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Citation Information
http://digitalcommons.osgoode.yorku.ca/sclr/vol16/iss1/11

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THERRIEN, OCEAN PORT AND THE DOCTRINES OF JUDICIAL AND TRIBUNAL INDEPENDENCE

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Shirley Margolis**

Since the enactment of the Canadian Charter of Rights and Freedoms,¹ the Supreme Court of Canada has increasingly been called upon to address the meaning and scope of judicial independence and tribunal independence in Canada. In Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), [1997] 3 S.C.R. 3 the Supreme Court reached a high-water mark in the expansion of the doctrine of judicial independence by holding that judicial independence is an unwritten constitutional principle.

In 2001, the Supreme Court of Canada released two decisions with significant implications for the unwritten constitutional principle articulated in the Provincial Court Judges Reference: Therrien (Re)³ and Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch).⁴ In Therrien, the Supreme Court held that the unwritten constitutional principle did not require an address of the legislature to remove a provincial court judge from office. In Ocean Port, the Supreme Court held that the unwritten constitutional principle does not apply to administrative tribunals. Both decisions represent a considerable receding from the high-water mark reached in the Provincial Court Judges Reference.

The purpose of this paper is to consider the implications of the Supreme Court of Canada’s decisions in Therrien and Ocean Port. The paper will comprise three sections: the past doctrines, the recent decisions, and the future debates. The first section will describe the doctrine of judicial independence and the doctrine of tribunal independence developed by the Supreme

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Court of Canada prior to Therrien and Ocean Port. The second section will outline the decisions in Therrien and Ocean Port. The third section will examine the debates left open by these decisions. Together, these sections aim to situate the decisions in Therrien and Ocean Port in their historical and jurisprudential context and to consider the future development of the doctrines of judicial independence and tribunal independence.

I. THE PAST DOCTRINES

The doctrines of judicial independence and tribunal independence aim to ensure that decision-making is both independent and perceived to be independent. The Supreme Court of Canada has consistently affirmed the importance of both doctrines. In Beauregard v. Canada, the Supreme Court held that judicial independence is “essential for fair and just dispute-resolution” and is also “the lifeblood of constitutionalism in democratic societies.” In Canadian Pacific Ltd. v. Matsqui Indian Band, the Supreme Court recognized tribunal independence as a principle of natural justice:

[I]t is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension.

While these decisions affirm the importance of the doctrines of judicial independence and tribunal independence, they also suggest that these two doctrines have distinct sources. Judicial independence is linked to the constitution. Tribunal independence is linked to the common law principle of natural justice. The following section of the paper considers the distinct sources of judicial independence and tribunal independence and the way these distinct sources affected the scope of each doctrine prior to Therrien and Ocean Port. The doctrine of judicial independence is outlined first, followed by the doctrine of tribunal independence.

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6 Id., at 70.
8 Id., at 49.
1. Judicial Independence

Judicial independence is a constitutional principle whose sources are both written and unwritten. Over the past two decades, the sources of this constitutional principle have expanded from the quasi-constitutional Canadian Bill of Rights and Quebec Charter of Human Rights and Freedoms, to the Constitution Act, 1867 and the Charter and finally to the unwritten constitutional principle articulated in the Provincial Court Judges Reference.

The quasi-constitutional Canadian Bill of Rights and Quebec Charter protected judicial independence prior to the Charter and continue to protect judicial independence today. Subsection 2(f) of the Canadian Bill of Rights provides that the laws of Canada should not be construed so as to “deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.” Subsection 2(e) provides that the laws of Canada should not be construed so as to “deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.” Section 23 of the Quebec Charter provides that every citizen has a right to a “full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge. . . .”

The judicature provisions of the Constitution Act, 1867 protect the judicial independence of superior court judges, though not the judicial independence of provincial court judges. Section 96 of the Constitution Act, 1867 provides that the Governor General shall appoint superior court judges. Subsection 99(1) provides that superior court judges shall hold office during good behaviour and shall only be removable by the Governor General on address of the Senate and House of Commons. Section 100 provides that the salaries, allowances and pensions of superior court judges shall be fixed and provided by the Parliament of Canada.

Since the enactment of the Charter, subsection 11(d) has protected the judicial independence of all judges exercising criminal jurisdiction. Under subsection 11(d), any person charged with an offence has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Although section 7 of the Charter may also

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10 R.S.Q., c. C-12 [hereinafter the Quebec Charter].
guarantee judicial independence under the principles of fundamental justice, the Supreme Court of Canada has focused on the requirements for judicial independence under subsection 11(d).12

Together, subsection 11(d) of the Charter and the judicature provisions of the Constitution Act, 1867 provide important written constitutional sources of judicial independence. In the Provincial Court Judges Reference, the Supreme Court of Canada found that judicial independence also has an important unwritten constitutional source. The Provincial Court Judges Reference concerned the financial security of provincial court judges. The Supreme Court held that the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive code for the protection of judicial independence in Canada.13 Rather, these specific provisions are elaborations of a broader unwritten, underlying, organizing principle implicit in the preamble to the Constitution Act, 1867, which provides that Canada desires to have “a Constitution similar in principle to that of the United Kingdom.”14 The Supreme Court held that the preamble of the Constitution Act, 1867 recognizes and affirms judicial independence as an unwritten constitutional principle:

Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.15

In the Provincial Court Judges Reference, the Supreme Court of Canada applied the unwritten constitutional principle of judicial independence to the financial security of provincial court judges to find that before provincial governments may alter the financial remuneration of provincial court judges, the governments must establish objective, independent judicial compensation commissions to make recommendations. Although the Supreme Court applied the unwritten constitutional principle to the financial security of provincial court judges, the Supreme Court did not limit the application of the principle to this element of judicial independence.

On the contrary, the breadth of the unwritten constitutional principle articulated in the

12 In R. v. Généreux, [1992] 1 S.C.R. 259, the Supreme Court of Canada held that s. 7 did not provide a more comprehensive protection of judicial independence than s. 11(d) in that case. Since the accused’s challenge fell squarely within s. 11(d), the more open language of s. 7 did not strengthen the accused’s argument.
13 Supra, note 2, at 77.
14 Id., at 69-78.
15 Id., at 77-78.
Provincial Court Judges Reference suggested that the principle could apply equally to other elements of judicial independence.

These written and unwritten constitutional sources of judicial independence have given rise to a broad doctrine of judicial independence. In Beauregard and Valente v. R., the Supreme Court of Canada outlined four elements of judicial independence: adjudicative independence, security of tenure, financial security and administrative control over proceedings. Each of these elements will be considered in turn.

Adjudicative independence requires that the judicial decision-making process be free from interference by the legislature, the executive, pressure groups and other judges. In Beauregard, the Supreme Court of Canada held:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

The requirement that the judicial decision-making process be free from interference is so central to judicial independence that judges have been given testimonial immunity with respect to their decision-making process. In MacKeigan v. Hickman, the Supreme Court of Canada held that the judges of the Nova Scotia Court of Appeal who had overturned Donald Marshall’s conviction could not be compelled to testify about their decision-making process before the executive, the legislature, the Royal Commission appointed by the executive, or a judge in a civil suit.

Security of tenure has both institutional and individual dimensions. In its institutional dimension, security of tenure protects courts against modification or abolition by the legislature. In its individual dimension, security of tenure protects judges against removal from office. Section 99 of the Constitution Act, 1867 ensures that superior court judges hold office during good behaviour and that their removal requires an address of the legislature. With respect to the removal of provincial court judges, the Supreme Court of Canada held in Valente that subsection 11(d) of the Charter does not require an address of the legislature but does require the following:

...that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a

17 Supra, note 5, at 69.
full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.\footnote{Supra, note 16, at 698.}

Financial security protects against interference with the financial remuneration of judges. In Valente, the Supreme Court of Canada held that a judge’s right to salary must be established by law and that the executive may not interfere with the right to salary in a manner that affects the independence of the judge. Further, as noted above, in the Provincial Court Judges Reference, the Supreme Court held that before provincial governments may alter the judicial remuneration of provincial court judges, they must establish independent, objective judicial compensation commissions to make recommendations. The commissions must convene and report on a regular basis. Although their recommendations are not binding, governments must justify any departure from the recommendations on a standard of rationality.

Finally, administrative control over proceedings protects against interference with “administrative decisions that bear directly and immediately on the exercise of the judicial function” such as the “assignment of judges, sittings of the court and court lists” as well as “matters of allocation of court rooms and directions of the administrative staff engaged in carrying out these functions.”\footnote{Id., at 709, 712.}

Together, the four elements of judicial independence — adjudicative independence, security of tenure, financial security and administrative control over proceedings — comprise the doctrine of judicial independence developed by the Supreme Court of Canada prior to Therrien and Ocean Port. In comparison to the doctrine of judicial independence, the doctrine of tribunal independence has been more limited both in its sources and in its scope.

2. Tribunal Independence

While the sources of judicial independence are constitutional, the primary source of tribunal independence is the common law principle of natural justice. To be sure, the sources of tribunal independence are not entirely limited to the common law. The constitutive statutes of some administrative tribunals provide guarantees of tribunal independence. For example, the Regulated Health Professions Act, 1991\footnote{S.O. 1991, c. 18, Sch. 2, s. 38(4).} prohibits an individual from being a panel member of a discipline committee where the individual has taken part in the investigation of the subject matter of the hearing. Furthermore, the quasi-constitutional Cana-
*dian Bill of Rights* and Quebec Charter apply to administrative tribunals. In 2747-3174 Québec Inc. v. Quebec (Régie des permis d’alcool),\(^\text{22}\) the Supreme Court of Canada found that the institutional structure of the Régie des permis d’alcool did not meet the requirements of section 23 of the Quebec Charter because employees of the Régie were authorized to participate at each stage of the process leading to the cancellation of a liquor permit, from investigation to adjudication.

However, the constitutive statutes of many administrative tribunals do not provide explicit guarantees of tribunal independence. Moreover, although tribunal independence has quasi-constitutional written protection, the doctrine has no constitutional written protection. Neither the *Constitution Act, 1867* nor the Charter provides guarantees of tribunal independence. For these reasons, it is clear that the written sources of tribunal independence are more limited than the written sources of judicial independence. What was unclear after the *Provincial Court Judges Reference* and before *Therrien* and *Ocean Port* was whether the unwritten constitutional principle of judicial independence articulated in the *Provincial Court Judges Reference* extended to administrative tribunals.

In *Matsqui*, the Supreme Court held that “the principles of judicial independence outlined in Valente are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties.”\(^\text{23}\) However, the Supreme Court also held that “a strict application of these principles is not always warranted.”\(^\text{24}\) Moreover, as the following discussion suggests, the four elements outlined in *Beauregard* and *Valente* — adjudicative independence, security of tenure, financial security and administrative control over proceedings — have had a narrower scope in the context of tribunal independence than in the context of judicial independence.

Adjudicative independence has had a narrower scope because the executive and the legislature may interfere with the decision-making process through policy directions, cabinet appeals and budgetary control,\(^\text{25}\) because the tribunal may influence the decision-making process of its members through full-board meetings or the review of draft reasons,\(^\text{26}\) and because, in some situations, tribunal members can be compelled to testify about their decision-making.

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\(^\text{23}\) *Supra*, note 7, at 49.

\(^\text{24}\) *Id.*


\(^\text{26}\) *Id.*, at 104.
process during an application for judicial review. Security of tenure has had a narrower scope because tribunal members are commonly appointed on a part-time, limited-term, at-pleasure basis, because there are restrictions on the remedies for removal of tribunal members, and because the legislature may restructure tribunals. The fact that the legislature may restructure tribunals has also limited financial security and administrative control over proceedings.

The Supreme Court of Canada’s decision in the Provincial Court Judges Reference had the potential to expand the sources of tribunal independence and thereby expand the scope of the doctrine. In articulating the unwritten constitutional principle, the majority of the Supreme Court did not restrict the principle to particular judges or courts. It was therefore arguable that the unwritten constitutional principle could apply to administrative tribunals, or at least to administrative tribunals fulfilling quasi-judicial functions. As LaForest J. stated in dissent:

The word “court” is a broad term and can encompass a wide variety of tribunals. In the province of Quebec, for example, the term is legislatively used in respect of any number of administrative tribunals. Are we to include only those inferior courts applying ordinary jurisdiction in civil matters, or should we include all sorts of administrative tribunals, some of which are of far greater importance than ordinary civil courts? And if we do, is a distinction to be drawn between different tribunals and on the basis of what principles is this to be done?

The application of the unwritten constitutional principle articulated in the Provincial Court Judges Reference was at issue in both Therrien and Ocean Port. Having outlined the doctrines of judicial independence and tribunal independence developed by the Supreme Court of Canada prior to Therrien and Ocean Port, we proceed to consider the Supreme Court’s decisions in those cases.

II. THE RECENT DECISIONS

In both Therrien and Ocean Port, the Supreme Court of Canada receded from the high-water mark reached in the Provincial Court Judges Reference. In Therrien, the Supreme Court acknowledged the application of the unwritten

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27 Id., at 106-7. In Québec (Commission des affaires sociales) v. Tremblay, [1992] 1 S.C.R. 952, the Supreme Court of Canada held that the lack of testimonial immunity for administrative tribunal members was justified because of the nature of judicial review and because of the need to prohibit tribunals from constraining their members.


29 Supra, note 2, at 185.
constitutional principle to the financial security of provincial court judges but declined to apply the principle to require an address of the legislature prior to removing a provincial court judge from office. In *Ocean Port*, the Supreme Court acknowledged the application of the unwritten constitutional principle to judges but declined to apply the principle to administrative tribunal members.

1. Therrien

*Therrien* involved a constitutional challenge to the removal process of provincial court judges under section 95 of the *Courts of Justice Act*. Richard Therrien applied for judicial appointment on five occasions between 1989 and 1998. On the final occasion, he failed to disclose to the selection committee the existence of convictions for which he had been pardoned. The selection committee gave Therrien a favourable recommendation and the Minister of Justice recommended that he be appointed as a judge of the Court of Quebec. When the Minister learned of his failure to disclose his convictions, he lodged a complaint with the Quebec Conseil de la magistrature to determine whether Judge Therrien was “capable, in the circumstances, of fulfilling his role with dignity, honour and impartiality.”

The Conseil established a committee to consider the complaint and the committee found that the complaint was justified and recommended the removal of Judge Therrien. Pursuant to the committee’s recommendation, the Conseil recommended that the Minister of Justice initiate the process to remove Judge Therrien by making a request to the Court of Appeal under section 95 of the *Courts of Justice Act*. Section 95 provides that “[t]he Government may remove a judge only upon a report of the Court of Appeal made after inquiry at the request of the Minister of Justice.” The Minister of Justice made the request and a five-judge panel of the Court of Appeal conducted the inquiry. The Court of Appeal panel recommended that the Government revoke Judge Therrien’s commission.

On eventual appeal to the Supreme Court of Canada, Therrien argued, *inter alia*, that section 95 of the *Courts of Justice Act* infringed the structural principle of judicial independence by permitting a provincial court judge to be removed without an address of the legislature. In so arguing, he invited the Supreme Court to reconsider its decision in *Valente* in light of its decision in the *Provincial Court Judges Reference*. Although the Supreme Court in *Valente* had held that subsection 11(d) of the Charter does not require an address of the legislature, Therrien argued that subsection 11(d) is only relevant in a criminal

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30 R.S.Q., c. T-16.
31 Supra, note 3, at 20.
law context and that in a non-criminal law context, it is not subsection 11(d) but
the preamble of the Constitution Act, 1867 that should apply. In his view, the
preamble of the Constitution Act, 1867 should provide the same protection to
provincial court judges that section 99 of the Constitution Act, 1867 provides to
superior court judges, namely an address of the legislature prior to removal.

The Supreme Court of Canada dismissed Therrien’s constitutional challenge.
The Supreme Court reviewed the requirements for security of tenure outlined in
Valente in the context of subsection 11(d) of the Charter: that a judge may only
be removed for cause after a judicial inquiry at which the judge is given an
opportunity to be heard. The Supreme Court also reviewed the holding in
Valente that subsection 11(d) of the Charter does not require an address of the
legislature prior to the removal of provincial court judges. The Supreme Court
found that the Provincial Court Judges Reference had not undermined the
conclusions reached in Valente, but had rather reinforced and affirmed those
conclusions. In so finding, the Supreme Court confined the Provincial Court
Judges Reference to the financial security of provincial court judges:

Reference re Remuneration of Judges of the Provincial Court, supra, raised the
specific question of whether the guarantee of judicial independence, and primarily
the financial security aspect, restricted the manner by and extent to which the gov-
ernment and provincial legislatures can reduce salaries of provincial court judges.
A majority of the Court found that for purposes of s. 11(d) of the Canadian Cha-
ter, judges’ salaries may be reduced, increased or frozen provided that the govern-
ment refers consideration of the proposed measure to an independent commission.32

The Supreme Court concluded that an address of the legislature is not a ne-
cessary constitutional requirement for the security of tenure of provincial court
judges.

The Supreme Court also found that the Court of Appeal’s recommendation
that Judge Therrien be removed was the appropriate sanction in the case. The
Court held that the integrity of the judiciary and public confidence in the judi-
ary prevailed over Judge Therrien’s individual interests:

The public’s invaluable confidence in its justice system, which every judge must
strive to preserve, is at the very heart of this case. The issue of confidence governs
every aspect of this case, and ultimately dictates the result.

…

… I am not unaware that this case represented, in a sense, an invitation to society to
be ever more generous. The pardon that the appellant was granted is an act of gen-

32 Id., at 51.
erosity, of brotherhood, but also an act of justice on the part of society. It is undoubtedly desirable that such gestures be praised and encouraged. However, we cannot ignore the unique role embodied by the judge in that society, and the extraordinary vulnerability of the individuals who appear before that judge seeking to have their rights determined, or when their lives or liberty are at stake. Above all, a person who appears before a judge is entitled to have justice done in his or her case, and that justice be seen to be done by the general public. That kind of generosity is not something that a person can be compelled to offer. In the specific circumstances of the case at bar, the values of forgiveness and selfless generosity must therefore yield to the values of justice and the all-important integrity of the justice system.

2. Ocean Port

*Ocean Port* involved a challenge to the institutional independence of members of the Liquor Appeal Board (the “Board”) under the *Liquor Control and Licensing Act*\(^\text{34}\) (the “Act”). A senior inspector concluded that Ocean Port Hotel had violated the Act and imposed a two-day suspension of its liquor licence. Ocean Port appealed to the Board by way of a hearing *de novo*. Board members are appointed for a fixed term of one year, are paid per diem, and serve on a part-time basis and “at the pleasure of the Lieutenant Governor in Council.”\(^\text{35}\) After hearing Ocean Port’s appeal, the Board confirmed the two-day suspension of Ocean Port’s liquor licence.

The British Columbia Court of Appeal allowed Ocean Port’s appeal.\(^\text{36}\) The Court held that the ultimate decision to suspend a liquor licence because of a violation of the Act “closely resembles a judicial decision”\(^\text{37}\) and that the financial consequences of the suspension could exceed the maximum fine that the Provincial Court could impose for the same violation. Accordingly, the Court held that the content of the rules of procedural fairness “must approach those required of a court at common law.”\(^\text{38}\)

The Court of Appeal held that the Board lacked the security of tenure required to ensure its institutional independence. In the Court’s view, the Supreme Court of Canada’s decision in *Régie* determined the outcome of the appeal. Although *Régie* was concerned with section 23 of the Quebec *Charter*, the Court of Appeal held that Gonthier J. had looked to the common law rules

\(^{33}\) Id., at 96, 98 (emphasis in original).

\(^{34}\) R.S.B.C. 1979, c. 237 [now R.S.B.C. 1996, c. 267].

\(^{35}\) Id., s. 30(2)(a).


\(^{37}\) Id., at 503–4.

\(^{38}\) Id., at 504.
of natural justice in determining the appropriate scope of tribunal independence. The Court of Appeal further held:

Included in [Régie] was this sentence. “Fixed-term appointments, which are common, are acceptable. However, the removal of adjudicators must not simply be at the pleasure of the executive.” That expression of opinion was part of a considered judgment on the very point in issue before us having regard to a regime controlling the same industry. The adjudicative tasks at issue were similar.

... 

... [T]he Supreme Court of Canada has decided that appointments at pleasure to administrative agencies such as the Quebec Régie d’alcool and the Liquor Appeal Board exercising the power to impose sanctions for violations of statutes comparable to that possessed by courts of law are not sufficient to satisfy the requirement of security of tenure and that for such agencies security of tenure is an essential requirement of independence. I cannot distinguish a fixed term appointment on a part-time basis from a full-time appointment at pleasure in its effect on the office holder as it would be regarded by a well informed and right minded observer.39

The Court of Appeal concluded that since the Board was not sufficiently independent, the Board’s decision must be set aside. Since counsel for the Board had conceded that the validity of the senior inspector’s decision to suspend Ocean Port’s liquor licence depended upon a fair hearing before the Board, the Court held that the senior inspector’s decision must also be set aside.

The Supreme Court of Canada unanimously reversed the decision of the Court of Appeal. Writing for the Court, McLachlin C.J. held that the British Columbia Court of Appeal had erred in disregarding a fundamental principle: that in the absence of a constitutional challenge, “a statutory regime prevails over common law principles of natural justice.”40 The Supreme Court held:

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

... 

... [L]ike all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. ... Ultimately, it is Parliament or the legislature that determines the nature of a tribunal’s relationship to the executive. It is not open to a court to apply a

39 Id., at 510-11.
40 Supra, note 4, at 793.
common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator’s intention in assessing the degree of independence required of the tribunal in question.\textsuperscript{41}

The Supreme Court further held that there is a “fundamental distinction” between courts and administrative tribunals.\textsuperscript{42} While courts are constitutionally required to be independent, administrative tribunals do not, as a general rule, attract the constitutional requirements of the Charter:

Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: \textit{Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island} … Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges — both in fact and perception — by insulating them from external influence, most notably the influence of the executive …

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract \textit{Charter} requirements of independence, as a general rule they do not.\textsuperscript{43}

The Supreme Court held that there was no constitutional guarantee of independence implicated in the case, since Ocean Port had not challenged the Board’s independence under subsection 11(d) or section 7 of the Charter. Moreover, the Supreme Court held that the unwritten constitutional principle of judicial independence articulated in the \textit{Provincial Court Judges Reference} had no application to administrative tribunals:

The language and reasoning of the \textit{[Provincial Court Judges Reference]} are confined to the superior and provincial courts. Lamer C.J. addressed the issue of judicial independence; that is, the independence of the courts of law comprising the

\textsuperscript{41} \textit{Id.}, at 793-94.

\textsuperscript{42} \textit{Id.}, at 794.

\textsuperscript{43} \textit{Id.}, at 794-95.
judicial branch of government. Nowhere in his reasons does he extend his comments to tribunals other than courts of law.

Nor does the rationale for locating a constitutional guarantee of independence in the preamble to the Constitution Act, 1867, extend, as a matter of principle, to administrative tribunals.

Lamer C.J. ... supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts. [Emphasis in original]

The Supreme Court found that the legislative intention that members of the Board should serve at pleasure was unequivocal. Accordingly, the Act left “no room to import common law doctrines of independence.” The Supreme Court remitted the case to the British Columbia Court of Appeal to determine the issues it had not addressed.

III. THE FUTURE DEBATES

The Supreme Court of Canada’s decisions in Therrien and Ocean Port raise several issues for future debate. With respect to judicial independence, is the application of the unwritten constitutional principle limited to the financial security of provincial court judges? With respect to tribunal independence, does the holding that legislation can override the common law principle of natural justice apply to the elements of financial security and administrative control over proceedings just as it does to the element of security of tenure? If so, what is required of the legislature to override these elements of tribunal independence? Is it only legislation that can override the common law principle of

44 Id., at 797-98.
45 Id., at 796.
47 Jones, “Recent Developments in Administrative Law” (The Continuing Legal Education Society of British Columbia, 18 October 2001) [unpublished], at 35.
natural justice or can subordinate legislation or orders-in-council also override the principle?\(^{48}\) Where a quasi-constitutional statute protects tribunal independence, would the sort of part-time, limited-term, at-pleasure appointments at issue in *Ocean Port* satisfy tribunal independence?\(^{49}\) And to what extent will it be possible to maintain the Supreme Court of Canada’s distinction between tribunal independence and judicial independence?

The most challenging of these issues is the extent to which it will be possible to maintain the Supreme Court of Canada’s distinction between tribunal independence and judicial independence. The Supreme Court of Canada’s decision in *Ocean Port* almost entirely limits the doctrine of tribunal independence to the common law principle of natural justice, which is itself subject to legislative derogation. Because the Supreme Court held in *Ocean Port* that the unwritten constitutional principle does not apply to administrative tribunals and that administrative tribunals do not generally attract the constitutional requirements of the Charter, the doctrine of tribunal independence will be far more limited than the doctrine of judicial independence.

In his review of the Supreme Court of Canada’s decision in *Ocean Port*, David Jones questions the distinction between tribunal independence and judicial independence:

> Is there really a bright-line distinction between “courts” (including inferior courts like the provincial courts exercising both criminal and civil jurisdiction) and “administrative agencies” — especially those exercising quasi-judicial functions? What is it that makes a “court” a “court”? What are the limitations on the ability of the legislative branch to allocate adjudicative functions to administrative agencies rather than to the “courts”?\(^{50}\)

However, Katrina Wyman suggests that the distinction between tribunal independence and judicial independence is justified on two grounds: the distinct dispute-resolution process of administrative tribunals, and the limited constitutional role of administrative tribunals.\(^{51}\) She argues that these distinctive features militate against extending to administrative tribunals the unwritten constitutional principle of judicial independence articulated in the *Provincial Court Judges Reference*.

With respect to the first ground, the dispute-resolution process of administrative tribunals is generally more specialized, flexible, efficient, inexpensive and informal than the dispute-resolution process of courts. In *Douglas/Kwantlen*

\(^{48}\) Id., at 33-34.
\(^{49}\) Supra, note 46, at 68.
\(^{50}\) Supra, note 47.
\(^{51}\) Supra, note 25, at 116-22.
Faculty Assn. v. Douglas College,\textsuperscript{52} La Forest J. held that the “raison d’etre” of administrative tribunals is specialization, simple rules of evidence and procedure, and speedy decisions.\textsuperscript{53} In Wyman’s view, extending to administrative tribunals the unwritten constitutional principle of judicial independence would undermine the ability of governments to create tribunals with this distinct dispute-resolution process.\textsuperscript{54} For example, the part-time, limited-term, at-pleasure appointments at issue in Ocean Port are common types of appointments to administrative tribunals.\textsuperscript{55} These appointments have several advantages, including diversity of membership, the ability to attract participation, increased efficiency and decreased cost.\textsuperscript{56} If the Supreme Court in Ocean Port had held that such appointments fail to meet tribunal independence, governments would have been required to restructure myriad administrative tribunals and the advantages of these types of appointments would have been lost.

With respect to the second ground, only a small number of tribunals determine rights and freedoms under the Charter and constitutional issues arise less frequently before tribunals. Further, the decisions of tribunals on constitutional issues are not entitled to curial deference and tribunals are restricted in their remedial powers under section 52 of the Charter.\textsuperscript{57} By contrast, courts have always had a significant constitutional role and their role has become even more significant since the enactment of the Charter. The Supreme Court of Canada has relied largely upon the constitutional role of courts in developing the doctrine of judicial independence. For instance, in Beauregard, the Court held that “[t]he role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system” [emphasis in original].\textsuperscript{58} Similarly, in the Provincial Court Judges Reference, the Court held that “in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and the legislative branches of government.”\textsuperscript{59} If the constitutional role of the courts warrants greater protection for judicial independence, the primarily non-constitutional role of administrative tribunals must warrant less protection for tribunal independence.

\textsuperscript{52} [1990] 3 S.C.R. 570.
\textsuperscript{53} Id., at 602.
\textsuperscript{54} Supra, note 25, at 118, 120.
\textsuperscript{55} Rankin, “Case Comment: Ocean Port Hotel Limited v. B.C. (General Manager, Liquor Control) (1999) 57 Advocate 709, at 711.
\textsuperscript{56} Id.
\textsuperscript{57} Supra, note 25, at 116-17.
\textsuperscript{58} Supra, note 5, at 73.
\textsuperscript{59} Supra, note 2, at 90.
Together, the two grounds for the distinction between tribunal independence and judicial independence suggested by Wyman — the distinct dispute-resolution process of tribunals and the limited constitutional role of tribunals — may justify a lower level of protection for tribunal independence in many cases. However, they may not justify a lower level of protection in all cases. Some administrative tribunals closely resemble courts in both form and function: some tribunals have dispute-resolution processes similar to those of courts and, perhaps more importantly, some tribunals do determine rights and freedoms under the Charter. For such tribunals, there is little justification for a doctrine of tribunal independence that is far more limited than the doctrine of judicial independence.

In Ocean Port, the Supreme Court of Canada held that administrative tribunals do not “as a general rule” attract Charter requirements of independence, but that tribunals “may sometimes” attract these requirements. The Supreme Court did not explain the basis for this holding, nor did it explain precisely when tribunals might attract Charter requirements of independence. However, at the very least, the language of Ocean Port suggests that the distinction between judicial independence and tribunal independence may be open to further consideration and development and that the doctrine of tribunal independence may be open to further expansion. For administrative tribunals that closely resemble courts, this possibility is promising. If future courts respond to this possibility, the Supreme Court of Canada’s decision in Ocean Port may come to represent a low-water mark in the development of the doctrine of tribunal independence, just as the Supreme Court of Canada’s decision in the Provincial Court Judges Reference represents a high-water mark in the development of the doctrine of judicial independence.

60 Supra, note 25, at 116. Wyman cites the National Parole Board and Judicial Compensation Commissions as examples of administrative tribunals that determine rights and freedoms under the Charter.

61 Supra, note 4, at 795.

62 Id.
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