorne Sossin, “Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law” (2003) 27 *Advocates’ Q.* 478.

²⁵⁹ *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 22, 11 B.C.L.R. (4th) 1 [citations omitted]. This passage could be read as suggesting that some basis for deference would even arise if a court believed an error to be jurisdictional in nature. Some commentators have blanched at this suggestion. As David Mullan has argued, “[T]here are certainly domains where the claims of the decision maker to deference based on legislative choice and comparative institutional competence and practical advantage run out. Under accepted Canadian constitutional law principles, they run out when the statutory decision maker is dealing with questions as to the scope of its jurisdiction or behaves in such a way as to lose or exceed its jurisdiction” (David Mullan, “Deference from *Baker* to *Suresh*: Interpreting the Conflicting Signals” in Dyzenhaus, *The Unity of Public Law*, *supra* note 9 at 53-54).

²⁶⁰ One way to remedy this deficiency could be to add to the pragmatic and functional approach a criterion under which the court actually considered the relative independence of the administrative body as part of its decision to defer. I am grateful to David Mullan for raising this possibility in his comments on an earlier draft of the paper.

to have their rights adjudicated on the merits. Does this omission go against international human rights standards? As discussed in the first section, this question is not as cut and dry as perhaps it should be.

In some decision-making contexts, the European Court has gradually relaxed the requirements of its composite approach to the guarantee of tribunal independence. Courts reviewing a first-instance decision that does not comply with article 6(1) of the *ECHR*,²⁶¹ perhaps because the administrative decision maker is not independent, no longer need “full” jurisdiction over the claim; they only need “enough” jurisdiction to deal with the grounds of review point by point. Whether a reviewing court has “enough” jurisdiction depends on the manner in which the first-instance decision was arrived at, the content of the dispute including the grounds of review, and the subject matter of the decision. The first two factors are usually considered together. Thus, if the dispute is over a policy question, the initial decision could be made by a decision maker lacking independence as long as *Wednesbury*-like review is available. If the dispute concerns findings of fact, such limited judicial review is sufficient only if the initial decision is taken in a quasi-judicial process (i.e., a hearing) by a decision maker bearing some of the badges of independence. The third factor, the subject matter of the decision under review, is crucial. Proceedings that involve fundamental rights or interests demand more safeguards at first instance and more intensive review. These include child access proceedings, for which *Wednesbury* reasonableness review was, according to the European Court, insufficient to satisfy article 6(1).²⁶² According to the House of Lords, article 6(1) requires the highest standards of independence for decisions touching on basic rights such as liberty rights engaged by the criminal process, “private” rights, and rights protected by the European Convention, including the right to a private and family life. Controversially, the House of Lords suggests that decisions regarding the allocation of state resources, like statutory entitlements to public welfare or social housing, are at the lower end of the “independence spectrum” and attract minimum standards of independence.

It is not possible to make a general statement about how the Canadian standard of review jurisprudence measures up to international standards. Any assessment of whether Canadian administrative law is consistent with the international law norm of independence as formulated by the European Court and House of Lords is a contextual exercise that must be performed on a tribunal-by-tribunal basis. However, several recent decisions of the Supreme Court of Canada on the appropriate standard of review raise the prospect that in some instances, Canadian law may deviate from international norms.

²⁶¹ *Supra* note 22.

²⁶² See *W. v. United Kingdom, O. v. United Kingdom, B. v. United Kingdom, R. v. United Kingdom*, *supra* note 148.

In *Baker v. Canada*,²⁶³ an immigration officer acting on behalf of the minister of citizenship and immigration decided that there were no humanitarian and compassionate reasons to suspend Mavis Baker's removal from Canada, leading to her potential separation from her Canadian-born children. The Supreme Court decided that the appropriate standard of review for the officer's decision was reasonableness, which allows no reweighing of the factors relevant to the exercise of discretion. Given that the subject matter of the decision involves state interference with Mavis Baker's family life—an interest protected by conventional international human rights law²⁶⁴—and that the immigration official who made the decision, a civil servant and delegate of the minister, was likely not independent, it is questionable whether court review on a reasonableness standard complied with the right to a fair hearing before an independent tribunal any more than did *Wednesbury* review of the English authorities' child access decisions.²⁶⁵ Even greater concerns are raised by the decision of the Supreme Court in *Ahani v. Canada (Minister of Citizenship and Immigration)* that a determination by the minister of citizenship and immigration whether a convention refugee faces a substantial risk of torture upon deportation to his country of origin may only be reviewed on a patent unreasonableness standard.²⁶⁶ Under the approach outlined by the European Court and House of Lords, the fundamental nature of the human rights involved in this context would likely require more safeguards at first instance and more intensive review. Despite the fact that the decision maker involved in *Ahani* was undoubtedly not independent, the Supreme Court applied the least intrusive and most deferential standard of review available.

The independence of immigration adjudicators was considered by the Federal Court in *Mohammad v. Canada (Minister of Employment and Immigration)*.²⁶⁷ The minister ordered an inquiry into whether Mohammad should be removed because he belonged to an inadmissible class, having been convicted of offences relating to a terrorist attack prior to entering Canada, and because he failed to disclose these convictions when he applied for a visa. Mohammad sought to prohibit the deportation inquiry on the ground that the immigration adjudicator conducting it lacked the

²⁶³ *Supra* note 15.

²⁶⁴ See e.g. article 17 of the *ICCPR*, which protects individuals from arbitrary or unlawful interference with their family. See Committee on Human Rights, Communication No. 1011/2001, *Madafferi v. Australia*, UN Doc. CCPR/C/81/D/1011/2001 (2004).

²⁶⁵ Admittedly, one would need to consider the manner in which the first-instance decision was made. The European Court's decision in *Bryan*, *supra* note 126, contemplates that in addition to rendering their decisions after a fact-finding process that complies with the principle of procedural fairness, immigration officers would have to display at least some badges of independence for humanitarian and compassionate decision making to live up to the international norm.

²⁶⁶ *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72 at para. 17, 208 D.L.R. (4th) 57.

²⁶⁷ [1989] 2 F.C. 363 (F.C.A.), 55 D.L.R. (4th) 321 [*Mohammad* (F.C.A.) cited to F.C.], aff'd [1988] 3 F.C. 308 (F.C.T.D.), 50 D.L.R. (4th) 594 at 597 [*Mohammad* (F.C.T.D.) cited to F.C.], leave to appeal to S.C.C. refused, [1989] 1 S.C.R. xi.

institutional independence required by the rules of natural justice and by section 7 of the *Charter*. Among other things, he claimed that:

1. Both the Adjudicators and the Case Presenting Officers, who are part of the Enforcement Branch, are under the direction of the same Associate Deputy Minister. ...
2. The same Legal Services Branch of the Department gives advice to both the Adjudicators and the Case Presenting Unit. ...
5. Adjudicators are ordinary public servants with no unusual tenure or oath of office.
6. Adjudicators may be given acting assignments as Immigration Appeal Officers who represent the Minister before the Immigration Appeal Board. Case Presenting Officers may be given acting assignments as Adjudicators.²⁶⁸

The motions judge dismissed Mohammad's application. He recognized that adjudicators were employees of the Canada Employment and Immigration Commission ("CEIC") and enjoyed a relatively low level of independence. However, in reasoning reminiscent of the European Court's composite approach, he concluded that in light of the existence of a right of appeal to the more independent Immigration Appeals Tribunal,²⁶⁹ whose decisions could be appealed to the Federal Court of Appeal, it was "acceptable that, at the stage of the adjudicator's decision, the tribunal be somewhat less independent."²⁷⁰ The Court of Appeal dealt systematically with Mohammad's claims and, having regard to the scheme of the *Immigration Act 1976*,²⁷¹ the regulations, administrative directives, job descriptions, and the sworn testimony of a former adjudicator regarding the operation of the adjudication system, determined that immigration adjudicators had sufficient institutional independence. It held that while adjudicators and case-presenting officers (who played a prosecutorial role) were civil servants under the direction of the same minister, de facto they

²⁶⁸ *Mohammad* (F.C.T.D.), *ibid.* at para. 54.

²⁶⁹ Members of the tribunal were not CEIC employees. Appointed by the governor in council for fixed terms not exceeding ten years, they held office during good behaviour.

²⁷⁰ *Mohammad* (F.C.T.D.), *supra* note 267 at 331. The motions judge relied on the judgment of Justice McIntyre in *R. v. MacKay*, [1980] 2 S.C.R. 370 at 404-405, 114 D.L.R. (3d) 393 [*MacKay* cited to S.C.R.], who found that MacKay's trial by court martial on charges under the *Narcotics Control Act* did not violate his right to be tried by an independent and impartial tribunal under s. 2(f) of the *Canadian Bill of Rights*. In *R. v. Généreux*, [1992] 1 S.C.R. 259 at 292, 88 D.L.R. (4th) 110 [*Généreux* cited to S.C.R.], the Supreme Court questioned the validity of *MacKay*, preferring the dissenting judgment of Laskin C.J., who found that the court martial was not independent because of the presiding officer's "close involvement with the prosecution and with the entire military establishment" (*ibid.* at 379). In *Généreux*, the Court concluded that the structure of the court martial infringed a serviceman's right to be tried by an independent and impartial tribunal under s. 11(d) of the *Charter*. The Judge Advocate of the court martial did not have sufficient security of tenure, was not protected against the discretionary or arbitrary interference of the executive, and was appointed on a case-by-case basis by the Judge Advocate General, who served as an agent of the executive in supervising prosecutions.

²⁷¹ *Immigration Act, 1976*, S.C. 1976-77, c. 52.

operated within separate divisions of CEIC—the adjudication directorate and the enforcement branch—and did not report to a common superior. It also dismissed Mohammad’s claim that seconding case-presenting officers to the adjudication directorate and vice versa undermined the institutional separation between the functions of adjudicator and prosecutor, and concluded:

... I have the view that reasonable persons, reasonably informed, would view adjudicators ... as being independent, keeping in mind that they are, for the most part layman in the hierarchy of quasi-judicial tribunals, that their decisions are subject to judicial review by this Court, and that they have all taken an oath of office to “faithfully and honestly fulfil the duties ...” devolving upon them.²⁷²

In effect, the Court held that where appropriate safeguards were in place, the adjudication of certain immigration matters by public servants reporting to the minister of employment and immigration could satisfy an applicant’s right to a hearing before an independent and impartial tribunal. Such safeguards included placing the adjudicators within an adjudication directorate operating relatively autonomously from the staff charged with enforcing Canada’s immigration laws, ensuring that the adjudicators had recourse to the grievance procedures available to public servants, specifying in administrative directives and position descriptions²⁷³ that adjudicators were independent and that this independence had to be respected, and requiring adjudicators to swear an oath to “faithfully and honestly” fulfill their duties as public servants.

It is unlikely that *Baker* and *Ahani* would meet even the minimal standards of independence set out in *Mohammad*. First, the decision maker in *Baker* was exercising a statutory “humanitarian and compassionate” discretion on the minister’s behalf; he was not operating within a de facto independent branch of Citizenship and Immigration Canada (“CIC”), akin to the adjudication directorate in *Mohammad*. In *Ahani*, the decision maker was the minister herself. Second, there was no right of appeal on the merits to an independent administrative tribunal in either *Baker* or *Ahani*—only judicial review on a very deferential standard.

There is reason to doubt that *Mohammad* reflects current Canadian standards of independence, let alone international standards. First, the reasoning in *Mohammad* is deficient in several respects. While the Court of Appeal was right to review the

²⁷² *Mohammad* (F.C.A.), *supra* note 267 at 396.

²⁷³ The position description stated that:

As adjudicators are independent decision makers the Director must foster a flexible, collegial form of management. To ensure consistent application of the law, policy positions regarding the interpretation of the Immigration Act ... must be developed by means of discussion and persuasion in order to promote acceptance and implementation by Adjudicators. ... [A]s Adjudicators are a quasi-judicial tribunal it is necessary to ensure the impartiality and independence of the Adjudication Directorate and its policies (*ibid.* at 391).

administrative realities of immigration adjudication, it gave short shrift to the substantial connections between CEIC's adjudication and enforcement branches and accorded too much weight to a generic oath of office and the content of a job description. Additionally, while it purported to apply a test focusing on the objective guarantees that establish a perception of sufficient institutional distance between the adjudicators and the executive branch, the court relied extensively on the subjective opinion of a single retired adjudicator that he "felt" that the final decision on a case was solely his.²⁷⁴ Second, Parliament moved in January 1993 to amend the *Immigration Act* and, addressing the issue of independence, created an Adjudication Division within the Immigration and Refugee Board ("IRB").²⁷⁵ While adjudicators remained civil servants and continued to be appointed or employed under the *Public Service Employment Act*,²⁷⁶ they no longer reported to the minister but to the chair of the IRB, an independent tribunal.²⁷⁷ Third, the Federal Court of Appeal has openly questioned whether *Mohammad* is still good law. In *Ahumada v. Canada (Minister of Citizenship and Immigration)*,²⁷⁸ Justice John Evans, for a unanimous court, found that the relationship between CIC and one member of the Convention Refugee Determination Division ("CRDD") of the IRB, who had previously worked as an appeals officer²⁷⁹ in CIC's Enforcement Branch before her appointment to the IRB on a temporary leave of absence from CIC, gave rise to a reasonable apprehension that she was likely to be biased. The court reasoned that the member "might well be mindful of how her [CIC] colleagues were likely to view her decisions as a CRDD member and what effect her decisions might have on her career prospects or opportunities when she returned to CIC."²⁸⁰ The minister had argued that if the "obvious mingling of adjudicative and prosecutorial roles" among adjudicators and case-presenting officers had passed *Charter* scrutiny in *Mohammad*, then the "much more tenuous connection" between the seconded IRB member and CIC could not

²⁷⁴ *Ibid.* at 393. The adjudicator also testified that a superior officer discussed with him the fact that he was more likely than other adjudicators to release persons facing removal pending an inquiry, and that many of these had failed to show for the hearing. This "one example of questionable conduct," concluded the court, was not "fatal to the overall perception of independence" (*ibid.* at 396).

²⁷⁵ Bill C-86, *An Act to amend the Immigration Act and other Acts in consequence thereof*, 3d Sess., 34th Parl., 1992, cl. 47(1).

²⁷⁶ *Ibid.* at cl. 53.

²⁷⁷ *Immigration Act*, R.S.C. 1985, c. I-2, s. 58(3). The changes were hailed by some as ending the "enforcement bias and lack of independence of adjudicators ... under the general supervision of immigration enforcement officials": Canada, House of Commons, Legislative Committee on Bill C-86, "Commentary on Bill C-86 by the Law Union of Ontario" in *Minutes of Proceedings and Evidence* (5 November 1992) at 18:66.

²⁷⁸ [2001] 3 F.C. 605 (C.A.), 199 D.L.R. (4th) 103.

²⁷⁹ Appeals officers advise on whether the minister of citizenship and immigration should intervene in proceedings before the IRB and represent the minister at the hearing if he or she does intervene. They appear before the IRB "in order to represent the public interest in opposing a claim in order to keep the claimant out of Canada" (*ibid.* at para. 31).

²⁸⁰ *Ibid.* at para. 57.

raise a reasonable apprehension of bias.²⁸¹ The court rejected this argument in part because *Mohammad* was out of step with current standards of institutional independence:

... *Mohammad* ... predates the cases in which statutory provisions respecting administrative adjudication have been impugned before the Supreme Court of Canada for failing to ensure institutional independence and impartiality [e.g., *Matsqui* and *Régie*]. There must be some doubt, therefore, whether it would be decided the same way today as it was nearly 15 years ago.²⁸²

It also raised a note of caution regarding the conferral of adjudicative powers to public servants:

[O]fficials responsible for enforcing the law ... almost inevitably tend to view matters from an enforcement perspective. ...

It is precisely to avoid the danger of enforcement-minded adjudication that, like many statutory administrative schemes, the *Immigration Act* entrusts adjudicative functions to a tribunal that is independent of, and separate from, the agency responsible for enforcement.²⁸³

These post-*Mohammad* developments suggest that both Parliament and the Federal Court may eventually reassess and heighten standards of institutional independence for administrative decision making in the context of immigration and refugee determination.²⁸⁴ In our view, they would do well to take into account international norms of independence.

While we have focused primarily on independence concerns in immigration decision making, it is noteworthy that the right to a hearing before an independent tribunal at international law extends to human rights adjudication, professional discipline, the regulation of liquor licenses, and other contexts where the Supreme Court has not yet recognized a wide scope of application for section 7 of the *Charter*.²⁸⁵ Accordingly, while there may be no constitutional obstacle to the

²⁸¹ *Ibid.* at para. 40.

²⁸² *Ibid.* at para. 46 [citations omitted].

²⁸³ *Ibid.* at paras. 54-55.

²⁸⁴ But see C. Clark, "Critics assail Coderre's proposals for refugee system" *The Globe and Mail* (21 March 2003) A15. In 2003, former Immigration Minister Denis Coderre proposed removing initial decision making authority over refugee claims from the independent IRB and conferring it on CIC officials.

²⁸⁵ In the human rights adjudication context, see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 190 D.L.R. (4th) 513. In the disciplinary context, see Robert A. Sharpe, Katherine E. Swinton & Kent Roach, *The Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2002), who suggest that the "weight of authority, however, is to the effect that section 7 does not protect a right to engage in a particular type of professional activity" (*ibid.* at 201) [footnote omitted]. See also *Siemens v. Manitoba (A.G.)*, [2003] 1 S.C.R. 6 at para. 46, 221 D.L.R. (4th) 90, where the Supreme Court refused to accept that restaurant owners had a protected liberty interest under section 7 to operate video lottery terminals at their place of business. Arguably, like the

implementation of statutory regimes that do not meet even the requirements of independence mandated by the common law rules of procedural fairness, such regimes, combined with deferential standards of review, could be at variance with international norms.

In sum, we conclude that the approach to the standard of review in Canadian administrative law may fall short of international human rights standards. There are, however, hopeful signs, particularly in *Baker*, where the Court appeared to accept that international human rights norms could be relied upon to guide the judicial review of broad discretion in the context of imprecise statutes.

B. The Political Interference Problem: Independence and Appointments

In addition to the concern about Canadian administrative law arising from the legitimating of deference to administrative bodies that may themselves not be independent, a second concern arises because of the strong and arguably unjustified analogy to judicial independence as the basis for assuring the independence of administrative decision makers. Our review of the content of the international law norm of independence suggests that the *Valente*²⁸⁶ principles of security of tenure, financial security, and administrative independence are certainly recognized as important guarantees of tribunal independence in international law. However, international norms place an equal emphasis on the existence of guarantees against the danger of executive control and manipulation of the process for appointing and promoting tribunal members, and more generally on the existence of formal and practical guarantees against “outside pressure”, typically by the executive branch of government. This emphasis is illustrated most strikingly by the importance attributed in the *Basic Principles on the Independence of the Judiciary*²⁸⁷ and in the *Draft Declaration on the Independence and Impartiality of the Judiciary*²⁸⁸ to the implementation of a formal, merit-based appointments and promotion process for members of the judiciary. The Human Rights Committee is similarly preoccupied with the potential for executive and legislative interference in the judicial appointments process, expressing its concerns about the systems in place in both burgeoning and established democracies. In addition to examining the manner of appointment and the term of office of tribunal members, the European Court also looks for “guarantees against outside pressure” and asks whether a tribunal presents an “appearance of independence”. Accordingly, the court has focused on issues seldom canvassed by Canadian courts, such as the degree of legal training afforded tribunal members,²⁸⁹ their familiarity with the importance of the concept of tribunal

operation of video lottery terminals, serving liquor is a “purely economic interest” disqualified from section 7 protection.

²⁸⁶ *Supra* note 189.

²⁸⁷ *Supra* note 66.

²⁸⁸ *Supra* note 69.

²⁸⁹ See *Cooper*, *supra* note 139 at paras. 123-25.

independence,²⁹⁰ and whether frequent day-to-day contacts between tribunal members and state administrators deprived the former of the requisite appearance of independence.²⁹¹

We submit that tribunals are most vulnerable to political capture not through the absence of objective guarantees such as fixed term appointments but through the potential for political control over the appointments process and tribunal policy-making. In other words, if tribunal members are appointed in a partisan fashion in order to advance policy objectives or ideological perspectives, then whether the appointment is for full-time members to serve a fixed term of two years or for part-time members to serve on a per diem basis is of little relevance.

We touched on the issue of appointments and institutional independence above in the context of *Hewat*.²⁹² There, while holding that dismissals during a fixed term without cause violated the common law guarantee of institutional independence, the Ontario Court of Appeal had observed that “it would be intellectually naïve not to recognize that elected governments must have room to make political decisions and to conduct themselves in a manner to assure that their political policies are implemented.”²⁹³ Additionally, since the process of appointing judges is not constrained through judicial supervision, it would seem an odd inversion to establish judicial supervision over the independence of administrative appointments.²⁹⁴ Even if a court were inclined to assume such a mantle, it is not clear that courts have the capacity or expertise to distinguish legitimate political interests (advancing a policy agenda the government was duly elected to pursue) from illegitimate political interests (usurping an adjudicative function to further partisan interests).²⁹⁵

²⁹⁰ *Ibid.*

²⁹¹ See *Campbell and Fell*, *supra* note 125 at para. 77.

²⁹² *Supra* note 202.

²⁹³ *Ibid.* at 169.

²⁹⁴ Katrina Wyman makes a similar point: “However, the Supreme Court’s decision to use the criteria for judicial independence to assess the independence of adjudicative tribunals has come at a price. The common law that has emerged in the wake of judicial interpretation of s.11(d) of the *Charter* simply does not regulate the process for selecting the members of adjudicative tribunals because the constitutional jurisprudence on judicial independence does not regulate the ‘procedure and criteria’ for the appointment, of judges” (Wyman, “Appointments to Adjudicative Tribunals”, *supra* note 203 at 112).

²⁹⁵ See *Sethi v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 552 (F.C.A.) 52 D.L.R. (4th) 681, where the Federal Court of Appeal found that the executive’s introduction of a bill that proposed to terminate the employment of all members of the Immigration Appeal Board without compensation and regardless of tenure while holding out the prospect of their appointment to another tribunal did not support Sethi’s claim that his refugee claim could not be decided fairly due to the existence of a reasonable apprehension of bias by the board in favour of the government. The court accepted that, in light of the government’s stated intention, the financial security of board members (and thus, one would assume, their independence) was threatened. However, it found that no “informed, right-minded person” would believe that the board members would decide a refugee claim against the claimant and in favour of the government because, in the court’s view, the government had

The issue of appointments reached the Supreme Court in *C.U.P.E. v. Ontario (Minister of Labour)*, involving a challenge to discretionary ministerial appointments of interest arbitrators in the hospital sector.²⁹⁶ The *Retired Judges* case concerned the appointment of interest arbitration chairs under the *Ontario Hospital Labour Disputes Arbitration Act*.²⁹⁷ This *Act* provides that where the management and labour nominees to a board of arbitration cannot agree on the appointment of a chair, then “the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act.”²⁹⁸ In 1998, the minister of an ideologically neoliberal provincial government in Ontario broke with the historical practice, which was to appoint individuals possessing labour relations expertise and recognition in the labour relations community as being generally acceptable to both management and labour, and appointed retired superior court judges, at least some of whom were characterized as lacking expertise and general acceptability. The unions involved in the dispute found the retired judges to be unacceptable, and they challenged the appointment both on procedural fairness and substantive grounds. The application failed at the Divisional Court,²⁹⁹ but succeeded at the Ontario Court of Appeal.³⁰⁰ The Court of Appeal held that the retired judges appointed by the minister lacked the requisite institutional independence and that the minister’s undertaking to the unions created a legitimate expectation that the system of appointing chairs from a mutually acceptable group of arbitrators would not be altered.³⁰¹

The Supreme Court of Canada reached the same result as the Court of Appeal but for distinctly different reasons. While the Court of Appeal viewed the case principally as about institutional independence and procedural fairness, the Supreme Court unanimously found the appointments to be valid on procedural grounds. Rather, the Supreme Court’s concern with the appointments focused on the substantive standard by which such exercises of ministerial discretion should be reviewed. The Court was

no interest in seeing refugee claims defeated but sought only their fair adjudication (*ibid.* at 561-62). It is unclear whether the Court of Appeal would come to the same conclusion if there were evidence of executive pressure on board members to decide cases in accordance with government policies to restrict the influx of migrants, including refugees, as has been the case in Australia: see Susan Kneebone, “Is the Australian Refugee Review Tribunal ‘Institutionally’ Biased?” (Paper presented to the Eighth International Association for the Study of Forced Migration Conference, Chiang Mai, Thailand, 5 January 2003) [unpublished].

²⁹⁶ *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 193 [*Retired Judges*].

²⁹⁷ *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14.

²⁹⁸ *Ibid.* at s. 6(5).

²⁹⁹ *Canadian Union of Public Employees v. Ontario (Minister of Labour)* (1999), 117 O.A.C. 340 (Div. Ct.).

³⁰⁰ *Canadian Union of Public Employees v. Ontario (Minister of Labour)* (2000), 51 O.R. (3d) 417 (C.A.), 194 D.L.R. (4th) 265.

³⁰¹ For more discussion on the Court of Appeal judgment, see Bryden, *supra* note 203, and Lorne Sossin, “The Constitution and Administrative Independence: *CUPE v. Ontario* and Its Implications for Administrative Boards and Tribunals” (2000) 4 *Regulatory Boards and Administrative Law Litigation* 214.

unanimous in concluding that, by virtue of the pragmatic and functional approach, a standard of patent unreasonableness applied to the minister's discretion to appoint chairs of arbitration panels. However, the different approaches to applying that standard in the context of tribunal appointments illustrate the complexity of deference under Canadian administrative law.

Justice Binnie concluded that the minister's appointment of the retired judges was patently unreasonable because it failed to consider criteria that the minister was required to consider. He traced the requirement that relevant criteria be considered by discretionary decision makers from the seminal *Roncarelli v. Duplessis*³⁰² through to *Suresh*³⁰³ and concluded:

In applying the *patent* unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the [*Hospital Labour Disputes Arbitration Act*] legislative scheme.³⁰⁴

Justice Binnie looked to the cross-examination of government officials who confirmed that the minister did not inquire into the experience or expertise of the retired judges in the field of labour relations. For the minister, their qualification arose simply from their judicial background and the expertise in neutral decision making that such experience suggested. Justice Binnie declared, “[w]e look in vain for some indication in the record that the Minister was alive to these labour relations requirements.”³⁰⁵ Just as the Court was required to quash a decision that frustrated the objects and purposes of the minister's statutory discretion in *Roncarelli*, so Justice Binnie argued similar judicial intervention was required in this case.

For the dissenting justices, the legislative provision itself indicated that there were no obvious factors of particular relevance to the formation of the minister's “opinion” on who was “qualified” to act. Because there were no obvious factors implied by this broad grant of authority, there could be no “obvious” or “immediate” defect in the fact that the minister chose one particular factor (the generalist expertise of retired judges) over another (the specialized knowledge of labour arbitrators). In such circumstances, Justice Bastarache concluded the minister's decision could not be characterized as “clearly irrational” or, to use the turn of phrase coined in *Ryan*,³⁰⁶ “so flawed that no amount of curial deference” could allow it to stand.³⁰⁷ Indeed, the degree of analysis of the record required by Justice Binnie to reach the conclusion that the decision was

³⁰² [1959] S.C.R. 121, 16 D.L.R. (2d) 689 [*Roncarelli*].

³⁰³ *Supra* note 8.

³⁰⁴ *Retired Judges*, *supra* note 296 at para. 176 [emphasis in original].

³⁰⁵ *Ibid.* at para. 181.

³⁰⁶ *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 223 D.L.R. (4th) 577.

³⁰⁷ *Retired Judges*, *supra* note 296 at para. 36.

patently unreasonable represented for Justice Bastarache precisely the kind of “significant searching” that is inappropriate for the standard of patent unreasonableness.

Justice Bastarache concluded that, because the factors that may or may not be relevant to forming the minister’s opinion on who is qualified to act as chair are themselves not “obvious” and “uncontroversial”, courts should intervene sparingly in these settings:³⁰⁸

[A] reviewing court should not, in my view, find too readily that a discretionary decision was patently unreasonable. To do so dilutes the value of the patent unreasonableness standard and promotes inappropriate judicial intervention. *Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference.* This is especially the case where there were few indicators in the enabling legislation of the scope of the power and in an area where this Court has repeatedly counselled deference towards political and other expertise. I do not think that the Minister’s appointments demand our intervention.³⁰⁹

On the issue of political interference in tribunal appointments, the courts are caught on the horns of a dilemma. On the one hand, it is difficult to see how the rule of law may be upheld unless courts are prepared to wade into vaguely and broadly defined discretions to delineate the boundaries of lawful conduct. Justice Bastarache himself underscores this principle by noting that the minister’s discretion is not unfettered. He indicates, in *obiter*, that his conclusions do not imply that a minister could decide to appoint only members of his own political caucus, hospital CEOs or union business agents—which he refers to as “extreme examples.”³¹⁰ On the other hand, what basis would Justice Bastarache have to curtail the discretion of the minister in such extreme scenarios if he were unwilling to second-guess the minister’s judgment on which factors are relevant to administrative appointments?

As the *Retired Judges* case illustrates, the standard of review doctrine cannot be disentangled from the separation of powers doctrine more broadly. According to this constitutionally rooted division of labour, legislatures demarcate the institutional structure and legislative authority of administrative bodies, judges must restrict executive action to accord with the purposes and objects of legislative intent but refrain from interfering with the institutional and legislative autonomy accorded to administrative bodies, and administrative policy-makers and decision makers, in turn, are charged with implementing and elaborating both legislative authority and judicially articulated standards. At its best, this conceptual framework of deference

³⁰⁸ *Ibid.* at para. 36.

³⁰⁹ *Ibid.* at para. 46 [emphasis added].

³¹⁰ *Ibid.* at para. 40. While it is true that these are not the facts before the Court in the *Retired Judges* case, the legitimacy of purely patronage appointments or the decision not to reappoint for partisan reasons may well surface as the next sites of litigation of the standard of review for ministerial appointments.

allows for legislative, executive, and judicial priorities to be developed, interpreted and justified. At its worst, this framework may permit judicial whim to masquerade as fidelity to legislative intent in order to interfere with the policies and priorities of executive decision makers. Finally, it should be noted that in Canada, with some notable exceptions, judicial appointments also are a product of virtually unfettered executive discretion. It would be odd indeed for a court to insist on arms' length appointments as a condition of institutional independence of tribunals without any similar guarantee in place for judges.

In short, the Canadian administrative law doctrine of institutional independence has raised the question of political interference without resolving it. As Chief Justice Lamer observed in *Matsqui*, "the point of the institutional independence doctrine is to ensure that tribunal independence is not left to the discretion of those who appoint the tribunals. ... Independence premised on discretion is illusory."³¹¹ We suggest that one way around the stalemate reflected in the *Retired Judges* split on the Court is recourse to international human rights norms. These norms provide additional justification for courts to subject allegations of political interference in administrative decision making to judicial scrutiny. To say that an administrative body has sufficient objective guarantees such as security of tenure does not and should not end the inquiry into that body's freedom from political interference (whether through tribunal appointments, tribunal policy-making, or other means). While Canadian courts have been vigilant in specific cases where there is evidence of political tampering, they have preferred to turn a blind eye to the broader question of political appointments to adjudicative bodies.

Lastly, it is necessary to deal with the concern that by entrenching greater independence protections, especially in contexts such as administrative appointments, regulatory or adjudicative bodies that have no legitimacy to pursue policy preferences of their own will be too insulated from legitimate executive policy direction. We do not find this argument compelling. Government retains more than sufficient levers to shape policy direction for tribunals and agencies. It can modify the mandate and discretion of decision makers by statute or regulation. Ultimately, it can create or eliminate decision-making bodies and transfer jurisdiction from one to the other. Of course, in all these cases, these changes in policy direction are explicit and transparent and subject to political accountability of one kind or another. The lever removed from government—if independence is to have substance—is the option to inculcate policy changes in non-explicit and opaque ways, for example, through removing unwanted adjudicators and appointing like-minded ones at the government's whim.

³¹¹ *Matsqui*, *supra* note 195 at para. 104.

Conclusion

In this paper, we have claimed that Canadian administrative law may fail to live up to the international human rights standards that guarantee to every person an adjudication of his or her rights and obligations before an independent tribunal. We further claim that this deficiency reflects both a failure of elected governments, which too often undermine the independence of tribunals through statutes that provide appointment at pleasure, and a failure of Canadian courts, which have relied too often on highly formal distinctions between courts and administrative tribunals.

By asserting these claims, we are not suggesting that the constitutional norm of judicial independence is appropriate for tribunals in Canada, nor that courts are, by virtue of a constitutionally entrenched doctrine of independence, free from political influence (consider the appointment process of judges, which in many cases has fewer merit safeguards than most labour boards). By the same token, we are not suggesting that international law has a clear and unwavering commitment to the independence of administrative decision makers (as the wooliness of international law jurisprudence on this point, discussed above, demonstrates), nor even that the commitments contained in international human rights instruments have an effective track record of curbing political interference. Rather, our concern in this paper is that Canada's legal regime governing administrative justice is viewed too often as simply another malleable tool for policy-making. As stated in the introduction, locating questions of impartiality and independence within an international human rights discourse can lead to a more rigorous and constructive dialogue on the proper role for and constraints on executive influence of adjudicative decision making.

The specific divergences between Canadian administrative law and international norms of independence identified in this paper in the areas of judicial deference and executive interference (through, among others, the appointments process) are perhaps symptomatic of a more basic distinction between how independence is understood in international law as opposed to Canadian law. Whereas Canadian law proceeds from the assumption that, absent a constitutional or quasi-constitutional imperative, Canadian legislatures may disregard the guarantee of institutional independence in administrative decision making because of the formal place of administrative tribunals in our constitutional order as part of the executive branch, an individual's entitlement to an independent tribunal at international law arises from the nature of the right or interest to be adjudicated. If an individual's fundamental human rights, private rights, or public rights of a kind normally subject to judicial supervision and control are imperilled, he or she is entitled to a fair hearing before an independent tribunal, be it a traditional court or administrative board.

To be clear, we are not advocating the judicialization of all administrative decision making, nor are we suggesting that Canada should be hauled before some international body for failing to discharge its international law obligations. Our point is that administrative justice ought to be founded on the values of impartiality and independence, not because international instruments say so, but because political and executive interference represents a grave and enduring threat to the rule of law and

the fairness of administrative decision making. The appeal of international law is that when the independence and impartiality of administrative decision making is understood as a core human rights value, the cost of political and executive interference may rise and public confidence in administrative decision making may be enhanced. Our broader point is that international human rights norms provide a measuring rod against which to assess the aspiration of Canadian administrative law. We believe that Canada should be a beacon to other nations in terms of the protections afforded to individuals whose rights (and, for that matter, obligations and interests) are at issue. It is hoped that this paper will remind readers of the distance Canadian administrative law must travel before this hope is realized.
