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Independence After Matsqui?

Richard Haigh* and Jim Smith**

The authors look at the Supreme Court's latest fully reasoned decision on independence in Canadian Pacific v. Matsqui, where native tribunals were found to be biased because of certain institutional characteristics. The authors argue that the court employs, on the one hand, a very simplified analysis of independence, but at the same time, sets standards for testing independence and bias in tribunals that are impossible to adequately quantify in practice. Neither the reasoning of Lamer C.J., nor Sopinka J. is adequate to address the full range of tribunal experience; in fact, the Supreme Court examines administrative tribunals as if they were simply smaller courts, without recognizing their inherent differences. Subsequent cases on this point have failed to take into account the differences in these opinions. The authors conclude by noting the complexity of issues regarding bias, such as institutional independence, and question the direction of Canadian jurisprudence in this area.

Les auteurs examinent l'arrêt le plus récent de la Cour suprême du Canada en matière d'indépendance judiciaire, l'arrêt Canadien Pacifique c. Matsqui, dans lequel on a jugé que des tribunaux aborigènes étaient partiaux en raison de certaines caractéristiques institutionnelles. Les auteurs soumettent que la Cour a, d'un côté, eu recours à une analyse simplifiée du concept d'indépendance, tout en établissant du même souffle des critères pour évaluer l'indépendance et la partialité des tribunaux, critères s'avérant impossible à quantifier correctement dans la pratique. Ni l'opinion de Lamer, J.C.C., ni celle de Sopinka, J., n'arrive à poser correctement la question du vaste champ d'expertise du tribunal administratif; en fait, la Cour suprême examine les tribunaux administratifs comme s'il s'agissait simplement de plus petits tribunaux,

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Debate, both academic and judicial, concerning the appropriate level of independence required by administrative tribunals has gone on for decades. More recently, attention has shifted from individual member independence, to a tentative exploration of the concept of “institutional independence.” The idea has merit, as it recognizes systemic influences on decision-making. But any fully-elaborated position on institutional independence will have to fulfill two tasks. First, it will have to provide a rational basis for the concept itself. Second, it should clearly set out the concept’s distinguishing characteristics. It is of more than passing interest that the courts themselves will be the final arbiters of whatever standard — judicialized or dejudicialized — arises.

This paper is divided into three main parts. The first part is a brief sketch of the recent history and general context in which any consideration of tribunal independence must take place. In the second part, the case of Canadian Pacific Ltd. v. Matsqui Indian Band is introduced. An overview of the reasoning of Lamer C.J. and Sopinka J. follows, each of whom provides extensive (albeit obiter) consideration of the institutional independence of administrative tribunals. The third part is a more critical analysis of the judgment, using Lamer C.J.’s reasoning as a jumping off point and then exploring the application of Matsqui in two subsequent cases on bias. The conclusion that follows outlines certain problems unresolved by the case, and suggests appropriate directions for the future.

2. ADMINISTRATIVE TRIBUNAL INDEPENDENCE IN A NUTSHELL

Unlike some areas of administrative law, in which the theoretical literature and the cases experience significant interplay, the two dimensions of individual independence and institutional independence. The judgment arrived too late to be included in this article.

See, generally, Part 2 of this paper.


Such as in the areas of standard of review or jurisdiction, in which it is quite likely to find academic writing cited as authority in cases, and the theoretical writings often centred around a single or set of cases.
academic and judicial considerations of independence seem to have developed along two somewhat distinct lines. While the literature concerns itself primarily with optimizing agency organization and function within a matrix of administrative agencies serving adjudicative, policymaking or mixed functions, the moderate number of cases considering tribunal independence do so based on a small, tentative set of criteria. These criteria are painstakingly teased out from either or both of the administrative law test for reasonable apprehension of bias, and concepts gathered from judicial independence.

The courts have held independence and impartiality to be separate and distinct values or requirements. Tribunal impartiality is determined by the "state of mind" of the decision-maker whereas independence is a matter of the status of the tribunal which extends beyond the subjective attitude of the decision-maker. But the concern with status is generally looked at in respect of three factors — amount of remuneration, security of tenure for appointed members and degree of control over the appointment process.

In contrast, a wealth of commissions, committees, task forces, working groups and occasional papers published in academic journals, have analyzed the issue of administrative tribunal bias differently. These studies have been extensively canvassed by Robert Macaulay and James Sprague in their three-volume Practice and Procedure Before Administrative Tribunals, and by Margot Priest, in her paper delivered at the 1992 Law Society of Upper Canada Special Lecture series. Priest's survey shows that institutional independence is discussed in a number of reports.

Certain informal conclusions about the relative importance of various factors may be drawn from these reports and studies. In areas bearing on independence, much attention has been directed to the tenure and appointment process, with far less attention to remuneration. Administrative control is recognized as important, as is the need for separate supervisory, recruitment and disciplinary bodies and the training for members of tribunals. Finally, the continuing problem of patronage appointments is addressed through growing recognition that the process of appointment may need complete reassessment. To date, few, if any, of the recommendations have been acted upon.

3. CANADIAN PACIFIC LTD. v. MATSQUI INDIAN BAND

The Supreme Court of Canada, in Matsqui, explores the issue of independence of administrative tribunals in some depth. What the opining justices arguably deliver are two irreconcilable approaches to the question: one which advises abstract formalism; the other which advises a more pragmatic approach but provides little in the way of new insight.

(a) History of the Case

The question giving rise to the case was a deceptively simple one. Was Canadian Pacific Limited [hereinafter C.P.], obliged, before applying for judicial review, to avail itself of the appeal processes established by a number of First Nation bands under the Indian Act in order to question the jurisdiction of those bands to assess property taxes against them? The case was first heard at the Federal Court,

Lambert Commission (at 16), the Nielsen Task Force on Agencies Study Team (at 23), the Ouellette Report (at 36), the Macaulay study Directions (at 31-34) and the Ratushny Report (24-26), amongst others.

Though the studies might often speak of overwhelming problems rationalizing patronage and secrecy in appointments, their recommendations most often use this more fastidious term.

Supra note 5.

Trial Division. In striking C.P.’s application for judicial review, Joyal J. accepted the argument of the Matsqui Indian Band that their assessment by-laws, in providing for a right of appeal to an appeal tribunal and the Federal Court, Trial Division, were an adequate alternative remedy.

C.P. appealed this decision to the Federal Court of Appeal. Speaking for a unanimous panel, Pratte J.A. allowed the appeal on jurisdictional grounds, based on errors made by Joyal J. below. These four errors were: (1) questions of statutory interpretation relating to the accuracy of C.P.’s title to land and what flows therefrom were beyond the jurisdiction of the native appeal tribunals; (2) irrelevant policy considerations concerning the importance of native self government were relied upon; (3) the tribunal lacked experience in conducting a trial; and (4) creating an eventual appeal to the Federal Court was ultra vires all of the native bands. The purely procedural question of whether the Federal Court of Appeal was correct in setting aside the Trial Division decision, dismissing the band’s motion to strike and allowing C.P.’s application for judicial review of the native bands’ ability to determine rights of appeal, was appealed by the Matsqui Indian Band to the Supreme Court.

The final result in Matsqui, in a sense, both does and does not turn on consideration of the issue of independence of an administrative tribunal. The judgment provides a tortuous set of opinions, setting out four distinct positions. L’Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ., upheld the appeal on three grounds: that there was an appropriate exercise of discretion below on the issue of tribunal adequacy and that there was no evidence of either institutional partiality or institutional dependence (because both were too premature). Lamer C.J. and Cory J., confirmed both that there was an appropriate exercise of discretion below on the issue of tribunal adequacy and that there was no evidence of inadequate institutional impartiality (again holding that it was a premature question). However, they dismissed the appeal on the issue of institutional independence (on the basis that the tribunal was not sufficiently independent, and thus did not provide an adequate alternative remedy). McLachlin and Major JJ. dismissed the appeal solely on the issue of lack of discretion below, since lack of jurisdiction in the Band appeal process precluded the availability of an adequate alternative remedy. They rendered no opinion on institutional impartiality or on institutional independence. LaForest J. also dismissed the appeal, also on the issue of lack of discretion below to dismiss the application for judicial review, but for different reasons from those of McLachlin and Major JJ. LaForest J. also rendered no opinion on the issues of institutional impartiality or institutional independence.

It is apparent that a clear majority — six justices of nine — consider the issues of institutional impartiality and institutional independence relevant to the appeal. However, it is a minority of three, who do not see those issues as relevant, who carry the day, owing to a 4/2 split among those who do. The fact that Chief Justice Lamer and Justice Cory not only consider the issues relevant, but reason through, provide criteria, and then determine that the particular tribunal is inadequate under those criteria is, in a sense, essentially determinative of the final outcome of the appeal.

Unfortunately, playing out the numbers game is unsettling if one is looking for guidance from our highest court on the issue of an appropriate standard by which to judge tribunal independence. Six justices (L’Heureux-Dubé, Sopinka, Gonthier, Iacobucci, Cory J.J. and Lamer C.J.) hold that it is at least something to consider. Four of those six, while recognizing the validity of the concept of institutional independence, are content to see whether it manifests itself in the practices of the tribunal. The remaining two propose taking an objective look at the empowering legislation. Numerically, therefore, twice as many justices think that a possible apprehension of lack of institutional independence based solely on an examination of the empowering legislation should not act as a barrier to tribunal decision-making, as think that it should. However, the former four languish in
dissent in Matsqui, while Lamer and Cory JJ. find themselves a pyrrhically-victorious rump among the majority in the result. Questions naturally arise about the weight to be attributed to Lamer J. for property on the reserve, including assessment rolls, notices of dispute raised in employed by the various groupings of justices, we will look at the dissent in reasoning will have on future cases.

Before engaging in a detailed analysis of the reasoning employed by the various groupings of justices, we will look at the background of the regulatory scheme giving rise to the particular dispute raised in Matsqui.

(b) The Matsqui Tribunal

(i) The Nature of Native Taxation Tribunals

After a lengthy negotiation process between federal and provincial governments and representatives of Aboriginal peoples, the Indian Act18 was amended in 1988 to allow Indian bands to establish by-laws providing for the taxation of real property on reserve lands. In 1992, pursuant to the amended provisions of the Indian Act,19 seven Indian bands in British Columbia developed taxation and assessment by-laws. As required by s. 83(1) of the Indian Act, these by-laws were submitted for and received approval by the Minister prior to their implementation. Each by-law set up a comprehensive taxation scheme for property on the reserve, including assessment rolls, notices of assessment, the appointment of courts of revision or boards of review to hear appeals from assessment, followed by an appeal to the Federal Court, Trial Division if necessary. The Matsqui band’s by-law interposed a second appeal to an assessment review committee prior to recourse to the Federal Court. Despite this difference, and minor variations as noted below between the first native appellate bodies, the seven cases that culminated in Matsqui were heard concurrently at all levels, as turning on essentially identical facts.

17 Arguably the case might actually lack a ratio to isolate, in view of the effects of splits of opinion which allowed a three-judge minority to carry the day on an issue other than institutional independence. It could be seen as a portentous sign that the Supreme Court, usually following the tightly rendered decision making style of the United States Supreme Court, is moving towards an individualistic, House of Lords, High Court of Australia style.

18 Indian Act, supra note 13.

19 Ibid., s. 83(1)-(6).

The Matsqui first level review tribunal, the court of revision,20 is composed of members appointed by the Chief and Band Council by resolution (s. 27A), who must take an oath to decide all complaints impartially (s. 27D). Members are reimbursed for expenses incurred and might be paid “reasonable remuneration” (s. 27C). The Siska band, like the other five, has a single board of review level of appeal. Its members, only one of whom can be a member of the Siska Indian Band,21 are also appointed by the Chief and Band Council (s. 40.1), who can order the payment of remuneration to members (s. 40.3). All members are reimbursed expenses incurred in carrying out their duties (s. 40.3). All members must swear or affirm an oath of impartiality, identical to the Matsqui oath (s. 40.4).

The Matsqui band’s second level of appeal, the assessment review committee,22 is established annually by the Chief and Band Council by resolution (s. 35A), who also establishes the terms of appointment, duties and remuneration of the members (s. 35B). The three-member tribunal must be composed of (i) a person qualified to practise law in the province or who is currently or formerly a judge of the province (s. 35A.1); (ii) a former member of the provincial assessment appeal committee (s. 35A.2); and (iii) a member or agent of the Matsqui band without conflict of interest in any appealed assessment (s. 35A.3). One of the three members must be or have been an accredited land appraiser (s. 35A.4). An appeal to this level of review can arise from the person assessed, the assessor, the commissioner below, or from the Band itself (s. 49A).

The Indian Taxation Advisory Board was also involved, having published materials assisting the bands in designing and establishing their taxation tribunals.23 This material emphasized the common law principles of a right to a hearing, by an impartial tribunal,24 and specifically instructed that: “...[W]hatever appeal

20 Established by s. 27 of the Matsqui by-law. References to particular subsections of the by-law are contained in parentheses within the text, where appropriate.

21 Section 40.2 of the Siska by-law. References in parentheses are to the appropriate sections of this by-law.

22 Established by s. 35 of the Matsqui by-law.

23 This material included the 1990 manual, Introduction to Real Property Taxation on Reserve [sic], to which Lamer C.J. refers in Matsqui, supra note 5 at 35. The Indian Taxation Advisory Board also appeared as intervenors at the S.C.C.

24 Cite to Matsqui, supra note 5 at 35-36.
mechanisms are put in place, they will have to adhere to the principles of natural justice, since the appeal is in effect a subsequent hearing.\(^{25}\) Lamer J. summarized what he considered to be the salient generic features of these tribunals as follows:

\[\ldots\text{[M]}\text{embers of the Siska Board of Review and the Matsqui Court of Revision have no guarantee of salary. Under the Matsqui By-law, members of the Court of Revision "may" receive remuneration, while the Siska By-law also uses permissive language.}\]

On the subject of security of tenure, the Matsqui tribunals are to be appointed each year, although the terms of appointment are to be left to the Chief and Band Council. One might presume that the members of the tribunals are appointed for one-year terms; however, there is nothing in the Matsqui By-law protecting members from arbitrary dismissal mid-term. The Siska By-law is silent on all aspects of the appointment of tribunal members.\(^{26}\)

Two further points should be noted. First, although in their submissions to the Supreme Court alleging reasonable apprehension of bias, C.P. drew a clear distinction between the source of bias for non-native members and native members of the tribunals,\(^{27}\) this distinction was ignored by the Court. Second, the Court chose not to distinguish Matsqui band’s second level of appeal as substantially (or procedurally) different from the other bands’ single level of appeal.

\(\text{(ii) Tracing the Treatment of the Bias Argument}\

Although C.P. presented arguments concerning reasonable apprehension of bias at both levels of the Federal Court, in neither instance did it receive serious consideration, nor was it considered relevant to the determination. At the Federal Court, Trial Division,

\[\text{Joyal J., in deciding to deny C.P. Ltd. recourse to judicial review on the ground that there was an adequate alternative remedy, dismissed the allegation as premature in a few lines near the end of his judgment:}\]

\[\text{It is true, as pointed out by applicant’s counsel, that the first group of by-laws to which I have referred provides in section 40(2) that Boards of review shall consist of three members, only one of whom may be a member of the Indian band. Counsel argues bias. At best, this is a premature argument, no evidence being before me as to the composition of any Board of review.}\]^\(^{29}\) [emphasis added]

Although reasonable apprehension of bias was apparently argued by counsel for Canadian Pacific at the Federal Court of Appeal,\(^{30}\) Pratte J.A. is silent on the issue in his reasons.\(^{31}\)

At the Supreme Court of Canada, however, reasonable apprehension of bias, by way of a lack of sufficient institutional independence, becomes determinative (except in the technical sense) of the appeal.\(^{32}\) Lamer C.J. introduces the issue of bias in the fourth of four questions he poses regarding the exercise of discretion pursuant to the adequate alternative remedy principle:

\[(iv)\text{Is there a reasonable apprehension of bias in the appeal tribunals, which would evidence the inadequacy of the statutory appeal procedures?}\]^\(^{33}\)

Lamer C.J. determines that Joyal J. neither based his discretionary decision regarding the adequacy of the alternative remedy on irrelevant factors, nor acted unreasonably in light of the factors he did consider. Then Lamer C.J. considers the question of bias at length, as a relevant factor that Joyal J. failed to take into account. As noted, he carries with him a clear majority of the Court\(^{34}\) regarding the general

\[\text{\footnotesize 28 As quoted in Matsqui, supra note 5 at 47.}\]

\[\text{\footnotesize 29 Mentioned by Lamer C.J. in Matsqui, supra note 5 at 35, in the course of justifying his attention to the issue.}\]

\[\text{\footnotesize 30 Matsqui, supra note 5.}\]

\[\text{\footnotesize 31 It is interesting to observe that the issue of independence assumes such importance at the eleventh hour. It would be fascinating to explore theories as to why the four federal court judges missed its importance.}\]

\[\text{\footnotesize 32 Matsqui, supra note 5 at 25.}\]

\[\text{\footnotesize 33 Cory J. concurs with Lamer C.J. throughout. Sopinka, Gonthier, Iacobucci and L’Heureux-Dubé JJ. agree with him on bias generally and on institutional impartiality.}\]
question of bias and the first component question of institutional impartiality. On the second specific component question, that of institutional independence, only Lamer and Cory JJ. find the tribunal insufficiently independent. This is sufficient, however, to cause the appeal to fail. The result allowed Canadian Pacific to return to the Federal Court, Trial Division for judicial review only on the substantive question of whether their land was “in the reserve” and thus taxable — where they succeeded. However, at least one commentator has pointed out that a much more far-reaching implication of the finding on independence is to render the entire Indian taxation appeal regime as it stood at that time arguably ineffective.

(c) The Issue of Independence at the Supreme Court

(i) The Reasoning of Lamer C.J.

Its effect on the result aside, there are at least four reasons why Lamer C.J.’s extended reasoning on the independence of the native administrative tribunals merits close examination. First, it, along with Sopinka J.’s dissent, comprises the latest and most extensive discussion of the issue of tribunal independence, to which lower courts and legislators will attempt to look for guidance. Second, the question of the status of administrative tribunal independence is an ongoing subject of discussion; however, government, in its structuring of administrative tribunals, seems to have paid little heed to such theorizing, producing surprisingly repetitious complaint and advice from decade to decade. Third, analytical tools for assessing agencies on the subject of independence are still woefully underdeveloped. Fourth, despite a certain amount of common ground, Lamer J.’s formalist approach — that sufficiency of institutional independence may be assessed solely by examining the legislation — stands in stark contrast to Sopinka J.’s holding that institutional independence may only be assessed on the basis of the agency in action.

A. The General Category: Bias

A reasonable apprehension of bias violates what has been described as the second limb of the rules of natural justice. It is considered in two aspects — impartiality and independence — in Matsqui. Lamer C.J. is careful to lay the groundwork on both limbs in order to provide his opinion on institutional independence.

Lamer C.J. first acknowledges the important role Native taxing power plays in encouraging self-government. He asserts that those “underlying purpose and functions...provide considerable guidance in applying the principles of administrative law to the statutory provisions at issue here.” As a result of this, he employs a purposive and functional approach where appropriate, although aware that the matter is different from Beetz J.’s original approach. This approach allows the Court’s inquiry to be focused directly on the intent of the legislator rather than on interpreting isolated provisions.

After examining the history and application of the adequate alternative remedy doctrine, Lamer C.J. proposes using an open-ended

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35 P. Bryden, “Developments in the Supreme Court 1994-1995 Term” (1996) 7 Supreme Court L.R. 27 at 55. Query what course of action can now be taken by parties dissatisfied with their assessment (or with the fact of being assessed, in some cases).
36 2747-3174 Quebec Inc. v. Quebec (Regie des permis d' alcool), [1996] 3 S.C.R. 919, 42 Admin. L.R. (2d) 1, 140 D.L.R. (4th) 577, 205 N.R. 1, is a more recent decision on bias. However, the case (which sees Lamer C.J. and Sopinka J. both part of an 8-1 majority) turns on the issue of the intersection between impartiality and independence, and in the discussion on independence, simply reviews the same components — security of tenure, financial security and administrative control — discussed here. The major disagreements between Lamer C.J. and Sopinka J. seem to be little more than historical curiosities.
Lamer C.J. emphasizes that Valente stands for the proposition that judicial independence involves both individual independence and institutional independence. Lamer C.J. then relies on his own reasoning in R. v. Généreux to elaborate. Regarding the approach to determining tribunal impartiality

...the appropriate frame of reference is the “state of mind” of the decision-maker. The circumstances of an individual case must be examined to determine whether...the decision-maker...will be subjectively biased in the particular situation.

Whereas independence is a matter of the status of the tribunal, which

...extends beyond the subjective attitude of the decision-maker....The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups.

Independence is further separated into two categories: the “appearance of impartiality” regarding who may sit on the tribunal and the “appearance of independence of these members” regarding their security of tenure and remuneration. He points out that bias may not be actual, but simply a reasonable apprehension thereof flowing from the institutional structure.

B. Impartiality

Given that C.P. has not appealed to the tribunal, and band members have not been appointed to a tribunal, Lamer C.J. next agrees with Joyal J. that the allegation of bias on the basis of impartiality is speculative. He nevertheless goes on to cite himself in

convincing for Lamer C.J. to tie these objective conditions back in to the supposedly invidious effect they will have on the individual decision-maker, producing a reasonable apprehension of bias akin to the “corporate taint” argument.

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43 Matsqui, ibid at 24.
44 Matsqui, ibid at 26, 30.
47 Valente, supra note 46 at 685. Query whether it would have been more

set of factors to determine whether judicial review or a statutory appeal procedure is apposite. The set of factors, including allegations of bias, must remain open-ended to allow for the courts to isolate and balance the relevant factors.43

In the three issues that precede the question of bias, Lamer C.J. maintains a consistently purposive approach. He approves of Joyal J.’s attention to the important purpose of the empowering legislation and recognition of Parliament’s intention to allow bands to develop their own appeal procedures. At the same time, Lamer C.J. challenges the Federal Court of Appeal’s ruling that setting a final charged with an offence, but then turns to creating appeal procedures and subsequent Ministerial approval of the regime. But it is the final issue — allegations of bias evidencing relevance factor not considered by Joyal J. ’s attention to the important purpose of the empowering Parliament’s

48 Matsqui, supra note 5 at 32.
50 Généreux,ibid. Both quotes are at 283-284.
51 Matsqui, supra note 5 at 32.
R. v. Lippé, where he asserted the logical necessity of recognizing the existence of institutional or structural impartiality in addition to the concept of individual impartiality. This is based on the perception that independence has both an individual and institutional aspect. It developed into a threshold test in Lippé that asks will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?

The allegations in Matsqui fail to meet this threshold, according to Lamer C.J., in two regards. First, community interest representation on boards does not give rise to bias based on the finding of Cory J. in the Newfoundland Telephone case. Second, Lamer C.J. approves Iacobucci J.’s functional approach in Pearlman, which assesses allegations of pecuniary bias within a wider legislative and relevant experiential framework. The functional approach requires examining not just the tribunal’s empowering legislation, but the wider context of the self-governing professions generally. Accordingly, any general allegations of structural bias are necessarily too remote and must be determined on a case-by-case basis. In this way, Lamer’s functional test becomes indistinguishable from a contextual one.

C. Independence

The Valente principles establish areas of potential concern with independence. Lack of payment, lack of security of tenure, and appointment by band chiefs and councils were found determinative in Valente. According to Lamer C.J., Joyal J. committed a reversible error by not considering whether these conditions compromised the tribunals’ structural integrity.

However, before outlining his analysis on this sub-issue, Lamer C.J. repudiates the use of context in dealing with structural independence. To him, it may dilute the requirements of natural justice:

...[W]hile I agree that the larger context of Aboriginal self-government informs the determination of whether the statutory appeal procedures...constitute an adequate alternative remedy...I cannot agree...that this context is relevant to the question of whether the bands’ tribunals give rise to a reasonable apprehension of bias at an institutional level. In my view, principles of natural justice apply to the band’s tribunals as they would apply to any tribunal performing similar functions.

Note how Lamer C.J. switches back to the term “bias” rather than using “independence” or “impartiality.” Further, he dismisses context immediately after performing a context-based analysis on the issue of apprehension of insufficient structural impartiality (preferring to call it “functional”). He invokes the principles of natural justice as his analytical starting point. Relying on Gonthier J.’s statement about judicial independence in I.W.A. v. Consolidated-Bathurst Packaging Ltd., Lamer C.J. applies the Valente principles of judicial independence. He does

52 [1991] 2 S.C.R. 114 at 140, 61 C.C.C. (3d) 127 [hereinafter Lippé]. Lamer C.J. is, as has been observed in some quarters, rather prone to “bootstrapping.” Evidence of this is delightfully presented in P. McCormick, “The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada 1989-1993” (1995) 33 Osgoode Hall L.J. 453.

53 Lippé, ibid, cited in Matsqui, supra note 5 at 32-33.

54 Lippé, ibid at 144 (emphasis in the original).


57 Matsqui, supra note 5 at 34.

58 See Valente, supra note 46 at headings III-V.

59 Matsqui, supra note 5 at 35.

60 Matsqui, ibid at 35.

61 See discussion at notes 55-57 and accompanying text.

62 Matsqui, supra note 5 at 35.

acknowledge, however, that a strict application of them is not always warranted in an administrative context. But that even absent constitutional protection, judicial independence, as part of the rules of natural justice, pertains to administrative tribunals because a party deserves a hearing that is not only independent in fact, but also appears independent. 

Retreating once again to the term "bias," Lamer C.J. sets out the classic test for reasonable apprehension of bias, and confirms that flexibility of approach is crucial in applying the test for bias in the context of administrative tribunals. In support, he quotes his argument from Committee for Justice & Liberty recommending an analysis that, in effect, amounts to a functional or contextual approach:

...[T]he requirements of natural justice must depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

From this Lamer C.J. concludes that the test should be applied in light of the functions being performed by the particular tribunal. The approach should also be flexible, determined by a ranking of the interests at stake. For example, security of the person matters dictate a strict application of Valente criteria, whereas property matters such as tax assessment dictate something more flexible. The problem with this approach is that it sounds and feels very much — in fact exactly — like the contextual approach Lamer C.J. has just denounced as inappropriate.

Having established a set of ground rules, Lamer C.J. then derives the appropriate test to be applied in the current case:

...The Valente principles must be considered in light of the nature of the appeal tribunals themselves, the interests at stake, and other indices of independence, in order to determine whether a reasonable and right minded person, viewing the whole procedure as set out in the assessment by-laws, would have a reasonable apprehension of bias on the basis that the members of the appeal tribunals are not independent.[emphasis added]

Lamer C.J. then compares the structure of the regulatory scheme with the factors delimiting institutional independence. He demonstrates that members of the appeal tribunals perform adjudicative functions not unlike those of courts. He observes that the language regarding remuneration is permissive, as members may receive remuneration but are not guaranteed a salary. Further, that payment might only be provided after a decision in a case. On the subject of security of tenure, Lamer C.J. interprets the by-laws as indicating that although appointments are to be made annually, the length of term is only presumptively one year. Matsqui members could be arbitrarily dismissed mid-term, and the Siska band could, if it wished, appoint tribunal members on an ad hoc basis or could refuse to re-appoint members who reached decisions contrary to the interests of the band. He expresses serious reservations on this issue, as the possibility that tribunal members may be removed from their position at any time is potentially open to abuse.

Lamer C.J. poses his concern about the third Valente principle — administrative control — in terms of the selection procedure. Since the bands also select the members of the tribunals (in addition to controlling remuneration and tenure), there appears to be a dependency relationship between the tribunals and the bands. Added to this is the fact that a native band may be a party before a tribunal. He concludes that parties appearing at the tribunal may therefore


65 Matsqui, supra note 5 at 37. This reasoning is based on a consideration of Valente in Consolidated Bathurst, supra note 63 at 332 (per Gonthier J.).


68 Matsqui, supra note 5 at 39. Query how Lamer C.J. could conceivably reconcile this with his position as stated at 35 in Matsqui, quoted earlier in this section (notes 60-61 and accompanying text). He makes no attempt to do so.

69 Matsqui, ibid.

70 Matsqui, ibid at 42.
present their case before a tribunal whose members are appointed by the very band chiefs and councils who oppose their claim. To Lamer C.J., this raises a concern similar to the one in MacBain, in which the prosecutor of human rights abuses also selected the members of the adjudicating panel.

The Matsqui band counter with two arguments, both of which are dismissed by Lamer C.J. First is the notion that an oath of impartiality will counterbalance any tendency to be biased. Lamer C.J. finds that though this may be a factor to take into account, it cannot act as a substitute for financial security and security of tenure. The second argument relates to the comparative seriousness of the interest at stake -- tax assessment — as compared to security of the person which was at issue in Sethi. Again, while Lamer C.J. notes that it is a consideration to take note of when applying the Valente principles, it is not convincing enough to enable him to discard these principles. He reiterates the point that the Valente principles, while flexible, cannot be ignored or discarded.

Based on the foregoing, the Chief Justice finds insufficient independence. Emphasizing that it is the combined weight of the three factors which produces his conclusion, Lamer C.J. finds insufficient institutional independence based on:

1. complete absence of financial security for tribunal members,
2. complete absence (in the Siska Band) or ambiguity and thus inadequacy (in the Matsqui Band) of security of tenure, and
3. by virtue of the appointment process, determination by tribunal members of the interests of their appointers.

He subsequently repeats that any one factor, taken in isolation, would not necessarily lead to the same conclusion, offering as a counterexample the majority of provincial tax assessment regimes. Though many of these fail to guarantee security of tenure or remuneration, they appear to address the administrative control factor by ensuring that appointments are made by a different level of government from those whose interests, in proceedings before them, are directly at stake.

In closing, Lamer C.J. attempts to clarify two issues. First, he recognizes that encouraging aboriginal self-government might preclude ceding appointment powers to the federal government. Bearing this in mind, he sets out examples of minimum requirements that would satisfy the need for sufficient institutional independence: the bands’ by-laws must guarantee remuneration, stipulate periods of tenure, and restrict dismissal during tenure to dismissal for cause. The second point is that for the purposes of analyzing prematurity, Lamer C.J. differentiates between the concepts of institutional impartiality and institutional independence. While agreeing that allegations regarding impartiality are premature, since it is not possible to know in advance of a hearing what members think, Lamer C.J. asserts that this is not the case regarding independence. Independence and impartiality are distinct, and any inquiry on independence need solely examine the actual objective structure of the tribunal. In the latter case, according to Lamer C.J., it is sufficient to simply examine the by-laws and apply the Valente principles in order to reach a conclusion. The by-laws, in this analysis, become “conclusive evidence” of insufficient independence.

Finally, Lamer C.J. states his fundamental disagreement with Sopinka J.’s argument that institutional independence needs to be assessed in the context of an actual tribunal hearing. He characterizes Sopinka J.’s view as one interpreting the silence of the bylaws on tenure and remuneration as a discretion in the bands to implement their by-laws in a manner consistent with natural justice. This offends Lamer C.J.’s view of institutional independence, which functions to ensure that a tribunal is legally structured so that its members are reasonably independent of those who appoint them. Moreover, institutional independence ensures that tribunal independence is not left to the discretion of those who appoint the tribunals. If institutional independence exists, according to Lamer C.J., it must be located in the

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71 Matsqui, ibid at 43.
72 Supra note 64.
73 Matsqui, supra note 5 at 43.
74 Supra note 64.
75 Matsqui, supra note 5 at 43-44.
76 Matsqui, ibid at 44.
77 Matsqui, ibid at 45.
empowering bylaws; achieving it by a hopeful exercise of discretion is illusory.78

(ii) The Reasoning of Sopinka J.

Sopinka J. and Lamer C.J. are in agreement regarding all issues concerning bias with the exception of institutional independence. Sopinka J. also follows the same four-step process employed by Lamer C.J. But it is the final two where their analyses diverge: the relevance of the context of Aboriginal self-government as it relates to institutional independence, and the need for courts to consider the practice of the tribunal as depicted in the context of an actual hearing.

A. The Importance of Context in a Case Dealing with Natives

Underlying all of Sopinka J.'s analysis is a heavy reliance on the need to evaluate independence in context. He begins by noting that Lamer C.J. recognizes the importance of context in applying Valente:

the essential conditions of institutional independence...in the judicial context need not be applied with the same strictness in the case of administrative tribunals. Conditions of institutional independence must take into account their context.79 [emphasis in the original]

The primary contextual factor in this case, considered and relied upon by Joyal J. at first instance, is the importance of nurturing native self-government initiatives, here seen through the taxation regimes.80 Given the broad, general interpretive principles developed in previous Supreme Court cases dealing with native tax exemptions,81 weighted toward maintaining aboriginal rights, Sopinka J. insists that any assessment of institutional independence based solely on the bare wording of the by-laws themselves, without full regard given to their context, and thus their practical application, is incomplete.82

B. The Importance of Tribunal Practice as Relevant Context

While fully agreeing with Lamer C.J. that a tribunal must comply with the principles of natural justice, the essential question for Sopinka J. is what relevant information must the reasonable and right-minded person be expected to know, or discover, in order to sufficiently determine whether there is a reasonable apprehension of bias in a tribunal. Where Lamer C.J. would limit the information to the procedure set out in the by-laws, Sopinka J. would expand this information to knowledge of how the tribunal operates in actual practice. Assessing compliance with the principles of natural justice cannot be made, according to Sopinka J., absent a clear understanding of the relevant and operational context.83 Sopinka J. supports this contention by drawing on Committee for Justice & Liberty.84 There, de Grandpre J. held that the relevant context for analysis of natural justice could include "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."85 For Sopinka J., this approach should be employed in determining both institutional independence and institutional impartiality.

Sopinka J. supports his thesis first with a number of cases concerning institutional impartiality in which context was considered,86 asserting that their relevance rests on a minimal theoretical distinction between the impartiality and independence in

 81 See Matsqui, supra note 5 at 50.
 82 See Matsqui, supra note 5 at 51.
 83 See Matsqui, supra note 5 at 51.
 84 Supra note 66.
 85 Matsqui, supra note 5 at 51, citing Committee for Justice & Liberty, ibid, at 395.
 86 Lippé, supra note 52 (context of steps taken by part-time judges to render themselves impartial overcomes perception of bias); Pearlman, supra note 56 (wider context of Act and experience overcomes perception of bias).
the administrative context. He follows by citing a number of cases where a tribunal’s actual practice was used to assess institutional independence. On the basis of this case law, he draws the conclusion that the institutional bias question has, in general, been considered after the tribunal has been appointed and/or actually rendered judgment, and that considering contextual facts does not fall outside an “objective” consideration of institutional independence.

At the core of Sopinka J.’s reasoning is how to treat by-laws which are silent with regard to factors relevant to the Valente principles. When such factors are only vaguely or partly set out (or not at all), Sopinka J. concludes that it is not safe to form conclusions about the institution on the wording of the by-laws alone. He feels that the objective consideration requires, in the face of “missing” elements, a context “enriched” by “knowledge of the operational reality.”

As no panel had been appointed in this instance, it is Sopinka J.’s contention that the missing elements may have been satisfactorily addressed upon appointment. On this basis he holds that Joyal J. properly exercised his discretion at first instance and properly considered that the issue of bias was premature.

4. EXPLORING THE VALUE OF MATSQUI

The essential controversy between Lamer C.J. and Sopinka J. in Matsqui on the question of institutional independence can be reduced to two central, related, issues:

1. In examining an administrative tribunal for reasonable apprehension of bias based on lack of sufficient institutional independence, what are the necessary and sufficient conditions of knowledge required of the hypothetical “reasonable and right-minded person”? Does an “objective” assessment consist solely of an examination of the relevant legislation, or should/must it also include consideration of the “operational context”?

2. What is the appropriate treatment of empowering legislation which is silent, vague, or incomplete with regard to the three principles set out in Valente?

On both of these issues, the two justices seriously disagree. Lamer C.J. holds that the reasonable and right-minded person need only look to the wording of the empowering legislation in order to be sufficiently informed, and that silent, vague or incomplete empowering legislation must be cured by the imposition of sufficient guarantees to satisfy a minimum standard of independence. Sopinka J. holds that the reasonable and right-minded person must look beyond the bare wording of the legislation to the operational context or risk making an uninformed decision, and that the operational, contextual approach is even more necessary in the face of silent, vague or incomplete empowering legislation.

While stressing the flexible application of Valente principles in an administrative context, and employing a purposive approach for much of the judgment, Lamer C.J. delivers in the end a purely formalist, determinist answer on the issue of institutional independence. Sopinka J., on the other hand, agrees in principle with much of Lamer C.J.’s reasoning, but instead of holding back and making artificial distinctions between impartiality and independence, insists on imposing the contextual approach to the issue of institutional independence as well.

Two things stand out about the judgment of Lamer C.J. The first is that institutional independence assumes, by the end of his reasons, the weight of a fully-fledged common-law doctrine setting out the minimum conditions required to prevent a reasonable apprehension of bias on the basis of a lack of independence. Unfortunately, it is by no means clear that such a common law
doctrine need necessarily arise from the principles enunciated in *Valente*, or if it does, that it need necessarily take the explicit form given it by Lamer C.J. It is impossible to determine why viewing by-law procedures, which in and of themselves become conclusive evidence of independence, is adequate for establishing judicial standards of review. The second point to note is that Lamer C.J. reduces the analysis necessary for finding reasonable apprehension of bias to a mechanistic exercise. To him, applying the *Valente* principles to the wording of legislation allows one to come to a conclusion on the issue. However, one must ask, what exactly are the flexible principles (as both Lamer C.J. and Sopinka J. grant that *Valente* provides, even in the administrative arena) if one applies the *Valente* principles mechanistically to the wording of the legislation? In other words, can a flexible set of criteria ever be applied to specific wording without generating many, differentiated, conclusions?

As Sopinka J. observes, the problem is that the legislation may be silent, vague, or incomplete in its attention to the *Valente* criteria. In the face of silence, Lamer C.J. demands explicit remediation by adding specific reference to security of tenure and remuneration and administrative control; in the face of that same silence, Sopinka J. looks for operational, contextual details of the tribunal in action in order to examine its independence.

The next section looks at the reasoning in more detail, showing where the justices agree, disagree and where they failed to consider the issues at all. We then explore the new “doctrine” of institutional independence developed in *Matsqui*, and speculate as to how this decision may play out in the future.

(a) The Reasoning on Independence

(i) Common Ground

Much of the common ground in the respective analyses of Lamer C.J. and Sopinka J. is implicit, in that Sopinka J. opens his analysis with the statement that he is in agreement with the Chief Justice on all issues with the exception of his position on institutional independence. Although it must be remarked that all the reasoning regarding independence is technically obiter, areas in which Lamer C.J. and Sopinka J. agree can be considered quite significant, in that they carry the weight of six of the nine judges of the Court. Lamer C.J. and Sopinka J. agree that s. 11(d) of the *Charter*, while not applying directly to administrative tribunals, is relevant to some degree in examining bias. This is based on the *Valente* case, which acts as a guide in applying s. 11(d) to cases of bias, impartiality and independence in a tribunal. Moreover, the essential conditions of independence, as laid out in *Valente* in the judicial context, must be applied flexibly and in a manner sensitive to the context in the case of administrative tribunals. Both justices also implicitly agree that individual and institutional impartiality and independence are all separable components of a test for apprehension of bias, and may be analyzed separately.

Both justices allude to the need to examine each case on its own merits, and at the appropriate time. They implicitly recognize that the requisite level of independence will vary with the importance of the rights of the parties that are at stake and that allegations of apprehension of bias based on lack of impartiality are speculative prior to establishing a tribunal. The test to be applied in cases of impartiality is that for bias — the “reasonable, right-minded person” test — and the test for institutional impartiality — will there be a perception in a substantial number of cases? — developed by Lamer C.J. in *Lippé*. This functional approach acknowledges that context plays a relevant and necessary factor in the analysis.

Most interesting of all, both justices consider institutional independence a part of natural justice. In Lamer C.J.’s words:

My colleague Sopinka J. does not dispute that institutional independence is a principle of natural justice which applies to the band tribunals

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93 See *Matsqui*, ibid at 43.
94 See *Matsqui*, ibid at 45.
95 *Matsqui*, ibid at 47.
96 *Matsqui*, ibid, Lamer C.J. at 31, Sopinka J. at 48.
97 *Matsqui*, ibid, Lamer C.J. at 32, Sopinka J. at 53.
98 *Matsqui*, ibid, note 5, Lamer C.J. at 33-34, Sopinka J. at 51. Based on Iacobucci J.’s approach developed in *Pearlman*, supra note 56.
99 *Matsqui*, supra, note 5, at 45.
and, although somewhat more ambiguous, Sopinka J. states:

I do not disagree with the Chief Justice that the band taxation tribunals must comply with the principles of natural justice.\(^{100}\)

Support by a clear majority of the court for the following propositions heralds a doctrinal great leap forward: agreement that independence and impartiality are recognizable as clearly-delineated, separable components of the general test for bias; the clear recognition of autonomous institutional analogues capable of independent testing; and the arguably implicit recognition of institutional independence as a common law principle of natural justice. However, it is the fundamental disagreement between Lamer C.J. and Sopinka J. on what they see — or should see — once they arrive at that common ground, that becomes the focus of the analysis.

(ii) World’s Apart

Whereas much of the agreement in the two sets of reasons is implicit, in the end the disagreements between Lamer C.J. and Sopinka J. are loud, firm, and explicit. Having travelled much of the way together and having forged a new path toward an analysis of structural independence, on arrival the two justices disagree not just on what it is they see, but on how to look at it.

Lamer C.J.’s position is based on a number of tenets, most of which are the result of a formalistic examination of the by-law and a retreat from his position on context. In his view, a purposive examination of context is not relevant to the question of reasonable apprehension of bias at an institutional level,\(^{101}\) since consideration of context in an institutional setting will “dilute natural justice.”\(^{102}\) Instead, the appropriate test is whether a reasonable and right-minded person, viewing the whole procedure as set out in the assessment by-laws, would have a reasonable apprehension of bias on the basis that the members are not independent.\(^{103}\)

Examining the by-law in this instance leads Lamer C.J. to spot evidence of bias. For one, the appointing bodies may appear later as parties to an appeal, and are thus opposed in interest to other parties who appear before the tribunal.\(^{104}\) Secondly, giving weight to an oath of impartiality in the absence of explicit guarantees of remuneration and security of tenure, and attempting to weigh the relative property interests versus security of the person interests, ignores the Valente principles.\(^{105}\) Lamer C.J.’s solution to this is that the third Valente principle, administrative control, is normally addressed by appointment powers being placed in a different level of government. If the purpose of the legislation makes this undesirable, legislation must include explicit guarantees of remuneration, periods of tenure, and removal of members only for cause.

In answer to the concerns about the inquiry being premature, Lamer C.J. holds that an objective inquiry focused on the actual structure of a tribunal can be made prior to the formation of the tribunal. Again, he returns to the empowering by-laws. By applying the Valente principles, one can determine conclusively, in isolation, without benefit of a hearing, whether bias exists. Even silence in empowering legislation constitutes a discretion in the appointing body to ensure (or not ensure) sufficient institutional independence, which discretion is itself violative of the “institutional independence doctrine.”\(^{106}\)

As mentioned previously, Lamer C.J. and Sopinka J. do not disagree on the fundamental issues. Sopinka J. restricts his overt disagreement with Lamer C.J. to a handful of points. His first concern is the use of context. Sopinka J. states that context must be looked at in cases of institutional independence because it is relevant and necessary. This is especially true when one is basing a decision on the principles of natural justice, which cannot be applied in the absence of a clear understanding of the relevant, operational context of a tribunal, and as borne out by previous case law.\(^{107}\)

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100 Matsqui, ibid at 51.
101 Matsqui, ibid at 35.
102 Matsqui, ibid at 32.
103 Matsqui, ibid at 39.
104 Matsqui, ibid at 43. This is an implicit disagreement with Sopinka J., who makes the point that it is premature — see Matsqui at 53.
105 Matsqui, ibid at 43.
106 Matsqui, ibid at 45.
107 Matsqui, ibid at 50-52.
Sopinka J. then addresses both the matter of prematurity and the idea of reviewing by-laws raised by Lamer C.J. He argues that any decision regarding institutional bias based on insufficient institutional independence is premature if it occurs before a tribunal has been formed, as there has been no chance to observe the tribunal operating in practice. Presumably, Sopinka J. is placing weight on the need to see the actual terms of appointment and how they may spell out provisions relating to the duration of appointment, dismissability and remuneration. For him the proper place for considering the institutional bias question in general is after the tribunal has been appointed and/or rendered judgment, particularly when the empowering legislation is silent, vague or incomplete in terms of the Valente principles. More generally, he notes difficulties inherent with Lamer C.J.’s formalistic approach, showing how focussing on legislative wording is inadequate. The approach also violates the necessity for flexibility in applying the Valente principles to the administrative context, at least when the legislation is silent on the issue, or confers discretion.

It is important to note two things about the justices’ disagreement. First, prior to venturing out on the independence “limb,” they are both in essential agreement on all aspects of the test for apprehension of bias. This includes the first limb, impartiality, and the need for flexibility and attention to context when applying the Valente principles. Second, on institutional independence, Lamer C.J.’s position becomes strictly formalist, whereas Sopinka J.’s position remains contextualist.

(iii) Areas of Silence

While it is important that judges, in general, should confine themselves as much as possible to the issues before the court, it is arguably equally important that if an issue is judged relevant and is dealt with — whether dispositive or not — it is incumbent on the judges of our highest court to be mindful that their reasoning carries weight in future cases. In areas of unsettled or unclear law, Supreme Court obiter can be useful in providing guidance, or it can obfuscate and sow further confusion. Therefore, if a decision is offered, the reasoning should be carried out in a sufficiently comprehensive manner and with attention to the core areas needing treatment.

In this regard, it is possible that Lamer C.J. and Sopinka J. failed to pay adequate attention to the ramifications of the way in which they play out their disagreement. Two significant factors are either ignored or insufficiently treated.

The first factor is the widely-recognized complex typology of administrative agencies, on which both justices are silent. In Matsqui, the tribunals were established by subordinate legislation equivalent to regulation. The question is left untreated whether, and, if so, how, the reasoning on institutional independence will apply to tribunals established directly by statute, given the fact of legislative supremacy and the presumption of constitutionality. No attempt is made in the judgment to anchor “independence” firmly in a general legal framework — either statutory or constitutional.

The second factor is the role played by the Constitution and/or the Charter, which is insufficiently treated in the reasoning in Matsqui. Although s. 11(d) of the Charter is used to build the standard basis for the Valente principles, and Lamer C.J. makes brief mention of “security of the person” in contrast with “lesser interests” (without making explicit reference to s.7), the way in which such considerations should inform the analysis of institutional independence is left open. Further, adopting an inflexible, formalist approach, where purely economic interests of a corporation were at stake, leaves open the question of what further imposition of Charter standards would be possible in a case in which clearer personal interests were at issue. In terms of the Constitution itself, as above, no mention is made of any possible relevance of the subordinate nature of the pertinent legislation.

The net result of such lacunae in analysis is either to leave the decision-makers below to “tack on” their own reasoning with regard to those issues or to mistake the reasoning here as complete, when it is not. In some instances this may not be important. In other cases, it

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108 Matsqui, ibid at 53. Although the argument has merit after appointment, the suggestion that one should wait until after a case has been decided to determine bias is highly dubious.

111 Matsqui, supra note 5 at 31.
may be crucial. Either way, it is now unclear, after Lamer C.J.’s decision, what role context plays in institutional bias cases. It is this failure of the Court to carefully explore the implications of its reasons to which we now turn.

(b) The New “Doctrine” of Institutional Independence

Any critique of the “doctrine” of institutional independence arising from Matsqui must focus on Lamer C.J.’s reasoning. It is the Chief Justice who has supplied the major part of the prior reasoning in previous cases on this subject, as he implicitly recognizes by citing himself in Lippé and Généréux. Sopinka J.’s reasoning on the issue is, in essence, purely reactive to, and arises from his disagreement with, Lamer C.J.’s analysis. But Lamer C.J.’s approach to the treatment of empowering legislation that is silent, vague or incomplete with regard to the Valente criteria of tenure, remuneration and administrative control is inadequate. There are at least six weaknesses in Lamer C.J.’s reasoning that undermine this new test for reasonable apprehension of bias. Sopinka J.’s reply also falls short in a number of areas.

(i) Lamer C.J.’s Six Pitfalls

First off, Lamer C.J. argues that while context is important for deciding individual impartiality, it is irrelevant when considering structural independence. This is at once contradictory, because he also acknowledges how the nature of the tribunal itself is important. In any event, when he does go on to ignore context by restricting the relevant information to the bare wording of the by-law, he not only acts inflexibly, but arbitrarily. Flexibility based upon considerations of whether a tribunal is adjudicative, policy-making, or mixed must surely go beyond the bare wording of the by-law. His attempt to sufficiently differentiate “bias” from “institutional independence” in order to abandon notions of context and function is hindered by repeated conflation of the two terms.

Second, Lamer C.J. has an easy time dismissing allegations regarding the impartiality of band members as speculative because C.P. had not applied to the appeal tribunals, and the band members were not appointed. But his approach is different when the issue of institutional impartiality arises. The combined silence, vagueness and incompleteness of the by-laws on a number of factors pertinent to the Valente principles of judicial independence become conclusive evidence of the tribunals’ insufficient independence. Lamer C.J. substantiates his conclusion by cataloguing those things which might happen. These include the possibility that

- members might not be paid
- members might be dismissed mid-term or at any time
- members might be paid only after a decision
- members might be appointed ad hoc for no particular term
- members making a wrong decision might not be reappointed.

But as Sopinka J. is at pains to point out, the opposite could also be true. Sometimes waiting and seeing may be perfectly fair and unbiased. As with the arbitrary restriction of the question of bias to the wording of the by-law, the sudden switch from the use of speculation as a reason not to draw a conclusion on impartiality, to using it to draw a negative conclusion on independence, is disconcerting.

Third, that the by-laws indicate both self-selection of members, and control of remuneration and tenure produces, in Lamer C.J.’s view, an appearance of dependency between the tribunal and the band. Here is a clear manifestation of the contextual approach that Lamer C.J. insisted would not be applicable in his institutional independence analysis. The possibility for cases appearing before the tribunal in which a particular band does not appear is given no weight in the analysis. Were the by-laws to set out that the bands were to be a party to every appeal, Lamer C.J. would have more to work with. And his prescriptive cure — guarantees of remuneration and tenure with

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112 See arguments at Part 3, sections (c)(i) B. and C.
dismissal only for cause, with no mention of the third Valente principle — downplays the problem he previously identifies, and remains arbitrary.

Fourth, the simplicity of the test offered by Lamer C.J. — application of the Valente principles to the tax appeal tribunal’s by-laws — is deceptive. The principles in Valente were developed in the context of a criminal case, directly involving interpretation of the content of the protections afforded the judiciary under ss. 96-101 of the Constitution, in conjunction with the protections afforded an accused under s. 11(d) of the Charter. Lamer C.J. merely asserts that Valente provides guidance in assessing tribunal independence. Then he notes that the Federal Court of Appeal applied the Valente principles to administrative tribunals in a number of cases. However, he fails to indicate (although Sopinka J. in response does) that all these cases were brought after a tribunal rendered a decision, that they may not be authority for using Valente’s s. 11(d) concerns in an administrative context and of these cases, two relied on context anyway. Taken together, it is questionable whether the cases should be used as bare authority for the application of these principles to the administrative context. But Lamer C.J. continues by asserting that it is a principle of natural justice that a party before an adjudicative tribunal should receive a hearing which is not only independent, but also appears independent. He again reiterates the idea of flexibility recommended by de Grandpre J. in Committee for Justice & Liberty, but he demonstrates this by limiting the test to a review of the assessment by-laws. The dictates of natural justice, according to Lamer C.J.’s reading of them, provide little room for flexibility after all, at least in the area of institutional independence.

Fifth, Lamer C.J. generates from his analysis a number of formalist conclusions. All seem the product of, at best, inadequate foundational reasoning. Oaths of impartiality in office are dismissed as an insufficient substitute for financial security or security of tenure in assessing the institutional independence of a tribunal. This is based on Lamer C.J.’s conflation of the indicia of individual impartiality with that of institutional independence, two concepts he had earlier carefully segregated. Ignoring the different weight that should be ascribed to property interests relative to security of the person interests points out the problem of refusing to frame an analysis in terms of the Bill of Rights or the Charter. And, due to his equivocation on the three factors of financial security, security of tenure and interested party adjudication, a tribunal’s by-laws could reflect any one of five permutations to escape from a finding of insufficient institutional independence. In effect, Lamer C.J. specifies a doctrine that can be satisfied, minimally, in one of two ways. Either a statute should specify security of remuneration and tenure, or it should specify appointment by another level of government. If this is indeed what he meant, it is unfortunate it was not stated more clearly. Further, to cohere with his own prescriptive finding, it is also necessary for an empowering statute to explicitly forbid the appearance of the different-level appointing body before the tribunal. If a statute allowed, or was silent, on the right of the appointing body to appear, the appointing province might appear before the tribunal, which by Lamer C.J.’s own prior reasoning, should result in a finding of insufficient institutional independence.

Finally, the reductivist techniques employed by Lamer C.J. in his formalist analysis, enable him to define the institutional independence doctrine in deceptively simplistic methodological terms: “We can examine the by-laws, apply the Valente principles, and reach a conclusion.” The function of this objective entity, institutional

\[117\] Matsqui, ibid at 44-45.

\[118\] See the cases of MacBain, Sethi, Mohammad, supra note 64.

\[119\] See section (ii) of this Part 4(b), infra.

\[120\] Sethi and Mohammad, supra note 64, as immigration cases, stand a much higher chance of involving some degree of concern over s. 7 (security of the person). Regardless, both results upheld the sufficiency of independence of the immigration board and adjudicators, respectively.

\[121\] Matsqui, supra note 5 at 37.

\[122\] Supra, note 66.

\[123\] Matsqui, supra note 5 at 39.

\[124\] Canadian Bill of Rights, S.C. 1960, c. 44. See s. 1(a).

\[125\] Supra, note 45, s. 7.

\[126\] The possibilities are: (i) security of tenure, security of remuneration and appointment by a different level of government; (ii) appointment by a different level of government; (iii) security of tenure and appointment by a different level; (iv) security of remuneration and appointment by a different level; and (v) security of tenure and security of remuneration.

\[127\] Matsqui, supra note 5 at 45.
independence, which Lamer C.J. has promoted to a principle of natural justice, is simple as well: “to ensure that a tribunal is legally structured such that its members are reasonably independent of those who appoint them.” There is no need for “reasonable apprehension” in the rewritten test, as the wording will either pass muster or will not. By-laws that fail on this analysis will violate principles of natural justice. Viewed in this way, the concept of institutional independence narrows his focus to the core of their disagreement — the role of context in an analysis of institutional independence. Specifically, Sopinka J. looks at the content of the term when applying the test for the apprehension of bias as set out in Committee for Justice & Liberty. Lamer C.J.’s failure to give appropriate attention to context is the basis of Sopinka J.’s conclusion that restricting the institutional independence test to the text of a by-law will leave the right-minded person uninformed. Given the fact that at the time of the appeal no panel had been appointed, nor any terms of tenure or remuneration set, Sopinka J. argues that no decision on institutional independence could, or should, be made.

Two flaws make Sopinka J.’s analysis and critique of Lamer C.J.’s reasoning less useful than it might otherwise have been. The first flaw is his failure to elaborate on a major conceptual difference with Lamer C.J. The second flaw, which pervades much of his reasoning, is an inability or unwillingness to provide a solid definition of “context.”

Buried between paragraphs providing illustrations of cases dealing with institutional impartiality and institutional independence, Sopinka J. makes the following general statement:

(ii) Sopinka J.’s Rejoinder

In contrast to the Chief Justice, Sopinka J. (with whom three justices concur) does not range broadly over the topic, but narrows his focus to the core of their disagreement — the role of context in an analysis of institutional independence. Specifically, Sopinka J. looks at the content of the term when applying the test for the apprehension of bias as set out in Committee for Justice & Liberty. Lamer C.J.’s failure to give appropriate attention to context is the basis of Sopinka J.’s conclusion that restricting the institutional independence test to the text of a by-law will leave the right-minded person uninformed. Given the fact that at the time of the appeal no panel had been appointed, nor any terms of tenure or remuneration set, Sopinka J. argues that no decision on institutional independence could, or should, be made.

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128 Matsqui, ibid at 45.
129 Supra, note 66 at 394-395.
130 Matsqui, supra note 5 at 53.
131 Matsqui, ibid at 52.
132 Supra note 44 at 685.
133 Both cited as earlier authority by Lamer C.J. in support of his culminating total separation of the two concepts in Matsqui. See notes 48-54 and accompanying text.
134 See Matsqui, supra note 5 at 50-53. From Sopinka J.’s decision in Matsqui, we learn that context, for example, might include how a tribunal operates in actual practice (at 50); its contextual setting (at 50); the relevant, operational context (at 51); the actual context and operation of the office (at 51); the wider context provided by a governing Act and the experience of self-governing professions generally (at 51); the context of an actual hearing (at 52); the statutory scheme on its face (at 52); the actual appointment terms, financial security and connection to the executive branch of government for each of the individual lay members (at 52); the administrative policy respecting remuneration of tribunal members (at 52); whether a tribunal is actually constituted and the procedure of short listing prospective tribunal members (at 52); the importance of both the scheme of the legislation and how that legislation operated in practice (at 52); a range of operational facts and circumstances including: the chain of command from the Minister to the actual adjudicator, legal direction, monitoring, security of tenure, the collective bargaining unit, transfer arrangements and scheduling of cases (at 53); knowledge of the operational reality of elements such as security of tenure and remuneration that may be missing (at 53); and the practice of a tribunal as depicted in the context of an actual hearing (at 53).
independence, it remains an elusive term, susceptible to multiple interpretations. It clearly widens the objective knowledge required beyond the limitation imposed by Lamer C.J. However, the excessive detail contained within Sopinka J.’s list makes it difficult to set a standard. In the end, one does not have much confidence that a hypothetical person, or for that matter, a decision-making body, has sufficient information to ascertain a reasonable apprehension of bias.

(c) The Utility of the Reasoning in Matsqui: Will it Work as an Analytical Tool?

The most cogent criticism of the reasoning of both Lamer C.J. and Sopinka J. is that each fails to answer important questions. For instance, with whom should we side when faced with an empowering statute which is silent, incomplete or ambiguous in terms of the Valente criteria? On the one hand, Lamer C.J. offers a formalist method of analysis which is exceptionally easy to apply at a very early stage, yet potentially fatal to the very existence of a number of agencies. On the other hand, Sopinka J. offers a contextualist mode of analysis which may allow a potentially flawed tribunal to make decisions, before being challengeable on grounds of independence. But he leaves one unsure of what context really is. Neither alternative comforts.

The lack of any serious consideration of the remedial aspect of their findings hobbles the reasoning of both Lamer C.J. and Sopinka J. Arguably, this is due to their dealing with an issue which was not considered in any depth in the courts below, and which was tangential to the deciding issue in the result. However, the truncation of the two justices’ considerations may be particularly problematic if one is looking to Matsqui for guidance.

In dealing with a tribunal established by subordinate legislation, Lamer C.J. was, technically, justified in limiting his attack to the principles of natural justice. No consideration was given in his reasons, however, to how the fundamental tenets of legislative supremacy and the presumption of constitutionality might impact on tribunals established directly by statute. Arguably there was no need for the Chief Justice to consider that. As he was willing to extend himself as far into theory as he did, however, it should be incumbent on him at least to indicate he was aware of a potential problem. In view of the fact that he did not, and his consequently incomplete “general field theory” of institutional independence, it might be best to “read down” his statements in Matsqui. Perhaps they are best seen as very strong recommendations on how the Valente principles of judicial independence must find expression in subordinate legislation establishing adjudicative tribunals. Meanwhile, the question of how to apply the theory to statutory tribunals must remain unanswered.

Constitutionally, the reasons of both justices seem oddly adrift. Neither analysis is grounded in the Constitution, the Charter, or the Bill of Rights, thereby providing no indication how — or whether — these texts might speak further to the issue of institutional independence. Once again, it might be argued that it was unnecessary to do so in this case. But by using s. 11(d) of the Charter to introduce the Valente principles, and obliquely alluding to security of the person, Lamer C.J. left room for development. There was a missed opportunity to characterize the interest at stake as either “the enjoyment of property” or “the determination of rights and obligations” as provided for in the Bill of Rights.

Still, there are a number of issues relating to bias on which a clear majority of the Supreme Court agree. It is possible that, in isolation, none of the above comments necessarily restrict Matsqui from providing some guidance on the issue of tribunal independence. But in view of the mutually contradictory positions developed by Lamer C.J. and Sopinka J., the value of the case as a source for understanding the nature of institutional independence must be questioned.

The polls are obviously still open regarding Matsqui’s role on the subject of institutional independence. No commentator has sufficiently stressed the frustrating disutility of the standard set by Lamer C.J.; nor has the paralysing nature of the disagreement between Lamer C.J. and Sopinka J. been observed. A trend common to the

135 Although, it seems that the analysis is performed in exactly the same fashion — see Regie des permis d’alcool, supra note 36. The judgment was silent on the question of whether there are any analytical differences between the two.
136 Sections 1(a) and 2(e), respectively, of the Canadian Bill of Rights, supra note 124.
137 See Part 4, section (a)(i) of this paper, supra.
138 See P. L. Bryden, supra note 34 at 27-33 passim, 49-60; D.J. Mullan, Administrative Law (Toronto: Carswell, 1996) (also Volume 3 of the Canadian
academic commentary to date is either to treat the judgments in Matsqui as unitary (effectively as the pronouncement of Lamer C.J.) and incorporate them into the canon of administrative law,\(^{139}\) or view them as a set of positions from which one can draw what one wills.\(^{140}\) Similarly, of two cases subsequent to Matsqui that employ its reasoning, Katz\(^{141}\) effectively ignores the difference between Lamer C.J. and Sopinka J.’s approach, though opting in the end for Sopinka J.’s while Bissett\(^{142}\) just opts for Sopinka J.’s approach without much explanation. These cases, concerning a provincial securities regulation regime, and the federal labour regime respectively, are examined in more detail below.

(i) Katz v. Vancouver Stock Exchange

The case involved a challenge to the disciplinary process set out in the by-laws of the Vancouver Stock Exchange, authorized by two British Columbia statutes, the Securities Act\(^{143}\) and the Vancouver Stock Exchange Act.\(^{144}\) Katz and others were charged with violating provisions of the bylaws and Exchange rules. After a panel was appointed by the executive committee of the Exchange to conduct an inquiry into allegations of contraventions of by-laws and Exchange rules, but prior to the inquiry itself, the defendants requested a hearing and review by the B.C. Securities Commission,\(^{145}\) alleging lack of institutional independence in the hearing panel. The Commission rejected the argument of reasonable apprehension of bias, as did the B.C. Court of Appeal. The appellant, Katz, relied primarily upon Lamer C.J.’s holding in Matsqui in both fora, but at the Court of Appeal, chose to allege a lack of institutional independence based solely on the appointment of the chair of the hearing panel. A unanimous panel of the British Columbia Court of Appeal noted the non-controlling nature of Lamer C.J.’s minority opinion in Matsqui,\(^{146}\) and also distinguished Lamer C.J.’s test for institutional independence on the facts of the case before them.

As in Matsqui, Katz involved a challenge to an alleged structural flaw in delegated legislation that rendered the tribunal insufficiently independent. The flaw manifested itself in a lack of two “essential indicia of institutional independence”\(^{147}\) — security of tenure and remuneration — in that the by-laws provided for a hearing-specific panel composed of a lawyer member chair, paid on a per hour basis, and two unpaid industry members. All members were chosen on a rotational basis from a standing 44-member hearing committee.\(^{148}\) The issue of administrative control was also argued, in that the lawyer chair of the standing hearing committee, responsible for officially appointing the hearing panel members, was in turn appointed by the executive committee, the body responsible for initiating the hearing process following potential violations by Exchange staff. Unlike the process in Matsqui, these procedures were in place for some time\(^{149}\) and had been used on a number of previous occasions, providing a history and evidence of how the by-laws were implemented in practice.

\(^{139}\) See Bryden and Des Rosiers, *ibid*.

\(^{140}\) See Mullan, *Administrative Law*, supra note 139 at 218.


\(^{143}\) S.B.C. 1985, c. 83.

\(^{144}\) S.B.C. 1907, c. 62, as amended.

\(^{145}\) This was a right set out in s. 15 of the Securities Act.

\(^{146}\) *Katz*, supra note 141 at 426h.

\(^{147}\) *Ibid.* at 426.

\(^{148}\) In practice, the rotating list and the initial forwarding of potential names was managed by a senior employee of the Exchange. The practice was not provided for in the by-law.

\(^{149}\) Since 1991. See *Katz*, supra note 141 at 429c.
The first thing to observe is the influence of Lamer C.J.’s holding in Matsqui. All parties, including the Securities Commission and the Court of Appeal, accepted the analytical framework set out by Lamer C.J. uncritically. The appellant framed his appeal by explicit reference to the terms outlined by Lamer C.J. both the Securities Commission and the Court of Appeal delivered a significant portion of their judgments in terms of the same (Lamer-enhanced) Valente criteria.

The second central point to observe about the judgment is the method by which each of the Securities Commission and the Court of Appeal respond to the appellant’s argument of a structural flaw based on the Lamer C.J. test. In both cases, their analysis relies wholly on evidence of practice and context, two terms central to the position expressed in Matsqui not by Lamer C.J., but by Sopinka J. This is, in fact, initiated by the appellants themselves prior to the Commission hearing, where they requested “information as to the disciplinary process, and, in particular, the process as it related to the appellant.”

The lengthy response by Exchange counsel outlined the composition of the hearing committee, the history of selection of hearing panels generally, and a chronicle of the selection of the hearing panel in the instant matter. The appellant did not take issue with this statement, and it was accepted as fact by both the Commission and the Court of Appeal. It is impossible to reconcile this admission with the position stated by the appellant in the appeal, which depends solely on Lamer C.J.’s restriction of the test for institutional independence to the bare wording of the relevant by-law:

1. The administrative scheme by which the Vancouver Stock Exchange appoints hearing panels under its by-laws is structurally flawed and does not meet the requisite level of institutional independence as set out in Matsqui.... The Exchange scheme neither provides security of tenure nor security of remuneration, the two principle factors that must be considered in determining whether the requisite level of institutional independence exists.

Given this admission, it is perhaps not surprising that in making its decision, the Commission took into account “the purpose and responsibilities of the Exchange in disciplinary matters” and the “evidence of the practice established for the appointment of hearing committees.” What is surprising, however, is that the Commission did not then go on to frame their rejection of the appellant’s claim by relating the evidence to the test as set out by Sopinka J. involving considerations of purpose and practice.

The Commission next went on to examine each of the three criteria of security of tenure, security of remuneration and adequate administrative control. In finding that all three were indeed satisfied, the Commission imposed Sopinka J.’s contextual analysis — although without identifying it as such:

- security of tenure: “any lack of formal security of tenure is not a realistic threat to...independence.”
- security of remuneration: “nor is security of remuneration a concern in these circumstances....it is irrelevant for industry members....[W]hile it is a theoretical possibility that the Exchange could refuse to pay accounts of a [lawyer] member whose decision was not considered appropriate, this is not a practical concern.”
- administrative control: “by-law 5-20...makes clear that the hearing panel has control of the proceedings once a hearing begins...[T]he appointment of hearing panel members is the responsibility of the Chairman of the hearing committee who is one of the lawyer members of the committee.”

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150 Ibid., at 427.
151 Ibid., at 437d-h and 439a-g respectively. Unfortunately, it is even less rigorous than Lamer C.J.’s own test. Notably absent is any reference back to the specific wording of the by-laws of the Exchange. This is inexplicable under a detailed reading of Lamer C.J.’s Matsqui criteria.
152 Ibid., at 429.
153 Ibid., at 427.
154 Ibid., at 435.
155 While not specifically citing the wider “purposive” approach developed by Iacobucci J. in Pearlman among his dozen adumbrations of “context” in Matsqui, Sopinka J.’s acceptance of the relevance of “wider purpose” falls clearly within his stated area of implicit agreement with Lamer C.J. “Practice” is, of course, the mainstay of Sopinka J.’s difference with the Chief Justice.
156 All from Katz, supra note 141 at 437.
The Court of Appeal, following the Commission below, also felt it necessary to go on to illustrate how each of the three factors were satisfied. Once again, they are dealt with in a manner clearly consistent with the approach recommended by Sopinka J. and not Lamer C.J.:

- security of tenure: "[w]hile chairpersons do not have security of tenure based on any contractual rights or rights found in the by-law, the practice over the last few years demonstrates...."

- security of remuneration: "the evidence is clear that the lawyer members submit their fee for services...and these fee accounts are paid as rendered. It is true that the lawyer members do not have a written contract...and there is nothing in the by-laws of the Exchange. Their right to be paid...must be presumed as a matter of law."

- administrative control: "is also not contractually stipulated or guaranteed in the by-laws but the evidence does not suggest any interference in the process.... The practice leads us to the conclusion that there is administrative independence."

This culminates in the Court unanimously finding that the legislation and the by-laws of the Exchange, when taken along with the practice of the tribunal, can be seen objectively to show that members of the hearing panel are sufficiently independent.

The crucial thing to observe about the decision of the Court of Appeal is that in the above passages, the Court observes that the panels indeed do fail — by the complete silence of the by-law — on all three of the indicia of institutional independence set out by Lamer C.J. Yet by imposing an analysis that is completely congruent with that proposed by Sopinka J., without acknowledging this fact, the court felt that it had sufficiently answered the question of institutional independence. This misapplies the mutually contradictory approaches set out by the two justices.

At least two questions arise from Katz which are relevant to the utility of Matsqui in examining institutional independence. First, given the inability of not just the decision-makers, but also the appellant himself, to confine an analysis to the bare wording of the by-law, are we seeing evidence of how context exerts an inexorable pressure and thereby forces its own consideration? Second, on what basis, if any, may the factors specified by Lamer C.J. be satisfied by advancing operational context evidence as suggested by Sopinka J.?

Neither question may be answered through recourse to the reasoning in Katz. That the Court of Appeal felt obliged to set out at great length sections of both Lamer C.J.'s and Sopinka J.'s reasoning in Matsqui, without once acknowledging their fundamental disagreement, is in itself worrisome. That worry is only confirmed by witnessing the ease with which Sopinka J.'s analysis is marshalled in response to Lamer C.J., without any indication that a choice is being made. The contextual approach clearly wins the day in Katz, but the final ruling is offered as if it satisfies both methods. While these characteristics of Katz may be the result of sloppy decision-making on the part of the appellate judges, they might equally indicate that Matsqui provides no coherent guidance on dealing with the issue of institutional independence. In effect, Lamer C.J.'s approach is ignored. A pertinent question is whether this springs from the fact that in Katz, the hearing panel procedure, set out by the by-law, had five years of operational history. If this is so, it suggests the need to qualify Lamer C.J.'s holding in Matsqui, it is not to be ignored entirely. Perhaps it must be limited in its application not just to tribunals established by subordinate legislation, but also only to tribunals that have yet to be implemented.

\[\text{157 Recall that on appeal, the appellant reduced the allegation to lack of sufficient institutional independence in the chair alone.}\]

\[\text{158 Katz, supra note 141 at 439.}\]

\[\text{159 Ibid.}\]
It may be that the same result would arise in *Katz* without benefit of *Matsqui*, given the stress on context and flexibility in the administrative arena in earlier cases like *Lippe*, *Généreux*, *Sethi*, and *Valente*. This ignores the possibility, however, that the case itself might not have been brought forward but for *Matsqui*. A cynical reading of what *Matsqui* supplies, in light of *Katz*, could be that by his formalist minimalism Lamer C.J. has merely provided an easy way to challenge the adequacy of certain fora: what Sopinka J. has supplied, in turn, is a similarly formulaic method of responding to that challenge.

*Katz* was subsequently appealed to the Supreme Court of Canada. In a one-paragraph judgment delivered by Iacobucci J. for the full Court, the appeal was denied and the judgment of the British Columbia Court of Appeal upheld. The Sopinka J. standard of looking at the practice of the tribunal was adopted, without attribution, and *Matsqui* was distinguished on context. As can be seen from the judgment, quoted in its entirety below, no effort was made to explain how context could satisfy (or oust) Lamer C.J.’s formalist criteria:

We agree with the British Columbia Court of Appeal that the practice of the tribunal in question is one of the many factors to consider in determining whether the necessary degree of independence is present to avoid creating a perception of reasonable apprehension of bias. We also agree with the British Columbia Court of Appeal that the situation in this case, particularly its self-regulatory context, is quite different from that which was present in ... *Matsqui*.

(ii) *Bissett v. Canada (Minister of Labour)*

The issue in *Bissett*, a 1995 Federal Court, Trial Division decision on two opposing motions for stays of proceedings, concerned whether a statutory appeal to a referee under the *Canada Labour Code* was an adequate alternative to judicial review. In some ways, the situation giving rise to the motions resembled the situation in *Matsqui*. The applicant, faced with a decision by a Ministry of Labour inspector, had a statutory right of appeal to a referee appointed by the Minister of Labour. He instead applied for judicial review, challenging the adequacy of the appeal procedure on the basis of jurisdiction, insufficient institutional independence on the part of the referee, and the alleged constitutional inability of the referee to review the inspector’s decision. *Matsqui* was relied upon in regard to the first two issues. On both, the applicant failed: the referee was found to possess sufficient institutional independence; furthermore the statutory appeal procedure was an adequate forum in which to entertain arguments and evidence regarding jurisdiction and all other issues.

Under authority of the *Canada Labour Code*, an inspector issued payment orders totalling over $500,000 representing unpaid wages, against the directors of a bankrupt corporation. Several of the directors claimed to have resigned from the board of the corporation prior to the dismissal of employees by the receiver; for this reason, they argued, neither the Ministry of Labour inspector nor the referee on appeal, had jurisdiction over them. In addition, in their application for judicial review to the Federal Court, they challenged the institutional independence of the inspector/referee regime:

As to the nature of the appeal body, the applicants say that the referee does not have security of tenure, security of remuneration or independence from the executive and is therefore not institutionally independent, giving rise to a reasonable apprehension of bias.

They also elaborated upon their argument regarding the particular factor of administrative control:

The applicants’ argument is not based on the particular individuals or circumstances involved, but on the scheme of the legislation. They say that the inspector is appointed by the Minister of Labour, as is the referee. In their view, this brings into question the referee’s

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163 *Katz*, supra, note 141.
164 Ibid.
165 One motion was for a stay of proceedings of an appeal to a referee under the *Canada Labour Code*, the opposing motion was for a stay of proceedings of an application for judicial review of the originating decision of an inspector for the Ministry of Labour.
166 R.S.C., 1985, c. L-2, as amended.
167 *Bissett*, supra note 142 at para. 8.
168 Section 251.1(1).
169 *Bissett*, supra note 142 at 768.
institutional independence.

Although it is not reported in the case, it is presumed that the inspector is an employee of the Ministry of Labour, appointed under s. 251.12(1) of the Canada Labour Code. The Court noted that the Canada Labour Code is silent on the issues of tenure and remuneration. Guidelines are apparently distributed to referees with their letter of appointment but were not provided to the Court.

The Ministry of Labour made two arguments in response. First, that there was no evidence showing a lack of any of the three criteria of security of tenure, security of remuneration, or inappropriate administrative control. This argument, while clearly incompatible with Lamer C.J.’s approach of looking at the wording of the legislation alone, fit within Sopinka J.’s widened notion of context. The second argument the Ministry made was that the dispute was premature. Again, this argument is clearly compatible with Sopinka J.’s approach in Matsqui.

Rothstein J. confirmed that Lamer C.J.’s reasoning in Matsqui on the appropriate application of the adequate alternative remedy applied. But he found any attempt to apply Lamer C.J.’s reasoning on institutional independence to the case problematic:

While I cannot say that parliament could never establish a scheme that might run afoul of the principle of institutional independence, that is not a question of whether a referee in a specific case is an adequate alternative to judicial review, having regard to the type of considerations suggested by Lamer C.J. in Matsqui. It is an argument that goes to the constitutional validity of the referee provisions of the Canada Labour Code...[U]nlike [Matsqui] where the relevant provisions were contained in what amounted to regulations, which, as subordinate legislation, could be challenged under ordinary common law principles of ultra vires, here the provisions in issue are contained in primary legislation.

It is important to note Rothstein J.’s immediate default to Sopinka J.’s approach. Rothstein J. had little difficulty in accepting the argument that, absent further evidence, it would be premature to decide the question of institutional independence.

It is apparent to me, as it was to Sopinka J. in Matsqui, that it is not appropriate to form a final conclusion at this early stage as to the institutional independence of the referee on the basis only of a consideration of the Canada Labour Code and the appointment letter. Further evidence as to the nature of referee appointments, the basis of remuneration and other relationships, if any, between the referee, the Minister and the inspector would be necessary in order that a decision as to institutional independence be an informed one.

Two aspects of how Matsqui was perceived in Bissett are particularly relevant to any analysis and assessment of institutional independence. First, Lamer C.J.’s formalist emphasis on the bare text of empowering legislation leaves open the possibility of mistaking an institutional independence challenge for a constitutional challenge to the validity of the legislation. Second, the need to contextualize a challenge to a tribunal’s independence is explicitly expressed in Bissett, whereas in Katz, it was only implicitly understood in the emphasis placed on evidence and practice. In relation to the first point, the sufficiency of Lamer C.J.’s approach even to subordinate legislation is thrown into question by the result in Katz. The Sopinka J. approach appears to be in the ascendant, and the importance of context, however defined, is further confirmed.

(iii) What Now?

It is important to remember that in Matsqui, Lamer C.J., Sopinka J. and four additional justices agreed on the need to separate institutional independence and institutional impartiality. Katz and

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170 Ibid. at 771.
171 Canada Labour Code, supra note 166. See Bissett, supra note 142 at para. 11.
172 Bissett, ibid. at para. 22.
173 Ibid. at para. 19.
174 Ibid. at para. 8.
175 This is certainly a debatable proposition, but beyond the immediate concern of the current inquiry.
176 Supra note 142 at 771.
177 Ibid. at 773. The type of “further evidence” required for an informed decision described here by Rothstein J. closely resembles the list drawn by Sopinka J. from his characterization of Mohammad (supra note 64) in Matsqui, supra note 5 at 53.
Bissett confirm that this division will continue to be accepted, even in the absence of a clear articulation of the two concepts. These two subsequent cases also demonstrate that Lamer C.J.’s and Sopinka J.’s different evaluative criteria introduce what almost certainly is a less-than-productive attempt to square the circle by driving decision-makers to look first at the bare wording of an enabling regulatory scheme, in deference to Lamer C.J., then to examine its context and practice to satisfy Sopinka J. So far, it appears that Lamer C.J.’s criteria will be subsumed in Sopinka J.’s. This would certainly not violate Lamer C.J.’s earlier admonition to be flexible! But beyond this, Lamer C.J.’s approach would seem to have little to recommend it.

The very nature of the contradiction presented by the two vying positions on institutional independence, in combination with the incompletely grounded nature of the reasoning, undermines the authoritativeness of Matsqui. As was apparent in Katz, Lamer C.J.’s approach in Matsqui certainly offers a tidily restrictive framework, yet one which can easily be employed in ways other than intended. Whereas Sopinka J.’s approach, basically an insistent reminder of the relevance of context and practice, delivers little beyond a pragmatist’s caution against excessive theoretical fugue, a call not to wander too far off into abstract and conceptual theory.

Given the thesis concerning the internal flaws in the two approaches in Matsqui, it is likely that this situation will continue. The case will likely be further mined as support for various propositions concerning bias and its components, impartiality and independence. In the occasional case concerning institutional independence, a “mix-and-match” approach will be taken towards the judgments of Lamer C.J. and Sopinka J. Despite being the most significant statement on the issue of institutional independence by the Supreme Court, the holdings in Matsqui will do nothing to settle the academic debates concerning independence of administrative tribunals. This need not have been so, had Lamer C.J. also attempted to ground his theory more closely in the practical realities under which tribunals operate, or if Sopinka J. had focused his treatment of context and practice as necessary components, and provided a much more ample response in terms of his difference with Lamer C.J. In the end, Lamer C.J.’s restrictive criteria will probably not affect the “revolution” referred to by Bryden,178 nor will it, except in isolated cases of tribunals newly established under subordinate legislation, serve to alter the structure of many tribunals. Despite this, though, Matsqui will always present a tempting ground for litigants to challenge tribunals. However, its internal flaws — in logic, consistency and lack of grounding — will prevent successful understanding of institutional independence.

5. CONCLUSION

It is evident from the foregoing that the issue of institutional independence concerns virtually all actors in the administrative arena — from the Supreme Court to academe, and from the Native tax assessor to the Privy Council. What is also evident from the justices of our highest court is that their divergent opinions concerning the necessary and sufficient indicia for independence — are they the words of the by-law? The operational context? — make it necessary to construct tribunals carefully.

In R.W. Macaulay’s 1989 study of Ontario regulatory agencies, he observes that

[a] number of structural adjustments are needed to the agency system in order to improve its performance overall. These touch on the amalgamation or elimination of agencies, program evaluation, sunsetting, appointments, tenure, remuneration, training, a code of conduct and conflict of interest, the relationship between agencies and ministries, the authority of the chairperson and public access. The major obstacle to needed structural changes for agencies is the lack of consensus regarding their goals and reasons for initial creation.179

Macaulay, unlike Lamer C.J. in Matsqui,180 makes no attempt to unduly stress one component, such as tenure or remuneration, over another. Note also that he describes all components as “structural” elements of “the agency system.” Macaulay, it is contended, made a wiser choice of words than whoever first joined the term “institutional” to “independence” and “impartiality.” Tenure, remuneration, and administrative control that is, the possession of—

178 See Bryden, supra note 35 at 49.
180 Drawing of course, from the line of cases beginning with Valente (supra note 46), in which Dickson C.J. first offered the court’s own mirror up, somewhat ambiguously, to tribunals.
one's own process) are, indeed, elements of the structure of tribunals. The other elements mentioned by Macaulay are also elements of that structure. If these are poorly served, it may well be that independence suffers as much as by any absence of tenure or remuneration. Macaulay draws attention to the lack of consensus regarding not just the goals of the tribunal system, but the very reason for its creation.

Given the prescriptive enthusiasm of Lamer C.J. in Matsqui, any reasonable observer might assume the tribunal system was created simply to generate a number of small, imperfect courts.

In extending the specific criteria from Valente into the realm of tribunals such as the Native assessment appeal boards, Lamer C.J. fails to take account of a host of pragmatic difficulties attendant in the creation of such agencies. Before insisting on abstract principles like secure tenure and sufficient remuneration, he would have been well advised to turn his mind, however informally, to a number of questions beyond even the operational context advised by Sopinka J. In general terms: How many appeals might actually arise in a year? What is the appropriate salary for a tribunal member? What quantum will likely make them independent? What quantum will not? Is a year a long enough period of tenure? Is seven years too long? And specifically in the Matsqui case: At what point, given the potential tax base in the reserve, does the cost of an appeal tribunal exceed the taxes collected? Will tribunal members, assured of position and pay, be unaware that too many judgments against a native band will make them cost-ineffective? At what point should bands throw up their hands and collapse the system into an appeal to the Federal Court, Trial Division only? Will this provide more or less opportunity to appeal an assessment? For whom? How will appealing every contested assessment (for those with deep enough pockets to do so) encourage aboriginal self-government? It might be said that these are not properly Lamer C.J.'s concerns. He simply needs to ensure that a tribunal functions sufficiently like a judicial analogue to satisfy his concept of the "doctrine" of institutional independence, not whether the tribunal can or does work. On the other hand, the insufficiency of Sopinka J.'s response to Lamer C.J.'s sterile formalism makes it difficult to discern whether his more pragmatic and functional approach would itself open outward to the concerns expressed above.

In almost every study and report prepared on the topic of independent agencies, it is noted that a significant number use part-time members. This single statistic is perhaps one of the most important when examining the need for independence:

Independence ... seems to be affected by at least two factors. First, many agency members are part-time appointments. Being part-time means that these people do not rely solely upon their position as an agency member for their livelihood. They can, therefore, theoretically afford to take an independent approach to their part-time job and to resist any attempts by Government to influence their individual case decisions....Some will not want to see that income lost on the altar of independence but clearly their dependence upon agency-related income is far less than that of a full-time employee.

It is, therefore, the appointment process and form of member employment that become issues of paramount importance. Although patronage might seem to pertain more to impartiality than independence, its prevalence makes it a structural, even systemic, problem. This is a major deficiency in the Valente criteria. Failure to oust a tainted appointment process should be as equally egregious as lack of agency control of their own processes. Lamer C.J.'s Diceyan adherence to a delimited set of criteria, themselves a response to the operational context assessed in Valente, is, in the end, entirely arbitrary.

The chasm between Lamer C.J.'s theoretical, yet restrictive, approach and Sopinka J.'s less-than-rigorously-defined "operational context" approach impedes, for the foreseeable future, development of a more coherent analysis of the issue. Although six justices did manage to agree on a number of factors, these factors cannot be used to any proper effect without agreement on the proper direction to take. If this can eventually be achieved, it would be best that the justices

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181 Murray Rankin, for example, in "Perspectives on the Independence of Administrative Tribunals" (1993) 6 C.J.A.L.P. 91 at 97, has observed that notwithstanding the trappings of independence, however, the Cabinet of course has the power to appoint individuals to the agencies, and its indirect but obvious control over the pursestrings may constrain any potential independence on the part of the boards.

182 Or, more properly, its continuous haphazard growth.

183 As presumably the native band tribunals were.

attend more closely to the many voices, past and present, that have illuminated the essential nature of tribunals — the non-court aspects of administrative decision-making. In the meantime, as the pragmatic and functional approaches bleed through the strict doctrinal theory, it would be the lesser of two evils for the courts to favour the approach taken by Sopinka J. in *Matsqui.*